To be Argued by:
CARL L. FINGER
Time Requested: 15 Minutes

New York Supreme Court

Appellate Division - Second Department

Docket No. 2019-09157

MAPLE MEDICAL LLP,

Plaintiff-Respondent,

- against -

JOSEPH SCOTT, M.D.,

Defendant-Appellant,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Defendant.

BRIEF FOR PLAINTIFF-RESPONDENT MAPLE MEDICAL LLP

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I. QUESTIONS PRESENTED

1. Did the Trial Court correctly hold that the doctrine of *stare decisis* mandate that it follow the precedent set in the decision of the Appellate Division, First Department in *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465, 96 N.Y.S.3d 526 (1st Dept. 2019)?

   Answer: Yes.

2. Did the Trial Court correctly rule that awarding Defendant-Appellant Joseph Scott M.D. the cash proceeds of MLMIC's demutualization would result in his unjust enrichment?

   Answer: Yes.

II. PRELIMINARY STATEMENT

Respondent-Appellee, Maple Medical LLP ("Maple" or "Respondent") filed the underlying action to prevent the unjust award of the proceeds of a demutualization of MLMIC[1] its medical malpractice carrier (the "Cash Consideration") to its employee physicians that Maple insured through payment of its insurance premiums. While the New York insurance statutory scheme, past case law involving group practice insurance policies, and principles of equity dictate that the Cash Consideration go to the medical practice, it is only through a quirk of medical insurance practice that requires the individual insureds be named as "policyholders" instead of the group that spawned this litigation and numerous others.

[1] Medical Liability Mutual Insurance Company.

The *exact* same legal issue founded on the same facts were before the Appellate Division, First Department in *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465, 96 N.Y.S.3d 526 (1st Dept. 2019) ("*Schaffer*"). In *Schaffer*, the First Department considered virtually all of Appellant's arguments herein and ruled that the physician's receipt of Cash Consideration would have unjustly enriched her (Dr. Title) because she had already received the benefit of her bargain with her employer. *Id.* While the parties bargained for and expressly agreed to a salary, benefits and malpractice insurance, paid for entirely by her employer, an additional award of Cash Consideration based on the demutualization of malpractice policy that she did not pay any premiums for would have been an undue windfall.

> Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. **Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.**

Id. (emphasis added) (citations omitted).

The *Schaffer* decision confirms that Maple is indisputably entitled to the MLMIC distribution. Just as in *Schaffer*, Dr. Scott's employment agreement with Maple provided that Maple would provide medical malpractice insurance and pay the premiums. Further, Maple selected and administered the policies, and paid the

premiums for the policies, pursuant to Dr. Scott's employment agreement. Dr. Scott did not bargain for the proceeds of a demutualization of MLMIC malpractice policies; thus Dr. Scott cannot invoke any contractual right to the proceeds.

Thus, *Schaffer* is clearly binding precedent as to the question it considered and squarely decided, namely where, as here, a medical practice employer that paid all MLMIC premiums for its employees, judgment in favor of the medical practice employer on principles of unjust enrichment is warranted and the Cash Consideration is properly awarded to the medical practice employer.

Consequently, the Trial Court's application of the principles set forth in *Schaffer* that the medical practice, Maple, is entitled to the Cash Consideration, was the proper ruling that should be affirmed by this Court.

III. COUNTERSTATEMENT OF THE FACTS

The facts in this case are largely undisputed. Appellant Joseph Scott M. D. ("Dr. Scott") is a licensed physician employed by Maple pursuant to a written employment agreement. (R. 212-20, 238-42). As part of Dr. Scott's employment agreement, Maple agreed to pay for professional medical malpractice insurance coverage for Dr. Scott, at no cost to her. (R. 212-20, 238-42) Although Maple procured and paid for the policies, medical malpractice insurance cannot be written as a group policy and must name individual insureds on the policies. As a result,

individual physicians including Dr. Richard Frimer, a partner in Maple's practice are named on the policies instead of Maple. (R. 238-39)

In July 2016, MLMIC applied to the New York Department of Financial Services ("DFS") to convert from a mutual insurance company to a stock insurance company. MLMIC announced the sale of the company to Berkshire Hathaway by email dated July 18, 2016, which stated in pertinent part:

> [T]he person or entity that paid the premium will be considered as the owner of the eligible policy" and that "each owner of an eligible policy will be entitled to receive in cash a proportionate share of all of the cash consideration...

(R. 288-90, "Email Announcement").

Thereafter, MLMIC continued to release information pertaining to the transaction reiterating that "the person or entity that paid the premium will be considered as the owner of the eligible policy" and that "each owner of an eligible policy will be entitled to receive in cash a proportionate share of all of the cash consideration paid.". (R. 291-93, "Newsletter"). MLMIC further prepared a Plan of Conversion dated June 15, 2018 (hereinafter "Plan") (R. 63-160). However, contrary to the foregoing pronouncements and the understanding of all involved, the Plan indicated that the person or entity that paid the premium would not be considered as the owner of the eligible policy. In short, the Plan defined "Policyholder" as "*the person(s) identified on the declarations page of such Policy as the insured.*" (Definitions, "Eligible Policyholder" R. 68). Thus, by this definition, the party that

paid the premium would not be entitled to receive a proportionate share of all the cash consideration paid from the demutualization. This sudden and sea change in the definition of policyholder, owner of the policy, and party who would be entitled to the cash consideration, came almost two years after the initial announcement. Equally momentous is that the Plan also changed the party that would be entitled to vote on the whether to approve the plan of demutualization and the sale, only weeks before the vote whether to approve the sale and demutualization. (Definitions, "Eligible Policyholder" R. 68)

The revisions set forth in the labyrinthine Plan provided that cash consideration would be paid to policyholders/members in exchange for the extinguishment of the policyholder membership interests. Pursuant to the Plan, "Each Eligible Policyholder (or it's designee) shall receive a cash payment in an amount equal to the applicable conversion." (R. 77, § 8.2 (a)). An "eligible policyholder" was the person designated as the insured, while a "designee" meant employers or policy administrators, "designated by Eligible Policyholders to receive the portion of the Cash Consideration allocated to such Eligible Policyholders." (R. 68, § 2.1 "Designees") According to the Plan, in the absence of an explicit designation from the policyholder/member, the policy administrator would not receive cash consideration.

In short, the revised definitions of the Policyholder and Eligible Policyholder in the Plan would not be the party that paid the premium as originally disclosed in the Email and the Newsletter. The prior disclosures never indicated that the Policy Administrator was or would be a substantive designation or, more importantly, that the failure of the party acting as Policy Administrator but not having been formally designated Policy Administrator would have any substantive impact.

Shortly after the Plan a Notice of Public Hearing was published (R. 123, "Notice") The Notice stated that eligible policyholders would be eligible to receive the cash consideration but did not clearly indicate who would be considered an eligible policyholder. It also stated that "an eligible policyholder may designate another party (such as a policy administrator or employer) to receive that policyholder's share of the cash consideration by timely completing and returning to MLMIC a designation form to be provided by MLMIC." (R. 222) The Notice of Public Hearing further stated that "previous appointments of designees by policyholders for certain purposes (such as submitting premium payments or receiving dividends on the policyholder's behalf) are not valid for this purpose."

The Public Hearing was held on August 23, 2018 (R. 171-72). The problem wrought by the Plan's revision to who is a "policyholder" was aired at the public hearing by multiple policy administrators who testified about how the Plan denied

the entities justly and long-believed entitled to the cash distributions – that is the groups like Maple that obtained the policies and paid the premiums. (R. 183-85, 243)

New York Insurance Law § 7307 codifies a plan of conversion to be enacted when a demutualization occurs. The conversion plan must be presented to and approved by the Superintendent of the New York State Department of Financial Services ("DFS"). The statute further sets forth the calculation of how demutualizing companies should distribute compensation corresponding to equitable share associated with each policy:

> The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which ***the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies*** in effect during the three years immediately preceding the adoption of the resolution...***bears to the total net premiums received by the mutual insurer from such eligible policyholders.***

N.Y. INS. LAW § 7307(e)(3) (emphasis added).

Insurance Law § 7307(e)(3) is seemingly straightforward in directing that the proceeds of a demutualization be distributed to "policyholders" based on the amount of premiums "such policyholder" has paid. Under a typical group policy, the employer pays the premiums and is the listed policyholder removing all doubt as to which party would be the recipient of the proceeds of demutualization. However, medical malpractice insurance cannot be written as a group policy, necessitating the naming of individual physicians on the policy.

On September 6, 2018, the DFS issued a Decision approving the

demutualization of MLMIC. (R. 162-89) Recognizing that disputes might arise concerning the proper beneficiary of the cash consideration for a particular policy, the Plan set forth a procedure whereby objections could be filed with MLMIC, which would in turn trigger an escrow of the relevant cash consideration until the dispute was resolved either by agreement of the parties or by a judicial ruling. (R. 184-86) However, throughout the decision the DFS misconstrues the express language of § 7307(e)(3) by failing to hold that the policyholders, are the parties that paid the premiums on the policy of insurance, *i.e.* the medical practice. By classifying the insured physicians as the "policyholders" contrary to all of the prior declarations and policy, and contrary to the statutory language that requires, *inter alia*, calculation of the distribution ***such policyholder has properly and timely paid*** *to the insurer on insurance policies in effect*, the DFS decision stood to unjustly enrich the physicians and deprive the medical practices of their due proceeds as well as disenfranchising them from voting on whether to approve the demutualization.

In order to remove any doubt as to its entitlement to the Cash Consideration, Maple filed the underlying action against 6 of its employee physicians. [2]

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[2] In addition to the underlying matter, *Maple Med. LLP v. Scott*, 2019-09157 (Index No. 51107/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019), the following cases were filed and decided: *Maple Med. LLP v. Sundaram*, 2019-09161; *Maple Med. LLP v. Mutic*, 2019-09162 (Index No. 51103/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019); *Maple Med. LLP v. Youkeles*, 2019-09160 (Sup. Ct. Westchester Cty. Jul. 7, 2019); *Maple Med. LLP v. Goldenberg*, 2019-09160 (Index No. 51108/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019); *Maple Med. LLP v. Arevalo*, 2019-09159 (Index No. 51109/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019) (collectively the "Six Actions").

IV. ARGUMENT

1. *Stare Decisis* Compels Affirming the Order of the Trial Court

On April 1, 2019 the Appellate Division First Department ruled on the *exact* issues now before the Court on the parties' motions for summary judgment. In *Schaffer, Schonholz & Drossman, LLP v. Title,* the parties stipulated to the facts at issue pursuant to CPLR 3222 ("Action on submitted facts") and certified the issue for a decision by the Appellate Division, First Department. In ruling that the Petitioner/Plaintiff medical practice was entitled to the proceeds of the demutualization of MLMIC, the Appellate Division, First Department ruled that the insured/individual physician would be unjustly enriched if permitted to keep the proceeds since the medical practice procured, bargained for, paid for and was entitled to the proceeds:

> Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. **Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment** (*see Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 [9th Cir1990], *cert denied* 498 U.S. 899 [1990]; *Chicago Truck Drivers, Helpers & Warehouse Workers Union [Ind.] Health & Welfare Fund v. Local 710, Intl. Bhd. of Teamsters, Chicago Truck Drivers, Helper and Warehouse Workers Union [Ind.] Pension Fund,* 2005 WL 525427, *4, 8, U.S. Dist LEXIS 42877, *10–11, 21–22 [ND Ill, Mar. 4, 2005]).

Schaffer, Schonholz & Drossman, LLP v. Title, 171 A.D.3d 465, 96 N.Y.S.3d 526 (1st Dept. 2019) (the "*Schaffer* Decision").

Because the facts of the case at bar fall squarely within the holding *Schaffer* and the *Schaffer* Court considered and resolved the very issues before this Court, the Trial Court correctly relied on *Schaffer*.

> This court resolves the issue in the companion matter of *Maple Medical, LLP v. Scott*, 51103/2019 ("the *Scott* decision") by decision signed this same day. In the *Scott* decision, this court finds that the recent holding of the Appellate Division, First Department in the *Matter of Schaffer, Schonholz & Drossman, LLP v. Title* (171 AD3d 465) ("the *Matter of Schaffer*"), decided April 4, 2019, is dispositive of the question raised by the parties in the Six Actions. Of note, Scott does not try to distinguish the facts in this case from the facts set forth in the *Matter of Schaffer*, or from the facts presented in *Maple Medical, LLP v. Scott* or any other of the Six Actions. Applying the principles set forth in the *Matter of Schaffer* opinion to the facts presented here, the court finds that, for the reasons set forth in the *Scott* decision, plaintiff is entitled to the distribution of the sales proceeds of MLMIC.

Maple Med. LLP v. Scott, 64 Misc. 3d 909, 910, 105 N.Y.S.3d 823, 824 (N.Y. Sup. Ct. 2019) (ruling on all Six Actions).

The Trial Court made clear in its ruling that it considered all of the contentions of the parties in reaching its decision that *Schaffer* was controlling, including many of the arguments reiterated herein and properly rejected by the Trial Court.

> The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied.

Id., 64 Misc. 3d at 910, 105 N.Y.S.3d at 824.

Since the First Department has ruled on this same issue, *stare decisis* compels the same result in the case at bar.

> Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 377, 130 S. Ct. 876, 920, 175 L. Ed. 2d 753 (2010), *see also, Mt. View Coach Lines, Inc. v. Storms,* 102 A.D.2d 663, 664, (2d Dept. 1984) ("[T]he doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule."); 31 Carmody-Wait 2d § 172:76 ("*Stare decisis* promotes predictability in the law, engenders reliance on decisions of the court of appeals, encourages judicial restraint and reassures the public that decisions of the court of appeals arise from a continuum of legal principle rather than the personal caprice of the members of the court of appeals.")

This case is on all fours with *Schaffer*. However, the three key undisputed facts underpinning the *Schaffer* ruling are present here and place this case firmly within the *stare decisis* doctrine:

1. the medical practice was contractually obligated to procure and pay the premiums for the malpractice insurance policy covering the employed physician (R 212-13, 238-40);

2. the medical practice paid all the premiums for the policy (R 212-13, 238-40); and

3. the employment contract itself made no express mention of demutualization proceeds (R 212-13, 238-40).

Unable to deny these immutable facts, Appellant, without any factual or legal basis, assails the advocacy of the parties in *Schaffer*, the submitted facts procedure pursuant to CPLR 3222 and the authority relied upon by the First Department. Appellant's claim that the payment of premiums was only a "contractual obligation" and in no way weighs in favor of a distribution to Maple completely ignores the rationale behind *Schaffer* and the jurisprudence relied on by the *Schaffer* court.

Appellant also attempt to convince this Court that *Schaffer* is not binding since it was only "four sentences" as if length of a decision has any bearing on its effect. Of course, it does not and *Schaffer* fully "addressed an issue that was before that Court." *Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117, 123 (2d Dept. 2006) ("Principles are not established by what was said, but by what was decided."). In fact, there was ultimately but a single question facing both this Court and the *Schaffer* Court – do the proceeds of demutualization go to employer or employee? The First Department considered the binary question before it and ruled that the medical practice that paid the MLMIC premiums is entitled to the Cash

Consideration.

Appellant also summarily concludes without reference to any supporting authority that the since Schaffer was decided pursuant to CPLR 3222 its binding effect is mitigated. This assertion is frivolous since the *Schaffer* Court ruled by applying the same controlling law to the submitted and undisputed facts as in any case where a final dispositive ruling is rendered.

In fact, the *Schaffer* decision is hardly an anomaly and the First Department cited prior jurisprudence that illuminates the sound judicial reasoning and principles upon which *Schaffer* stands. In *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.* the Ninth Circuit Court of Appeals faced a similar set of facts, with employer and employee contending over the proceeds from the conversion of a mutualized fund. 903 F.2d 1232 (9th Cir. 1990) In affirming the district court, the *Ruocco* Court articulated the key consideration in determining how to disseminate the proceeds of a group procured disability insurance plan where, as here, it is not governed by any express contractual requirement. *Id.* at 1238 ("Union Mutual was required to distribute this retained surplus to policyholders prior to its conversion from a mutual insurance company to a wholly-owned subsidiary of a publicly-owned stock corporation.") The basic common-sense principle enunciated by *Ruocco* and followed by *Schaffer* and the trial court herein is that in the absence of an express

contractual provision addressing demutualization the party that pays for the policy is entitled to the proceeds of any conversion.

> **In this case, the district court found that the balancing of equities weighed in favor of the plan participants because the premiums for the plan were paid for by the participants and because "[o]utside of minor administrative costs, BEHR[employer] paid nothing."** The court also found that if the surplus were distributed to the defendants, the fund would not inure to the benefit of the plan participants, but rather "as a result of BEHR's incentive bonus plan, would fall in large part into the hands of BEHR's Executive Committee which had voted to keep the distribution." We agree with the district court that the balance of equities weighs in favor of the plaintiff class.

Id. at 1238 (emphasis added).

The Ninth Circuit further cited to *Wright v. Nimmons,* a case decided by United States District Court for the Southern District of Texas for the similar proposition that where a trust plan is silent as to the distribution of assets, if the employer has "exclusively funded a plan," the "unbargained for distribution of excess assets to participants represents an unintended windfall for employees". 641 F.Supp. 1391, 1406–07 (S.D.Tex.1986).

Ruocco has been relied on not only by the First Department but other courts to reach a result analogous to the one reached here. The United States District Court for the Northern District of Illinois followed the Ninth Circuit and also held that the inquiry of how to distribute unanticipated proceeds hinges on determining whether the employer or employees paid the premiums.

> Like the disability plan in *Ruocco,* the contributions to the 401(k) plan in this case were made entirely by the employees, outside of minor administrative costs. Therefore, the demutualization compensation should revert to the employees . . . .

Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters, Chicago Truck Drivers, Helper & Warehouse Workers Union (Indep.) Pension Fund, No. 02 C 3115, 2005 WL 525427, at *8 (N.D. Ill. Mar. 4, 2005)

Moreover, not only has the Ninth Circuit weighed on this issue, but the United States Court of Appeals for the Sixth Circuit has as well. On facts that parallel those before the Court now, the Sixth Circuit concluded that the owner of a group policy was the party that chose the carrier and paid the premiums was the owner of the policy and thus eligible to receive the proceeds of a demutualization.

> The district court interpreted the statute to mean that policyholders are typically "owners" of the group policy. The district court therefore found that Plaintiffs cannot be the owners of the group policy because as employees and retirees Plaintiffs 'had nothing to do with the choice of insurance carrier, nor with its governance, and they received what they bargained with the City to get: insurance coverage' . . . .
>
> Accordingly, by virtue of the process of demutualization we are compelled to conclude that Plaintiffs are precluded from recovering any of the proceeds from Anthem's demutualization. Based on the reading of the merger documents, it is clear that Anthem did not create new membership rights for employees enrolled post-merger. Therefore, the Class B members were not eligible policyholders under the Anthem plan and were thus not entitled to receive Anthem's demutualizationproceeds.

Mell v. Anthem, Inc., 688 F.3d 280, 289 (6th Cir. 2012) (affirming district court's ruling that demutualization proceeds go to group and not individual employees who did not pay premiums for policy they benefitted from).

Consequently, *Schaffer* is binding precedent and *stare decisis* compels following its decision, as the Trial Court and other New York trial courts have done.

> However terse, the First Department found as a matter of law that an award of the MLMIC proceeds to the named insured doctor would result in her unjust enrichment. The significant facts relied upon by the First Department are not distinguishable from the significant facts in this case.

Schoch, CNM v. Lake Champlain OB-GYN, P.C., 64 Misc. 3d 1215(A), at *1-2 (Sup. Ct. Saratoga Cty. 2019) (granting summary judgment to medical practice based on *stare decisis*), *Long Island Radiology Assocs., P.C. v. Koshy,* Index No. 600195/19 (Sup. Ct. Nassau County Oct. 7, 2019) (Employer who paid MLMIC premiums entitled to demutualization proceeds); *Urgent Med. Care, PLLC v. Amedure*, 64 Misc. 3d 1216(A) (N.Y. Sup. Ct. 2019) (granting summary judgment to medical practice based on unjust enrichment and awarding it the MLMIC distribution).

Appellant's "distinctions" are of no moment and there is no basis for a result contrary to *Schaffer* to be reached here. *See People v. Peque*, 22 N.Y.3d 168, 194, 3 N.E.3d 617, 635 (Ct. Appeals 2013) ("In determining the precedential effect to be given to a prior decision, this Court must consider "the exercise of restraint in overturning established well-developed doctrine and, on the other hand, the justifiable rejection of archaic and obsolete doctrine which has lost its touch with

reality"). Ultimately, Appellant has proffered no reasons for this Court to reject stare decisis and rule contrary to *Schaffer* in the face of identical key facts at bar.

2. The Trial Court Correctly Decided that the Physician/Employee Would be Unjustly Enriched by the Demutualization Proceeds

The Trial Court correctly applied the principles of equity in determining that Maple should receive the proceeds to prevent "unjust enrichment." As in *Schaffer*, the requisite elements to prevail on a claim for unjust enrichment are present:

1) the defendant was enriched;

2) at the plaintiff's expense; and

3) in equity and good conscience, defendant ought not to be allowed to retain what the plaintiff seeks to recover.

Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 (2011).

When considering an unjust enrichment claim, a court's "essential inquiry" is one of "equity and good conscience." *Paramount Film Distrib. Corp. v. State,* 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 (1972). Fundamental to this claim is that there need not be proof that the unjustly enriched party, here Dr. Scott, did anything "wrong" or unjust:

> Unjust enrichment ... does not require the performance of any wrongful act by the one enriched" (*Simonds v. Simonds,* 45 N.Y.2d 233, 242, 408 N.Y.S.2d 359, 380 N.E.2d 189). "Innocent parties may frequently be unjustly enriched" (*id.*). "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it'

> "(*id.* at 242, 408 N.Y.S.2d 359, 380 N.E.2d 189, quoting *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337; *see Paramount Film Distrib. Corp. v. State,* 30 N.Y.2d at 421, 334 N.Y.S.2d 388, 285 N.E.2d 695).

Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC, 114 A.D.3d 888, 889, 981 N.Y.S.2d 135, 137 (2d Dept. 2014).

Throughout Dr. Scott's employment with Maple, Maple provided malpractice liability insurance coverage for Dr. Scott though MLMIC. During this time, all indications and facts conclusively establish that Maple, not Dr. Scott, owned and managed the policies including the fact that Maple paid for, renewed and decided on policy coverages. All premium reductions and returns were payable to Maple including when employees left the practice. As such, employees and Dr. Scott's eligibility for coverage from MLMIC was contingent on employment by Maple. Further evidencing that Maple was owner and policyholder, MLMIC itself initially confirmed "the person or entity that paid the premium will be considered as the owner of the eligible policy" and that "each owner of an eligible policy will be entitled to receive in cash a proportionate share of all of the cash consideration..."

By contrast, Dr. Scott cannot demonstrate that he or any employee of Maple had any ownership interest whatsoever in the Policies. He did not elect MLMIC as malpractice insurer, did not pay any premiums, did not negotiate rates or otherwise interact with MLMIC with respect to the policy that he was named under. As a result, were Dr. Scott to receive any of the proceeds of demutualization, this would

constitute classic unjust enrichment whereby Dr. Scott enjoys a substantial windfall that he neither bargained for, expected or deserved. Dr. Scott did receive what he bargained for as an employee of Maple -- malpractice coverage under policies procured and paid for by Maple. It would thus be against "equity and good conscience" to permit Dr. Scott to the windfall he seeks. *Schaffer*, 171 A.D.3d 465, 96 N.Y.S.3d 526 ("Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.")

Dr. Scott does not seriously contest that receiving the Cash Consideration would be an unanticipated windfall. Instead, Appellant vainly argues that Maple should not have prevailed on an unjust enrichment claim because the claim between the parties "arises out of the subject matter of a written agreement." This claim is completely without merit since the written employment agreement between the parties does not address, much less even mention, the proceeds of demutualization. There is nothing in the employment agreement that addressed demutualization or entitles Dr. Scott to the Cash Consideration. Dr. Scott's employment agreement covers the normal incidents of his employment such as salary compensation, fringe benefits and malpractice insurance, the premiums for which Maple was required to pay. It is beyond peradventure that the MLMIC demutualization was unforeseen by

the parties and outside the bargain struck and consummated by the employment agreement and Appellant's strained argument that it was somehow "part and parcel" of the employment agreement defies all sense and evidence in the record. Consequently, unjust enrichment is not barred by the employment agreement.

The authorities cited by Appellant rest on an assumption inapposite to the undisputed facts at bar, namely that the employment agreement governs how the Proceeds are to be distributed. The Trial Court properly rejected this red herring by following *Schaffer*. There is a long line of established case law that holds that "where the contract does not cover the dispute in issue," an unjust enrichment claim may proceed. *Ashwood Capital, Inc. v. OTG Mgm't, Inc.*, 99 A.D.3d 1, 10 (1st Dept. 2012) (contract between parties that did not address specific dispute does not bar unjust enrichment), *see also Bank Midwest, N.A. v. Hypo Real Estate Capital Corp.*, No. 10 CIV. 232 WHP, 2010 WL 4449366, at *4 (S.D.N.Y. Oct. 13, 2010) (New York law) ("[A] plaintiff may proceed on a theory of unjust enrichment despite the existence of a valid contract where 'the contract does not cover the dispute in issue.'") (*citing Mid–Hudson Catskill Migrant Ministry, Inc. v. Fine Hosp. Corp.*, 418 F.3d 168, 175 (2d Cir. 2005)); *Baker v. Robert I. Lappin Charitable Found.*, 415 F. Supp. 2d 473, 485 (S.D.N.Y. 2006) (New York law) (claims in quasi-contract permitted where contract does not address the subject of dispute "[T]here is no valid, express agreement in this respect."); *Unjust enrichment—Limitations on*

Application, 28 N.Y. Prac., Contract Law § 4:21 ("A plaintiff may proceed with the claim despite the existence of a valid contract where the contract does not cover the dispute that gives rise to the unjust enrichment claim.").

3. New York Insurance Law § 7307 is not Dispositive of Any Issues

Appellant also claims that the Trial Court erred by not holding that he should receive the Proceeds because he is the named policyholder under the MLMIC policy and thus have an alleged "ownership interest" in the demutualization proceeds. This argument is without merit for several reasons.

First, the First Department rejected this "policyholder" argument when it held that the employer was entitled to the Proceeds, not the physician whose name appears as policyholder on the declaration page of the policy.[3] *Schaffer*, 171 A.D.3d 465, 96 N.Y.S.3d 526 (R. 316)

Rather than showing that the First Department and the Trial Court committed error as Appellant argues, the New York Insurance Law highlights the genesis of this dilemma and the need for the Courts to settle this dispute based on a theory of unjust enrichment. While Insurance Law § 7307(e)(3) mandates that demutualization proceeds be paid to the "policyholder", the Insurance Law states

[3] Similarly, it is irrelevant whether a party has or has not been designated as the "Policy Administrator" of the MLMIC policy. The only consequence of a designation as a "Policy Administrator" and, in turn as a "Designee," as defined by the Plan, is the ability to directly payment of the Cash Consideration from the MLMIC escrow account without court intervention or arbitration.

that the cash consideration is calculated based upon a ratio of "the net premiums...*such policyholder has properly and timely paid to the insurer*" and the "*total net premiums received by the mutual insurer from such eligible policyholders.*" N.Y. Ins. Law § 7307(e)(3) (emphasis added).

Appellant completely ignores this language because Dr. Scott never paid any premiums. Thus, Dr. Scott is not entitled to any cash consideration since any calculation will results in zero dollars. The New York Insurance Law contemplates that the cash consideration should be paid both to the "policyholder" and to whomever paid the premiums to the insurer. Of course, if the policyholder does not contribute any money to the mutual fund, then there will be money to mature and pay out. Thus, the Insurance Law only bears on the issues to strongly suggest the common sense and equitable outcome – that the party paying the premiums, in this case Maple, be the recipient of the Cash Consideration.

Appellant relies heavily on the purported imported of the decision of the Department of Financial Services issued on September 6, 2018 adopting MLMIC's plan of conversion (the "the DFS Decision") (R. 162-89) for its claim that Dr. Scott is the "policyholder" and thus entitled to the proceeds of demutualization. The implications of *Schaffer* clearly eviscerate any binding effect of the DFS Decision. Further, the DFS Decision only articulated that Insurance Law § 7307 "is not determinative" of the right to the Cash Consideration" (R. 184 "The Superintendent

finds that this is not determinative because the same provision refers to the 'policyholder,' which might or might not be the person who paid the premiums.").

> The Determination of who is entitled to the cash consideration depends upon the facts and circumstances of the parties' relationship and applicable law, to be decided either by agreement of the parties or by an arbitrator or court.

(R. 185-86)

We note that throughout the DFS Decision the Superintendent misquotes New York Insurance Law § 7307(e)(3) by failing to properly find and conclude that the policyholders, entitled to receive the cash consideration and entitled to vote whether to approve the plan of demutualization, are the parties that paid the premiums on the policy of insurance. This failure is readily apparent from the plain language of the statute.

> [P]rovides that each Eligible Policyholder's equitable share of the purchase price shall be determined based on the amount of net premiums timely paid on that Eligible Policyholder's eligible policy or policies...

(R. 165)

Further, by failing to properly reference the policyholder as the party that paid the premium, the DFS Decision arbitrarily overrides the statute by approving the Plan's definition of the Policyholder as the insured rather than the statutory definition of the Policyholder as the party that has **properly and timely paid** the insurance premiums. Thus, in failing to properly define the Policyholders in accordance with N.Y. Ins. Law § 7307(e)(3), the Superintendent determined not only to permit the payment of cash

consideration to the incorrect parties, but disenfranchised the true parties in interest from voting on the whether to approve the demutualization. The DFS Decision consequently had the improper and unjust effect of denying Policyholders (as defined by N.Y. Ins. Law § 7307(e)(3)) the right to vote on whether to approve the demutualization. Those "Policyholders", *i.e.* the medical practices, paid for, negotiated, procured, renewed, and otherwise managed and informed all insurance policies issued by MLMIC.

Consequently, neither the New York Insurance Law nor the DFS Decision provide any basis upon which to overturn the Trial Court's determination that Maple is entitled to the Proceeds.

V. CONCLUSION

The decision of the trial court should be affirmed in all respects.

Dated: March 2, 2020
White Plains, New York

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114 A.D.3d 888
Supreme Court, Appellate Division, Second Department, New York.

ALAN B. GREENFIELD, M.D., P.C., appellant,
v.
LONG BEACH IMAGING HOLDINGS, LLC, defendant,
Lenox Hill Radiology & Medical Imaging Associates, P.C., respondent.

Feb. 26, 2014.

Synopsis

Background: Professional services corporation specializing in diagnostic radiology brought action against radiology clinic, seeking to recover damages for unjust enrichment. Radiology clinic moved to dismiss. The Supreme Court, Nassau County, Bucaria, J., granted motion. Corporation appealed.

The Supreme Court, Appellate Division, held that allegations were adequate to state a cause of action against radiology clinic to recover damages for unjust enrichment.

Reversed.

Attorneys and Law Firms

****136** Eisenberg & Carton, Port Jefferson, N.Y. (Lloyd M. Eisenberg of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success, N.Y. (Sarah C. Lichtenstein of counsel), for respondent.

PETER B. SKELOS, J.P., CHERYL E. CHAMBERS, L. PRISCILLA HALL, and ROBERT J. MILLER, JJ.

Opinion

***888** In an action, inter alia, to recover damages for breach of contract and unjust enrichment, the plaintiff appeals from an order of the Supreme Court, Nassau County (Bucaria, J.), dated December 17, 2012, which granted the motion of the defendant Lenox Hill Radiology & Medical Imaging Associates, P.C., pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against it.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendant Lenox Hill Radiology & Medical Imaging Associates, P.C., pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against it is denied.

The plaintiff, Alan B. Greenfield, M.D., P.C. (hereinafter the P.C.), is a professional services corporation specializing in diagnostic radiology. It commenced this action against the defendants Long Beach Imaging Holdings, LLC (hereinafter Long Beach, LLC), and Lenox Hill Radiology & Medical Imaging Associates, P.C. (hereinafter Lenox Hill). In the amended complaint, the plaintiff asserted one cause of action against Lenox Hill, which sought to recover damages for unjust enrichment. Lenox Hill moved pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against it, and the Supreme Court granted the motion.

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v. Olinville Realty, LLC,* 54 A.D.3d 703, 703–704, 864 N.Y.S.2d 70; *see* ***889** *Leon v. Martinez,* 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 A.D.3d 34, 38, 827 N.Y.S.2d 231; *see EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26).

****137** "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v. State of New York,* 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695). A plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104).

"Unjust enrichment ... does not require the performance of any wrongful act by the one enriched" (*Simonds v. Simonds,* 45 N.Y.2d 233, 242, 408 N.Y.S.2d 359, 380 N.E.2d 189). "Innocent parties may frequently be unjustly enriched" (*id.*). "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it' " (*id.* at 242, 408 N.Y.S.2d 359, 380 N.E.2d 189, quoting *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337; *see Paramount Film*

Distrib. Corp. v. State, 30 N.Y.2d at 421, 334 N.Y.S.2d 388, 285 N.E.2d 695).

Here, the amended complaint alleged that Long Beach, LLC, wrongfully withheld, or otherwise wrongfully barred access to, the plaintiff's files and records (*see Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 832 N.Y.S.2d 873, 864 N.E.2d 1272; *Sporn v. MCA Records*, 58 N.Y.2d 482, 489, 462 N.Y.S.2d 413, 448 N.E.2d 1324). The complaint further alleged that Lenox Hill used the plaintiff's files and records to enrich itself at the plaintiff's expense. These allegations were adequate to state a cause of action against Lenox Hill to recover damages for unjust enrichment (*see generally Levin v. Kitsis*, 82 A.D.3d 1051, 1053, 920 N.Y.S.2d 131; Restatement [Third] of Restitution § 40). Lenox Hill's contention that the nexus between the plaintiff and Lenox Hill was, as a matter of law, too attenuated to support a cause of action for unjust enrichment is without merit (*cf. Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 519, 950 N.Y.S.2d 333, 973 N.E.2d 743; *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104). Accordingly, the Supreme Court should have denied Lenox Hill's motion pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against it.

All Citations

114 A.D.3d 888, 981 N.Y.S.2d 135, 2014 N.Y. Slip Op. 01285

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104 S.Ct. 2305
Supreme Court of the United States

ARIZONA, Petitioner
v.
Dennis Wayne RUMSEY.

No. 83-226.
|
Argued April 23, 1984.
|
Decided May 29, 1984.

Synopsis

Defendant was convicted before the Superior Court, Maricopa County, Arizona, Clause No. CR–109802, Rufus C. Coulter, J., of first-degree murder and armed robbery and he appealed. The Supreme Court, 130 Ariz. 427, 636 P.2d 1209, remanded for resentencing. On remand, the Superior Court, imposed death penalty, and defendant appealed. The Supreme Court, 136 Ariz. 166, 665 P.2d 48, reversed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that double jeopardy clause prohibited Arizona from sentencing respondent to death after life sentence was set aside on appeal, notwithstanding that failure to initially impose death penalty was based on misconstruction of capital sentencing law.

Judgment of the Supreme Court of Arizona affirmed.

Justice Rehnquist, with whom Justice White, joined, filed dissenting opinion.

Syllabus[*]

Arizona's statutory capital sentencing scheme provides that, after a murder conviction, the trial judge, with no jury, must conduct a separate sentencing hearing to determine whether death is the appropriate sentence. The judge must choose between two options: death or life imprisonment without possibility of parole for 25 years. The death sentence may not be imposed unless at least one statutory aggravating circumstance is present, but must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. ****2306** The judge must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument, the State having the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. After a jury convicted respondent of armed robbery and first-degree murder, the trial judge conducted the required sentencing hearing and ultimately found that no aggravating or mitigating circumstances were present. He ruled, contrary to the State's contention, that the statutory aggravating circumstance relating to killing for pecuniary gain applied only to murders for hire and did not apply to all murders committed in order to obtain money, such as murders committed during a robbery. Accordingly, respondent was sentenced on his murder conviction to life imprisonment without possibility of parole for 25 years, but he was also sentenced to 21 years' imprisonment for armed robbery, with the sentences to run consecutively. Respondent appealed to the Arizona Supreme Court, challenging the imposition of the consecutive sentences, and the State filed a cross-appeal, contending that the trial court had committed an error of law in interpreting the "pecuniary gain" aggravating circumstance to apply only to contract killings. Rejecting respondent's challenge to his sentence and ruling for the State on its cross-appeal, the court set aside the life sentence and remanded for redetermination of aggravating and mitigating circumstances and for resentencing on the murder conviction. On remand, the trial court held a new sentencing hearing; rejected respondent's argument that imposing the death penalty would violate Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270; found that the "pecuniary gain" aggravating circumstance was present and that there was no mitigating ***204** circumstance sufficient to call for leniency; and sentenced respondent to death. On respondent's mandatory appeal, the Arizona Supreme Court held that under Bullington, respondent's death sentence violated the Double Jeopardy Clause of the Fifth Amendment and ordered that the sentence be reduced to life imprisonment without possibility of parole for 25 years.

Held: The Double Jeopardy Clause prohibits Arizona from sentencing respondent to death. This case is controlled by Bullington, which held that the Double Jeopardy Clause applied to Missouri's capital sentencing proceeding—barring imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, had resulted in rejection of the death sentence—because that proceeding was comparable to a trial on the issue of guilt and the initial sentence of life imprisonment in effect acquitted the defendant of the death penalty. The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that made it resemble a trial for purposes of the Double Jeopardy Clause. Thus, respondent's initial life sentence constitutes an acquittal of the death penalty, and the State cannot now sentence respondent to death on his conviction for first-degree murder. Although the trial court initially relied on a misconstruction of the statute defining the "pecuniary gain" aggravating circumstance, reliance on an error of law does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits of the issue in the sentencing proceeding—whether death was the appropriate punishment for respondent's offense. United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232,

distinguished. Pp. 2309–2311.

136 Ariz. 166, 665 P.2d 48, affirmed.

Attorneys and Law Firms

William J. Schafer III argued the cause for petitioner. With him on the brief was *Robert K. Corbin*, Attorney General of Arizona.

James R. Rummage, by appointment of the Court, 465 U.S. 1019, argued the cause and filed a brief for respondent.*

* *Timothy K. Ford, Jack Greenberg, James M. Nabrit III*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

Opinion

***205** Justice O'CONNOR delivered the opinion of the Court.

The question presented is whether the Double Jeopardy Clause prohibits the State ****2307** of Arizona from sentencing respondent to death after the life sentence he had initially received was set aside on appeal. We agree with the Supreme Court of Arizona that Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), squarely controls the disposition of this case. Under the interpretation of the Double Jeopardy Clause adopted in that decision, imposition of the death penalty on respondent would be unconstitutional.

I

An Arizona jury convicted respondent of armed robbery and first degree murder. The trial judge, with no jury, then conducted a separate sentencing hearing to determine, according to the statutory scheme for considering aggravating and mitigating circumstances, Ariz.Rev.Stat.Ann. § 13–703 (Supp.1983–1984), whether death was the appropriate sentence for the murder conviction. Petitioner, relying entirely on the evidence presented at trial, argued that three statutory aggravating circumstances were present. Respondent, presenting only one witness, countered that no aggravating circumstances were present but that several mitigating circumstances were. One of the principal points of contention concerned the scope of Ariz.Rev.Stat.Ann. § 13–703(F)(5) (Supp.1983–1984), which defines as an aggravating circumstance the murder's commission "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Respondent argued that this provision applies only to murders for hire, whereas petitioner argued that it applies to all murders committed in order to obtain money.

Several days after the sentencing hearing, the trial judge, who imposes sentence without the assistance of a jury under the Arizona scheme, returned a "special verdict" setting forth his findings on each of the statutory aggravating and mitigating circumstances. The judge found that no aggravating or mitigating circumstances were present. App. 53–58. In ***206** particular, with respect to the aggravating circumstance defined in § 13–703(F)(5), the trial judge found:
"5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

"In this regard, the Court does not agree with the State's interpretation of A.R.S. 13–703(F)(5) and State v. Madsen filed March 26, 1980. The Court believes that when A.R.S. 13–703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc." App. 54–55.

Having found no aggravating circumstances, the trial court was statutorily barred from sentencing respondent to death. Ariz.Rev.Stat.Ann. § 13–703(E) (Supp.1983–1984); App. to Pet. for Cert. A–3. The court accordingly sentenced respondent to life imprisonment without possibility of parole for 25 years, the sentence statutorily mandated for first degree murder when the death penalty is not imposed. Ariz.Rev.Stat.Ann. § 13–703(A) (Supp.1983–1984). With respect to the armed robbery conviction, the court found that respondent had committed a "dangerous offense" involving use of a deadly weapon and that there was an aggravating circumstance not outweighed by any mitigating circumstance—respondent had "planned this robbery ... in order to obtain what [[[he] knew was only a few hundred dollars...." App. 66. As authorized by Arizona law, Ariz.Rev.Stat.Ann. §§ 13–604 and 13–702 (1978 and Supp.1983–1984), the court accordingly sentenced respondent to 21 years' imprisonment for armed robbery. The prison terms for the two convictions were to run consecutively.

Respondent appealed the judgment to the Supreme Court of Arizona, arguing that imposition of consecutive sentences in his case violated both federal and state law. Under Arizona law, Ariz.Rev.Stat.Ann. § 13–4032(4)

(1978), respondent's appeal permitted petitioner to file a cross-appeal from ***207** the life sentence; in that cross-appeal ****2308** petitioner contended that the trial court had committed an error of law in interpreting the pecuniary gain aggravating circumstance to apply only to contract killings. The State Supreme Court rejected respondent's challenge to his sentence. It agreed with petitioner, however, that the trial court had misinterpreted § 13–703(F)(5): "theft committed in the course of a murder" could constitute an aggravating circumstance under that section. 130 Ariz. 427, 431, 636 P.2d 1209, 1213 (1981). Because of the trial court's misinterpretation, the State Supreme Court concluded, "the sentence of life imprisonment previously imposed will have to be set aside and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing." Id., at 432, 636 P.2d, at 1214. The sentence for armed robbery was left undisturbed.

On remand the trial court held a new sentencing hearing. Neither petitioner nor respondent presented any new evidence, although they had the opportunity to do so. The court heard argument, however, both on the lawfulness of imposing the death penalty on resentencing and on the presence of aggravating and mitigating circumstances.

Petitioner argued that neither federal nor state law barred sentencing respondent to death. Petitioner also urged the court to find the three statutory aggravating circumstances identified at the first sentencing, largely repeating the arguments it had made at the first proceeding. App. 78–94. Respondent argued that imposing the death penalty would violate Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and Arizona Rule of Criminal Procedure 26.14, which implements the resentencing principles of the Pearce case. With respect to aggravating and mitigating circumstances, respondent effectively conceded the presence of the pecuniary gain aggravating circumstance, thinking the issue foreclosed by a statement in the opinion of the State Supreme Court. See App. 104; 130 Ariz., at 431, 636 P.2d, at 1213 ("In the instant case, the hope of financial gain was a cause of the murder ..."). But ***208** respondent contended that this aggravating circumstance was outweighed by a statutory mitigating circumstance not among the five enumerated in the death sentencing statute: according to the testimony of the jury foreperson, the conviction for first degree murder was based on the felony-murder instruction, not on the premeditation instruction; thus, respondent contended, to regard the theft as an aggravating circumstance after using it to elevate second degree murder into first would be a form of double counting. App. 94–108.

Several days after the hearing, the trial court returned a special verdict reciting findings on each of the statutory aggravating and mitigating circumstances and on the one nonstatutory mitigating circumstance urged by respondent. The court found to be present only one of the seven statutory aggravating circumstances, namely, § 13–703(F)(5), concerning commission of the murder for pecuniary gain. The court also found that none of the five statutory mitigating circumstances was present and that the fact that the murder conviction was for felony murder, if a mitigating circumstance at all, was not sufficiently substantial to call for leniency. App. 118–124. Accordingly, as required under Arizona law, Ariz.Rev.Stat.Ann. § 13–703(E) (Supp.1983–1984), the court sentenced respondent to death.

In his mandatory appeal to the Supreme Court of Arizona, respondent argued that imposition of the death sentence on resentencing, after he had effectively been "acquitted" of death at his initial sentencing, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). He also argued that the death sentence violated the Due Process Clause of the Fourteenth Amendment, as interpreted in ****2309** North Carolina v. Pearce, supra. The Supreme Court of Arizona addressed only the first argument. It concluded that, under this Court's decision in Bullington v. Missouri, supra, respondent's sentence violated the constitutional prohibition on double jeopardy. 136 Ariz. 166, 665 P.2d 48 (1983). The court therefore ordered ***209** respondent's sentence for first degree murder reduced to life imprisonment without possibility of parole for 25 years.

The State of Arizona filed a petition for a writ of certiorari. We granted certiorari, 464 U.S. 1038, 104 S.Ct. 697, 79 L.Ed.2d 163 (1983), and now affirm.

II

In Bullington v. Missouri this Court held that the Double Jeopardy Clause applies to Missouri's capital sentencing proceeding and thus bars imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, has resulted in rejection of the death sentence. The Court identified several characteristics of Missouri's sentencing proceeding that make it comparable to a trial for double jeopardy purposes. The discretion of the sentencer—the jury in Missouri—is restricted to precisely two options: death, and life imprisonment without possibility of release for 50 years. In addition, the sentencer

is to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembles a trial. Finally, the prosecution has to prove certain statutorily defined facts beyond a reasonable doubt in order to support a sentence of death. 451 U.S., at 438, 101 S.Ct., at 1857. For these reasons, when the Missouri sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case. Because the Court believed that the anxiety and ordeal suffered by a defendant in Missouri's capital sentencing proceeding are the equal of those suffered in a trial on the issue of guilt, the Court concluded that the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty.

The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment ***210** without possibility of parole for 25 years. The sentencer must make the decision guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument. The usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. See Ariz.Rev.Stat.Ann. § 13–703 (Supp.1983–1984); 136 Ariz., at 171–172, 665 P.2d, at 53–54. As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri. Id., at 171–174, 665 P.2d, at 53–56.

That the sentencer in Arizona is the trial judge rather than the jury does not render the sentencing proceeding any less like a trial. See United States v. Morrison, 429 U.S. 1, 3, 97 S.Ct. 24, 25, 50 L.Ed.2d 1 (1976) (Double Jeopardy Clause treats bench and jury trials alike). Nor does the availability of appellate review, including reweighing of aggravating and mitigating circumstances, make the appellate process part of a single continuing sentencing proceeding. ****2310** The Supreme Court of Arizona noted that its role is strictly that of an appellate court, not a trial court. Indeed, no appeal need be taken if life imprisonment is imposed, and the appellate reweighing can work only to the defendant's advantage. 136 Ariz., at 173–174, 665 P.2d, at 55–56. In short, a sentence imposed after a completed Arizona capital sentencing hearing is a judgment like the sentence at issue in Bullington v. Missouri, which this Court held triggers the protections of the Double Jeopardy Clause.

***211** The double jeopardy principle relevant to respondent's case is the same as that invoked in Bullington: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullington principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for respondent's offense. The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' ... affects the accuracy of that determination, but it does not alter its essential character." United States v. Scott, 437 U.S. 82, 98, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) (quoting id., at 106, 98 S.Ct., at 2201 (BRENNAN, J., dissenting)). Thus, this Court's cases hold that an acquittal on the merits bars retrial even if based on legal error.

United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), held that the prosecution could appeal from a judgment of acquittal entered by the trial judge after the jury had returned a verdict of guilty. But that holding has no application to this case. No double jeopardy problem was presented in Wilson because the appellate court, upon reviewing asserted legal errors ***212** of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy. By contrast, in respondent's initial capital sentencing, there was only one decisionmaker and only one set of findings

of fact, all favorable to respondent. The trial court "acquitted" respondent of the death penalty, and there was no verdict of "guilty" for the appellate court to reinstate. The Supreme Court of Arizona accordingly "remanded for redetermination of aggravating and mitigating circumstances and resentencing," 130 Ariz., at 432, 636 P.2d, at 1214—that is, for a second sentencing proceeding similar to the first. Whereas the defendant in Wilson was not to be subjected to a second trial after an acquittal at his first, that is precisely what has happened to respondent.

III

Bullington v. Missouri held that double jeopardy protections attach to Missouri's capital sentencing proceeding because that proceeding is like a trial. The capital sentencing proceeding in Arizona is indistinguishable for double jeopardy purposes from the proceeding in Missouri. Under Bullington, therefore, respondent's initial sentence of life imprisonment constitutes an acquittal of the death penalty, and the State of Arizona cannot now sentence respondent to death on his conviction for first degree murder.

****2311** Petitioner has invited the Court to overrule Bullington, decided only three years ago. We decline the invitation. Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification. See, e.g., Swift & Co. v. Wickham, 382 U.S. 111, 116, 86 S.Ct. 258, 261, 15 L.Ed.2d 194 (1965); Smith v. Allwright, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). Petitioner has suggested no reason sufficient to warrant our taking the exceptional action of overruling Bullington.

***213** The judgment of the Supreme Court of Arizona is therefore

Affirmed.

Justice REHNQUIST, with whom Justice WHITE joins, dissenting.

Today the Court affirms the decision of the Arizona Supreme Court vacating the death sentence imposed on respondent for a murder committed in the course of an armed robbery. Applying the interpretation given the Double Jeopardy Clause by a bare majority of this Court in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court concludes that in this case the first sentencing also amounted to an implied acquittal of respondent's eligibility for the death penalty. I continue to believe that Bullington was wrongly decided for the reasons expressed in Justice POWELL's dissent in that case. But even apart from those views, I do not believe that the reasoning underlying Bullington applies to this remand for resentencing to correct a legal error. Accordingly, I dissent.

The central premise of the Court's holding today is that the trial court's first finding—that there were no aggravating and no mitigating circumstances and therefore only a life sentence could be imposed—amounted to an "implied acquittal" on the merits of respondent's eligibility for the death sentence, thereby barring the possibility of an enhanced sentence upon resentencing by virtue of the Double Jeopardy Clause. But the Court's continued reliance on the "implied acquittal" rationale of Bullington is simply inapt. Unlike the jury's decision in Bullington, where the jury had broad discretion to decide whether capital punishment was appropriate, the trial judge's discretion in this case was carefully confined and directed to determining whether certain specified aggravating factors existed. Compare Mo.Rev.Stat. § 565.008 (1979) with Ariz.Rev.Stat.Ann. § 13–703(E) ***214** (Supp.1983–1984). It is obvious from the record that the State established at the first hearing that respondent murdered his victim in the course of an armed robbery, a fact which was undisputed at sentencing. In no sense can it be meaningfully argued that the State failed to "prove" its case—the existence of at least one aggravating circumstance. It is hard to see how there has been an "implied acquittal" of a statutory aggravating circumstance when the record explicitly establishes the factual basis that such an aggravating circumstance existed. But for the trial judge's erroneous construction of governing state law, the judge would have been required to impose the death penalty.

If, as a matter of state law, the Arizona Supreme Court had simply corrected the erroneous sentence itself without remanding, there could be no argument that Bullington would prevent the imposition of the death sentence. That much was made clear in our decision in United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975). After stating the well-settled rule that an appellate court's order reversing a conviction is subject to further review without subjecting a defendant to double jeopardy, we wrote:
"It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge

has relied to some degree on evidence presented at trial in making his ruling. Although review of any ruling of law discharging a defendant obviously enhances ****2312** the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." Id., at 345, 95 S.Ct., at 1023.

The fact that in this case the legal error was ultimately corrected by the trial court did not mean that the State sought to marshal the same or additional evidence against a ***215** capital defendant which had proved insufficient to prove the State's "case" against him the first time. There is no logical reason for a different result here simply because the Arizona Supreme Court remanded the case to the trial court for the purpose of correcting the legal error, particularly when the resentencing did not constitute the kind of "retrial" which the Bullington Court condemned. Accordingly, I would reverse the decision of the Arizona Supreme Court in this case.

All Citations

467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164

Footnotes

* 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 Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

99 A.D.3d 1
Supreme Court, Appellate Division, First Department, New York.

ASHWOOD CAPITAL, INC., Plaintiff–Appellant,
v.
OTG MANAGEMENT, INC., et al., Defendants–Respondents,
John Doe, Inc., et al., Defendants.

July 10, 2012.

Synopsis
Background: Merchant bank filed action against concession operator alleging breach of contract and unjust enrichment, and seeking declaratory judgment seeking judicial determination of parties' respective rights and obligations under concession agreement at airport terminal. The Supreme Court, York County, Charles E. Ramos, J., dismissed action. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, Saxe, J.P., held that:

repeated use of term, "Terminal 6," in concession agreement at airport terminal unambiguously limited scope of contract exclusively to operation of concessions at Terminal 6;

merger clause barred any claim based on alleged intent that parties did not express in writing;

discovery regarding parties' intent in forming contract was not warranted;

contract regarding services to be provided for concessions at one particular terminal at airport did not bar cause of action for unjust enrichment for services to be provided for concessions at other terminal at airport;

statute of frauds barred unjust enrichment claim based on assertion that consultant acted as intermediary, without writing, between airline and concession operator during negotiations over operator's right to operate airline's concessions at particular terminal at airport; and

statute of frauds did not bar unjust enrichment claim seeking compensation for consultant's advice to concession operator regarding financing, its chief financial officers (CFOs), and raising quality of its concessions.

Affirmed.

Attorneys and Law Firms

****294** K & L Gates LLP, New York (Michael R. Gordon and Brian D. Koosed of counsel), for appellant.

Morrison & Foerster LLP, New York (David J. Fioccola, Dennis P. Orr and Shiri Bilik Wolf of counsel), for respondents.

DAVID B. SAXE, J.P., JOHN W. SWEENY, JR., DIANNE T. RENWICK, LELAND G. DeGRASSE, ROSALYN H. RICHTER, JJ.

Opinion

****295** SAXE, J.P.

***4** The central issue in this appeal from the dismissal of an action for breach of contract, unjust enrichment and a declaratory judgment is the scope of the parties' 2003 written agreement regarding the right to operate concessions within the JetBlue terminal at John F. Kennedy Airport (JFK). We are asked to determine whether the agreement's repeated use of the term "Terminal 6" unambiguously limited the scope of the contract exclusively to the operation of concessions at Terminal 6, or whether, as plaintiff contends, the parties intended for their rights and obligations under the agreement to endure after JetBlue relocated to another JFK terminal. Because contract terms that are unambiguous must be enforced as written (*W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]), and not interpreted in some other way based on one party's assertion that "when [it] used the words, [it] intended something [other] than the usual meaning" (*Hotchkiss v. National City Bank of N.Y.*, 200 F. 287, 293 [S.D.N.Y.1911]), we affirm the dismissal of the claim for breach of contract.

Plaintiff Ashwood Capital, Inc. is a merchant bank, founded in 1991; Ashwood's chairman and sole stockholder, Lawrence J. Twill, Sr., is an investment banker and a businessman with more than 40 years of experience. According to Ashwood, from 1998 to 2002, Twill personally worked with nonparty JetBlue Airways Corporation (JetBlue), then a fledgling airline, to help "develop its overall customer experience" and "facilitate JetBlue's entry into JFK in 2000." In late 2002, JetBlue CEO David Barger approached Twill to seek his assistance with attracting new, higher-quality restaurants and concessionnaires to JetBlue's facilities at JFK, then located in JFK Terminal 6.

According to the complaint, finding interested

concessionaires proved challenging because the Port Authority of New York and New Jersey, which operated JFK, had announced its plans to renovate and reorganize all JFK terminals over the next decade. With JetBlue's lease for Terminal 6 set to expire in November 2006, and the airlines' plans to relocate to Terminal 5 shortly thereafter, any newly-created concessions at Terminal 6 would be short-term and therefore were considered unattractive as an investment.

***5** Twill ultimately committed his own company, Ashwood, to opening new concessions at Terminal 6. In mid–2003, Ashwood alleges, it entered into a Concessionaire Agreement with JetBlue, whereby Ashwood secured the rights to open three restaurants in JetBlue's Terminal 6 facilities: a Papaya King franchise, a New York-themed sports bar and grill, and a Mexican restaurant. Ashwood, however, had little interest in the day-to-day operations and wished to acquire a business partner to assume these responsibilities. On the recommendation of JetBlue's vice president of real estate, Twill contacted defendant Eric Blatstein, then president of defendant OTG Management, Inc. (OTG[1]), which had been operating JetBlue's concessions in Philadelphia. Blatstein was undeterred by JetBlue's planned relocation and was eager to gain a foothold into JetBlue's concessions at JFK.

On December 18, 2003, Ashwood and OTG entered into a written agreement, ****296** assigning to OTG Ashwood's rights under the Concessionaire Agreement with JetBlue, namely "the right to use, for the purposes set forth therein, certain premises located at JFK International Airport, Terminal 6." Ashwood additionally agreed to provide up to twenty hours of consulting services per year to OTG "concerning the prospects for procurement and operation of additional food or liquor concessions" at "Kennedy Airport (Terminal 6)." As consideration for these rights and services, OTG agreed to pay Ashwood 1.5% of all gross sales from OTG's concessions "at Kennedy Airport, (Terminal 6)." The agreement is in the form of a letter, drafted by Ashwood, countersigned by Blatstein as president of OTG, and personally guaranteed by Blatstein as well.

Beginning in December 2003, OTG paid Ashwood 1.5% of gross sales from OTG's concessions at Terminal 6 on a monthly basis, as required under the agreement. In September 2008, however, JetBlue began operating out of its new facilities at JFK Terminal 5, having contracted with OTG to be the sole food concessionaire at the new terminal. After the closure of Terminal 6, in October 2008, OTG discontinued its monthly payments to Ashwood.

***6** Ashwood commenced this action against OTG in November 2010, seeking money damages based on allegations that: (1) OTG breached the parties' agreement by failing to pay 1.5% of gross sales since November 2008; (2) Blatstein breached his guaranty; and (3) OTG is liable under the quasi-contract theory of unjust enrichment by failing to compensate Ashwood for the consulting services it provided OTG. Ashwood additionally brought a cause of action for a declaratory judgment, seeking a judicial determination of the parties' respective rights and obligations under the agreement.

Defendants moved to dismiss these claims pursuant to CPLR 3211(a)(1) and (7). In four separate orders, two entered on July 29, 2011 and two on August 1, 2011, Supreme Court granted defendants' motion to dismiss the complaint, observing that the agreement "unambiguously limits Ashwood's rights to a percentage of Defendants' gross sales at Terminal 6."

Ashwood appeals the dismissal of its claims and, pursuant to CPLR 3211(d), requests discovery on the issue of the parties' intent.

Discussion

This case serves as a reminder that in order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it. As Judge Learned Hand stated:

> "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent" (*Hotchkiss*, 200 F. at 293).

Ashwood contends that the motion court erroneously dismissed its breach of contract claim based on an overly literal ***7** and formalistic interpretation of the phrase ****297** "Terminal 6." According to Ashwood, the parties intended to establish a long-term business relationship, the principal goal of which was to grant Ashwood a meaningful and

effective equity interest in OTG, and thereby bind the parties to the terms of their agreement well after JetBlue's relocation to Terminal 5. To accurately reflect the parties' intent, Ashwood argues, the phrase "Terminal 6" should be read to mean "any JetBlue terminal at JFK."

According to well-established rules of contract interpretation, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc.*, 77 N.Y.2d at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639). We apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople (*see Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 [2004]; *R/S Assoc. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 744 N.Y.S.2d 358, 771 N.E.2d 240 [2002]; *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 67, 869 N.Y.S.2d 511 [2008], *affd.* 13 N.Y.3d 398, 892 N.Y.S.2d 303, 920 N.E.2d 359 [2009]). In such cases, " 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include' " (*Vermont Teddy Bear Co.*, 1 N.Y.3d at 475, 775 N.Y.S.2d 765, 807 N.E.2d 876, quoting *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199, 738 N.Y.S.2d 658, 764 N.E.2d 958 [2001] [internal quotation marks omitted]). We instead concern ourselves "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Rodolitz v. Neptune Paper Prods.*, 22 N.Y.2d 383, 387, 292 N.Y.S.2d 878, 239 N.E.2d 628 [1968] [internal quotation marks omitted]). Accordingly, before assessing evidence regarding what was in the parties' minds at the time of the agreement, we must first look to the agreement itself.

The primary question here is whether the parties' agreement is ambiguous; specifically, whether the phrase "Terminal 6" is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*New York City Off–Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177, 809 N.Y.S.2d 70 [2006] [internal quotation marks omitted]). Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its ***8** meaning and not to extrinsic sources (*see Kass v. Kass*, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 696 N.E.2d 174 [1998]). Throughout the parties' agreement, the phrase "Terminal 6" is repeated a total of five times and consistently refers to JetBlue's facilities at JFK. In particular, the agreement specifies that OTG must pay Ashwood 1.5% "of all gross sales from concessions or food service businesses operated by OTG at Kennedy Airport, (Terminal 6)." The agreement neither mentions "Terminal 5," nor does it refer to any unspecified JetBlue terminal at JFK. We therefore agree with the IAS court that the phrase "Terminal 6" unambiguously limits the scope of the parties' agreement to concessions at JFK Terminal ****298** 6. The parties' use of the phrase "Terminal 6" is susceptible to no other interpretation.

Nor is the phrase rendered ambiguous, as Ashwood contends, by other language in the contract. Ashwood points to "future-oriented provisions" in the agreement to demonstrate an implicit long-term business relationship intended by the parties, which ostensibly would continue after JetBlue's relocation to Terminal 5. Although the agreement does give OTG the first option to acquire or operate Papaya King franchises outside of Terminal 6, OTG never exercised this option; indeed, Ashwood does not claim that it ever acquired the rights to operate Papaya King franchises either at Terminal 5 or anywhere besides Terminal 6. Ashwood's "mere assertion ... that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity" (*New York City Off–Track Betting Corp.*, 28 A.D.3d at 177, 809 N.Y.S.2d 70). As there is no reasonable alternative meaning for the phrase "Terminal 6," we find no ambiguity either in the term itself or when it is read in the context of the agreement as a whole.

If these commercially sophisticated and counseled parties had intended their agreement to apply to any JetBlue terminal at JFK, they could easily have expressed this intent in the language of the agreement. Indeed, both Ashwood and OTG were aware of JetBlue's upcoming relocation, yet their agreement neither mentions "Terminal 5" nor refers to any unspecified JetBlue terminal at JFK. That the agreement does not address the contingency of JetBlue's move to Terminal 5 does not, by itself, create an ambiguity. The parties omitted this contingency from their agreement, and it is not for the court to "imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was ***9** made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms" (*Reiss*, 97 N.Y.2d at 199, 738 N.Y.S.2d 658, 764 N.E.2d 958).

Similarly absent from the agreement is any mention or implication that the parties intended to grant Ashwood an equity stake in OTG. With nothing in the written agreement to support Ashwood's contention that the parties intended for Ashwood to receive a permanent ownership interest in

OTG, there is simply no basis for this Court to find an implicit long-term contractual relationship between the parties.

Furthermore, the agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in writing (*see Cornhusker Farms v. Hunts Point Coop. Mkt.*, 2 A.D.3d 201, 203–204, 769 N.Y.S.2d 228 [2003]; *see also Torres v. D'Alesso,* 80 A.D.3d 46, 56–57, 910 N.Y.S.2d 1 [2010]). The merger clause specifies that the agreement "constitute[s] the full and entire understanding and agreement among the Parties," and that "no Party shall be liable or bound to any other in any manner by any representations, warranties, covenants and agreements except as specifically set forth herein and therein." Accordingly, even if Ashwood, when drafting the agreement, had understood "Terminal 6" to be an implicit reference to any JetBlue terminal at JFK, the moment the written contract became fully executed by both parties, Ashwood could not rely on that understanding, as it was not included in the mutually executed written document. Moreover, in the years since entering into the agreement, Ashwood made no attempts to amend the terms of the contract ****299** pursuant to the no-oral-modification clause.

We therefore affirm Supreme Court's dismissal of Ashwood's claim for breach of contract.

Nor is Ashwood entitled to discovery regarding the parties' intent pursuant to CPLR 3211(d). Because the agreement is clear and complete on its face, "[a]ny such discovery would simply be an opportunity for plaintiff to uncover parol evidence to attempt to *create* an ambiguity in an otherwise clear and unambiguous agreement" (*RM Realty Holdings Corp. v. Moore,* 64 A.D.3d 434, 437, 884 N.Y.S.2d 344 [2009]). Absent a finding of ambiguity in the agreement, discovery would be unnecessary, as any parol evidence would be inadmissible (*id.*).

Ashwood's claim against Blatstein for breach of his guaranty falls with its breach of contract claim against OTG, since Blatstein's liability under the agreement "accrues only after ***10** default on the part of the principal obligor" (*Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC,* 30 A.D.3d 1, 10, 811 N.Y.S.2d 47 [2006] [internal quotation marks omitted], *affd.* 8 N.Y.3d 59, 828 N.Y.S.2d 254, 861 N.E.2d 69 [2006]). Similarly, the declaratory judgment Ashwood seeks, that Ashwood is entitled to 1.5% of the gross sales from OTG's concessions in the JetBlue's Terminal 5 facilities going forward, falls with its breach of contract claim.

As to Ashwood's cause of action for unjust enrichment, to the extent the claim is based on the consulting services it was required to provide under the agreement "from time to time as requested with OTG ... for procurement and operation of additional food liquor concessions at [Terminal 6]," its claim is barred. "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 907 N.E.2d 268 [2009]; *see also Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572, 807 N.Y.S.2d 583, 841 N.E.2d 742 [2005]). Only where the contract does not cover the dispute in issue may a plaintiff proceed upon a quasi-contract theory of unjust enrichment (*IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 405, 829 N.Y.S.2d 10 [2007]).

However, the unjust enrichment claim may arguably extend beyond a claim for services that were owed pursuant to the agreement. Since we have concluded that the parties' rights and obligations under the agreement are limited to activities at Terminal 6, Ashwood's claims relating to Terminal 5 may fall outside the scope of the agreement. On a motion to dismiss we must read the complaint liberally, accept as true the facts alleged, and accord plaintiff the benefit of every possible inference (*see 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151–152, 746 N.Y.S.2d 131, 773 N.E.2d 496 [2002]). Further, we must consider the factual assertions of an affidavit submitted in opposition to the dismissal motion in order to preserve "inartfully pleaded, but potentially meritorious, claims" (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]). Twill's affidavit elaborated on the consulting services that he, as Ashwood's principal, provided to OTG—namely, that he advised OTG to "(a) obtain financing, rather than have Mr. Blatstein continue to give away equity in the company in exchange for funding; (b) replace its first two Chief Financial Officers; and (c) raise the quality of its concessions in order to attract ****300** more—and more lucrative—customers." Twill also claims that he "regularly encouraged George Sauer, JetBlue's ***11** Vice–President of Real Estate, to give OTG more concession space and to grow OTG's business at both Terminal 5 and Terminal 6. I also devised the business strategy for OTG." As these services fall outside the scope of the agreement, the contract does not completely bar Ashwood's cause of action for unjust enrichment.

However, the statute of frauds bars any unjust enrichment claim based on the assertion that Twill acted as an intermediary between JetBlue and OTG during negotiations over OTG's right to operate JetBlue's concessions at Terminal 5 (*see* General Obligations Law §

5–701[a][10]). Without a writing, an alleged agreement, promise or undertaking is unenforceable under § 5–701(a)(10), if it "[i]s a contract to pay compensation for services rendered in negotiating ... a business opportunity ... 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (*id.*). The statute of frauds applies "where ... the intermediary's activity is ... that of providing ... 'know-who', in bringing about between principals an enterprise of some complexity" (*Snyder v. Bronfman*, 13 N.Y.3d 504, 510, 893 N.Y.S.2d 800, 921 N.E.2d 567 [2009] [internal quotation marks omitted]).

Yet, Ashwood's unjust enrichment claim does not fall entirely within the scope of § 5–701(a)(10), as Ashwood also seeks compensation for Twill's advice to OTG regarding financing, its CFOs, and raising the quality of its concessions. Therefore, dismissal of Ashwood's unjust enrichment claim in its entirety at this juncture was premature.

We have considered plaintiff's remaining arguments and find them to be without merit.

Accordingly, the orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered July 29, 2001 and August 1, 2001, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), should be modified, on the law, to deny the motion as to the cause of action for unjust enrichment to the extent plaintiff claims to have provided services beyond those mentioned in the parties' contract and those having to do with brokering or negotiating a deal between OTG and nonparty JetBlue for OTG's operation of JetBlue's concessions at Terminal 5, and otherwise affirmed, without costs.

***12** Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 29, 2001 and August 1, 2001, modified, on the law, to deny the motion as to the cause of action for unjust enrichment to the extent plaintiff claims to have provided services beyond those mentioned in the parties' contract and those having to do with brokering or negotiating a deal between OTG and nonparty JetBlue for OTG's operation of JetBlue's concessions at Terminal 5, and otherwise affirmed, without costs.

All concur.

All Citations

99 A.D.3d 1, 948 N.Y.S.2d 292, 2012 N.Y. Slip Op. 05483

Footnotes

1 "OTG" refers to defendants OTG Management, Inc., OTG Consolidated Holdings, Inc.; OTG Management JFK, LLC, a New York limited liability company; OTG Management JFK, LLC, a Pennsylvania limited liability company; OTG Management JFK, Inc.; OTG JFK T5 Venture, LLC; and various John Doe Entities (collectively OTG or defendants). "Defendants" also includes defendant Eric Blatstein.

415 F.Supp.2d 473
United States District Court,
S.D. New York.

Gil BAKER, Plaintiff,
v.
The ROBERT I. LAPPIN CHARITABLE FOUNDATION and Robert I. Lappin, in his individual capacity and as a trustee of The Robert I. Lappin Charitable Foundation, Defendants.

No. 04 Civ. 426(DC).
|
Feb. 22, 2006.

Synopsis

Background: Filmmaker hired by charitable foundation to produce educational film brought action against the foundation and its trustee for breach of contract, unjust enrichment, quantum meruit, and copyright infringement. Parties moved for partial summary judgment.

Holdings: The District Court, Chin, J., held that:

foundation's alleged agreement to fund unrelated feature length film in exchange for filmmaker's agreement to make educational film was too indefinite to be an enforceable contract under New York law;

filmmaker's express agreement to produce film did not bar his quasi-contractual claims for additional compensation for work on the film;

foundation's trustee and sole benefactor was not liable to filmmaker;

foundation's trustee and its executive director were joint authors of film; and

filmmaker did not make express warranty that he would finish the film completely for the foundation to its satisfaction.

Motions granted in part and denied in part.

Attorneys and Law Firms

***475** The Shapiro Firm, LLP, by Robert J. Shapiro, Esq., Natalia Porcelli Good, Esq., New York, N.Y. for Plaintiff.

Bingham McCutchen LLP, by Kenneth I. Schacter, Esq., Philip L. Blum, Esq., New York, NY, for Defendants.

Opinion

CHIN, District Judge.

In 2001, defendants Robert I. Lappin and The Robert I. Lappin Charitable Foundation (the "Foundation") hired plaintiff Gil Baker to write and produce an educational film entitled *Great Jewish Achievers* ("*GJA* "). *GJA* highlighted the accomplishments of notable Jewish figures, and when it was completed in November 2002, the Foundation distributed it free of charge to more than 2,000 educational and ***476** religious institutions throughout the United States.

In this case, Baker contends that he agreed to produce *GJA*—purportedly on financial terms favorable to defendants—in return for Lappin's promise to fund an unrelated feature-length film, *Bungalow 6*, that Baker was planning to make in the future. In other words, Baker contends that the consideration for his agreement to produce *GJA* was Lappin's promise to invest in *Bungalow 6.* Lappin has not provided that funding, and Baker has sued defendants for breach of contract, contending that he is entitled to damages of at least $500,000. Baker also asserts claims for unjust enrichment, quantum meruit, and copyright infringement.

Before the Court are the parties' cross-motions for partial summary judgment. The principal issue presented is whether, even under Baker's version of the facts, the purported agreement obligating Lappin to provide funding for *Bungalow 6* was sufficiently certain in its material terms as to be enforceable. Other issues include whether Baker's quasi-contractual claims are barred because an express contract governs; whether the claims against Lappin in his individual capacity fail because the Foundation, and not Lappin, hired Baker; and whether Baker's copyright infringement claim is precluded because Baker was not the sole author of *GJA* and the Foundation was, at a minimum, a co-author.

For the reasons that follow, both motions are granted in part and denied in part.

STATEMENT OF THE CASE

A. *The Facts*

Construed in the light most favorable to Baker, the facts are as follows:

1. *The Parties*

Baker, a resident of New York, is a filmmaker whose work has been broadcast on networks throughout the world. (Compl. ¶ 6).

The Foundation is a charitable not-for-profit organization with its principal place of business in Massachusetts. (Lappin 6/9/05 Decl. ¶ 2). It exists "to serve the interests of the Jewish community" and seeks to provide, among other things, support for Jewish educational programs. (*Id.*). Lappin, a resident of Massachusetts, is a trustee and the sole benefactor of the Foundation. (*Id.* ¶ 1; Answer ¶ 8).

2. *GJA*

In or before 1999, Lappin conceived the idea of producing a film about great Jewish achievers to be distributed free to Jewish organizations to enhance Jewish pride in young people. The film was to be produced and distributed with funding provided by the Foundation. (Lappin 6/9/05 Decl. ¶¶ 3, 4).

In early 2001, the Foundation began exploring options for producing *GJA.* (*Id.* ¶ 6). In November 2000, Lappin attempted to interest a prominent film director and producer in the project, advising that he was prepared to spend "up to one million dollars" on the film. (Good 7/8/05 Aff. Ex. D). In April 2001, the Foundation developed a specification sheet and statement of explanation that it distributed to solicit proposals. (Lappin 6/9/05 Decl. ¶ 7). Defendants apparently eventually received two proposals from filmmakers; one quoted a price of more than $700,000 and the other a price of more than $1 million. (Baker Dep. 13–14).

3. *Baker Works on GJA*

Baker and Lappin had known each other for many years, as Baker was close friends ***477** with Lappin's son, Peter. (Baker Dep. 14; P. Lappin Dep. 13). Lappin had asked Peter to look at the two proposals. (P. Lappin Dep. 17, 20–21). Peter forwarded them to Baker to get his "objective professional opinion" on "whether these were legitimate proposals or whether they were blown-up figures, exorbitant prices." (Baker Dep. 14; *see* P. Lappin Dep. 17–21).

Baker reviewed the proposals and eventually he and Lappin spoke about the project. (Baker 7/8/05 Aff. ¶ 4). Baker told Lappin that the two proposals were asking for "a lot of money." (Baker Dep. 18). Baker then provided some initial assistance, making some creative suggestions by drafting ten sample pages of a script and creating a name montage for the film, for which he received $2,500. (Baker 7/8/05 Aff. ¶ 4).

On April 30, 2001, Lappin sent Baker an e-mail, on behalf of the Foundation, inviting him to respond to the Foundation's solicitation for proposals for a script for *GJA.* The e-mail included a description of and specifications for the proposed documentary. The format was to be four fifteen-minute segments. (Schacter 7/11/05 Decl. Ex. E). Although the e-mail was from Lappin, it was clearly on behalf of the Foundation and the project clearly was intended to be a Foundation project. (*Id.*).

Baker responded by e-mail on May 7, 2001. He stated that although he was busy working on another film,

> I may have the time to write at least [ ] one or two of the segments you need. My fee for research, writing and a re-write, wouldn't exceed $2,500 per fifteen minute script. A writer who wanted much more than that, might be asking too much.

(*Id.* Ex. F).

Baker began working on *GJA* in the spring of 2001. (Baker 6/9/05 Aff. ¶ 6). On June 22, 2001, Baker sent Lappin an e-mail with a proposed budget for making *GJA.* The budget was for $70,000, covering four scripts, hosts and studio, interviews, archival footage, and $15,000 for "[c]ontingency." (Schachter 6/9/05 Decl. Ex. D). The proposal noted that "[t]he actual budget could be CONSIDERABLY LESS." (*Id.*).

Over the course of the next twelve months, as he worked on the project, Baker sent Lappin numerous revised budgets, ranging from $120,000 to a high of $155,500. (*Id.* Exs. E–J). The increase was due, at least in part, to an increase in the number of segments from four to five. (Baker 7/8/05 Aff. ¶ 7). The budgets included amounts for items such as research, scripting, archival research, editing, and contingency. (*See, e.g.*, Schacter 6/9/05 Decl. Exs. E,

G, I). The earlier budgets noted a "-" or "N/C"—meaning no charge—for items such as "Directorial Fees" and "Production Design." (*Id.* Exs. E, F, G). Near the conclusion of the project, Baker sent the Foundation an "accounting of production expenses," covering the period from September 2001 through June 2002. It showed "total production expenses" of $155,500, payment of the same amount, and a balance of zero. (*Id.* Ex. K). It included items such as research and scripting ($30,500), editorial and production services ($40,500), and film archive and photo research ($25,000). (*Id.*).

Although Baker now contends that he "waived all of his creative fees" and was paid only for out-of-pocket expenses (Pl. Opp. Mem. at 5), the documentary evidence shows otherwise. In a fax dated April 15, 2002, Baker acknowledged having been paid for at least some of his "time," as he wrote: "I've seen less than $9,000 for my time to date...." (Schacter 6/9/05 Decl. Ex. O). Moreover, he undoubtedly ***478** received some portion of the $30,500 paid for "research and scripting." (*Id.* Ex. K). In addition, Baker's check register shows that he used monies received from the Foundation for *GJA* to pay for personal bills, including: his mortgage ($4,876), his co-op maintenance fees ($7,251), home telephone and internet service ($3,396) and home utilities ($800). (Lappin 6/9/05 Decl. ¶¶ 23–24 & Ex. A; Schacter 6/9/05 Decl. Ex. M).[1]

4. *The Completion of GJA*

GJA was completed in November 2002, and it was distributed free of charge, at the Foundation's expense, to some 2,000 Jewish religious and educational organizations. (Lappin 6/9/05 Decl. ¶¶ 4, 5). Baker assisted in the distribution effort by making arrangements with third-party vendors for duplication bulk mailing of the film. (Baker Dep. 274; Lappin 7/8/05 Decl. ¶¶ 9–11). Unfortunately, after *GJA* was distributed, the Foundation learned that two of the individuals included in *GJA* were not Jewish and were included by mistake. (Baker 6/9/05 Aff. ¶¶ 18–21).

Baker's name does not appear in the credits or anywhere else in the DVD of *GJA* provided to the Court. (CX 1).[2] He is not identified as a writer or a director or at all. (*Id.* at 55:33–56:08; Baker Dep. 225). The closing credits start by stating that the film was "[m]ade possible by the Robert I. Lappin Charitable Foundation." (CX 1 at 55:33). They list Lappin as the Executive Producer and Coltin as the Associate Producer. (*Id.* at 55:40, 55:47). The credits end with the legend: "This tape may not be broadcast without written consent from the Robert I. Lappin Charitable Foundation." (*Id.* at 56:05). No copyright notice is provided on the DVD, either on the label or in the film. (CX 1). Nor does Baker's name appear in the teaching guide that accompanies *GJA.* (Baker Dep. 228). In the end, Baker did not want his name associated with *GJA* and he was "happy to let Bob take credit for it." (*Id.*). When *GJA* was distributed, a cover letter on Foundation letterhead identified the Foundation as the film's source. (Lappin 7/8/05 Decl. ¶ 10).

At the Foundation's request, Baker also created a website, gjainfo.com, as a supplement to *GJA.* The website became operational as of November 1, 2002 and continues to operate today. (Baker 6/9/05 Aff. ¶ 10). Baker also created, at the Foundation's request, a five-minute promotional video and a three-dimensional "Nobel Montage" to be used in conjunction with *GJA.* (*Id.* ¶ 9; Baker 7/8/05 Aff. ¶ 10). Baker also helped with a teaching guide that was to accompany the film, which Lappin and Coltin wrote. (Baker 7/8/05 Aff. ¶ 10; *see also* Lappin 6/9/05 Decl. ¶ 21).

479 5. *Lappin's Purported Agreement To Fund Bungalow 6

Baker contends that Lappin agreed, in return for Baker's work on *GJA,* to fund *Bungalow 6.* Although Baker and Lappin exchanged e-mails and other documents, Baker acknowledges that no documents make any reference to *Bungalow 6* or any agreement by Lappin to provide Baker with funding for *Bungalow 6.* (Baker Dep. 48; *see* Lappin 6/9/05 Decl. ¶ 13). Baker "never once" put in writing, in an e-mail or otherwise, anything about the alleged agreement with Lappin. (Baker Dep. 48–49). Indeed, Baker conceded at his deposition that "there is no writing and [there] has never been any writing which embodies the essential terms" of Lappin's purported agreement to finance *Bungalow 6.* (*Id.* 49).

Baker contends that Lappin made a binding agreement to invest at least $500,000 in *Bungalow 6* based on a conversation the two had on September 9, 2001. (Baker 7/8/05 Aff. ¶ 5; Baker Dep. 12). At his deposition Baker described the conversation as follows:

> ... [T]his was his dream, [Lappin] said, for over 20 years, to make a documentary about great Jewish achievers.
>
> So I said to him, Bob, I'll make your dream come true if you'll make my dream come true.
>
> He said, What's your dream?
>
> And I said, A little independent feature called Bungalow 6.

He said, What's that going to cost to make?

And I said, Approximately $500,000. And I may have just said $500,000.

And Bob nodded. He said, Who wrote the script?

I said, I did. I said, You want to see it?

He said, I wouldn't know a good script from a bad script. That was Bob talking.

And I said, You're welcome to a copy of the script. I can send it to you.

And he said, I don't really think I need to see it.

...

And he nodded his head and he was thinking this over. And he said, If you can bring in—his response to me was, If you can bring in [*GJA*] to my satisfaction for the $150,000 in out-of-pocket expenses, you can make your movie.

And I—that knocked a little breath out of my lungs. I said, Wow. I knew that Bob could back up—or I believed that Bob could back up what he was saying.

And so because of that, I said—and what was the next thing that he said? He said that. And I might have said, Are you sure you don't want to see the script? Or something like that, because now this is moving ahead.

And he said, No. And that was—that was pretty much it.

...

And the last thing that was—that I said to Bob was—because—so it might have been something like, So we have a deal? Or, We have an arrangement?

And he might have said, So we have an arrangement? Or, We have an agreement?

And I said, We do. And I remember that we shook hands. We stood up....

And I said, so—when he said, You'll be able to make your movie, I said, Have I got your word on that, Bob?

***480** And he said, You do.

(*Id.* 24–25, 28–29).[3]

Baker acknowledges that he and Lapin never discussed, and thus never agreed on, the following terms:

• Whether the investment was to be in the form of equity, a loan, or something else (*id.* 32);

• Whether the $500,000 would be provided by Lappin in a lump sum or over time or when it would be paid, e.g., at the beginning or the end of the project or throughout (*id.* 54);

• The terms under which Lappin would be repaid (*id.* 42);

• Whether and how Lappin would share in any profits from *Bungalow 6* (*id.* 45);

• Whether any share of profits would be of net profits or gross profits (*id.* 46);

• Who would be in control of *Bungalow 6* (*id.* 42–43);

• Who would own the copyrights to *Bungalow 6* (*id.* 45); and

• Whether Lappin would have approval rights over casting, content, dailies, and the like (*id.* 46).

In describing a conversation he had with Deborah Coltin, the Executive Director of the Foundation, during which she asked him about his plans after he completed *GJA*, Baker testified: "And I said, Well, I think Bob and I are going to be *possibly* making an actual—an actual movie together...." (Baker Dep. 50–51) (emphasis added).

6. *The Foundation's Involvement in the Production of GJA*

A reasonable jury could only find that Lappin and Coltin provided substantial creative input into *GJA*. The "idea" and the "concept" of *GJA* was Lappin's—"it was Bob's brainchild," as Baker acknowledged at his deposition. (Baker Dep. 195). Baker agrees that Lappin and Coltin "made a lot of changes" to the script. (*Id.* 199). They suggested individuals to include in the film and they made suggestions such as shortening or lengthening segments or eliminating music. They also commented on the script along the way. (*Id.* 201–02). Baker incorporated their suggestions. (*Id.* 202). Lappin and Coltin both played a role in writing parts of the script, including the parts dealing with "Israel and Jewish survival and the Torah." (Lappin Dep. 127; *see also* Coltin Dep. 63, 95–99, 102–04). As alleged in the complaint, Lappin and Coltin requested thirty-four text revisions to video-taped dialogue and recorded narration, which required "considerable alterations to the documentary." (Compl.¶ 24).

The documentary evidence shows that Lappin and Coltin provided extensive creative input. (*See, e.g.*, Schacter 7/11/05 Decl. Exs. D (Baker e-mail responding to specific suggestions and comments by Lappin and Coltin), H (dozens of e-mails, letters, and notes showing extensive input from Lappin and Coltin), I (e-mail from Lappin making suggestions), J (long e-mail from Lappin with numerous suggestions and comments), L (Baker tells Lappin in e-mail: "[Y]ou would have made a phenomenal studio boss ... or producer. The points you made were on mark."), N (several ***481** long e-mails from Lappin to Baker with numerous detailed suggestions and comments); Schacter 6/9/05 Decl. Ex. Q (long letter from Baker responding to specific comments and questions of Lappin)). For example, in an e-mail sent by Lappin to Baker on August 31, 2001, Lappin provided feedback on a draft of the script:

> Generally, I feel you are on the right track, but I have a strong feeling that the tone is not sufficiently sophisticated for ten to fourteen year olds.... Perhaps we are doing what we said we should not do—talking down to the youngsters.

(*Id.* Ex. H at 01056). Baker's response, dated September 1, 2001, shows his reaction to Lappin's suggestions:

> as usual, your perceptions are on target ... the youngest is too young ... it won't take long to smarten up this first draft ... as we had discussed, each show can end with a teaser on the next.

(*Id.* Ex. H at 01077).

Another long e-mail from Lappin to Baker shows that Lappin and Coltin contributed not just general ideas but specific suggestions for the expression of ideas:

> Gil,
>
> Debbie and I have gone over the script carefully, and here are out thoughts:
>
> 1) Rather than starting with an intellectual discussion, that falls short of being exciting, consider opening with actual film clips of some of our great Jewish achievers. Possibly include Mark Twain. Then have someone ask the group if they know what all these people have in common. Answer: all Jewish, except one. Then go from there with Mark Twain as on pages 11 & 12 of the script.
>
> ...
>
> 3) When you get in the script to the smallness of our numbers, you might help make the point visually by illustrating that there are approximately 1000 people in the world to every two Jews....
>
> 4) Similarly on Israel, show a world map, highlighting tiny Israel with bright color, so its tinyness stands out.
>
> 5) Assuming you like 1) above, pages 1 & 2 as written would be out.... [O]n page 3, The Girl—"he's cuter than all ... together." We feel this stereotypes and trivializes girls. The boys talk numbers and facts. All girls care about is how cute boys are.
>
> ...
>
> 13) We suggest opening the second Episode with Adam Sandler's Hanukah Song. You could then pick out the great Jewish achievers, he mentions.
>
> 14) Generally, and I repeat your own mantra, that we must avoid talking down. We fear much of the script falls into this trap, and will be considered "lame" by youngsters.

(*Id.* Ex. H at 01098–99).

Baker testified at his deposition in this respect as follows:

> Q. So would it be fair to say that this film is the product of your work and Bob and Debbie's work together?
>
> A. Well, you could say it that way. And the person could walk away thinking Gil did half and Bob and Debbie did half or Gil did a third, Bob did a third, and Debbie did a third. That would be I think a misrepresentation.
>
> Q. I'm not asking for quantities now. ... But without getting into quantities, would it be fair to say that the work, this film, was the product of joint work by yourself and Bob and Debbie together in some quantity?
>
> ***482** A. Yeah, that you could say.

(Baker Dep. 202–03).

Although Baker and Lappin never discussed ownership of the copyright to *GJA*, he understood that the "owner of the rights to the film" was "probably Bob" or "Bob's foundation." (*Id.* 230).

7. *The Thanksgiving Day Dispute*

On Thanksgiving Day 2002, at a family gathering at Peter Lappin's home in Massachusetts, Baker and Lappin had a discussion about *Bungalow 6.* The two differ in their descriptions of the conversation, but they agree that Lappin declined to provide any funding for *Bungalow 6.* (Baker 7/8/05 Aff. ¶ 23; Lappin 6/9/05 Decl. ¶¶ 17–18).[4] The two also agree that Lappin suggested that the Foundation was prepared to make additional payments to Baker, although Baker describes this as an offer by Lappin to pay " 'bills' for the work I had done and any additional expenses related to GJA" (Baker 7/8/05 Aff. ¶ 24), while Lappin states that he agreed only that the Foundation would "compensate [Baker] fairly" for "any extra work on non-film matters" performed at the Foundation's request (Lappin 6/9/05 Decl. 19).

Baker sent Lappin seven bills in late December 2002, totaling more than $80,000. (Schacter 6/9/05 Decl. Ex. B). They covered services such as compiling, verifying, and editing the Foundation's mailing list and preparing a "duplication master" of *GJA,* as well as services in connection with a *GJA* trailer, documentary guide, and website. (*Id.*). After receiving these bills the Foundation paid Baker only an additional $22,000. (Baker 7/8/05 Aff. ¶¶ 26–27; *see* Schacter 6/9/05 Decl. Ex. C (Lappin letter to Baker complaining of "shockingly and shamelessly inflated" bills)). Although the invoices were sent to Lappin, they were all addressed to the Foundation and not to Lappin personally. (Schacter 6/9/05 Decl. Ex. B). By the end, with the additional payments, the Foundation had paid Baker a total of some $177,500. (Baker 7/8/05 Aff. ¶ 26; Lappin 6/9/05 Decl. ¶ 16).

B. *Prior Proceedings*

This suit was commenced on January 20, 2004. The Court has subject matter jurisdiction over the action because of the diversity of citizenship of the parties and the existence of a claim under the Copyright Act of 1976. (Compl. ¶ 9 (citing 28 U.S.C. §§ 1332 and 1338)).

The complaint asserts eight causes of action: (1) breach of contract for Lappin's failure to honor his purported contractual obligation to fund *Bungalow 6* (Compl.¶¶ 34–35); (2) unjust enrichment as defendants purportedly received Baker's services in creating and producing *GJA* "without fully paying for the same" (*id.* ¶¶ 37–38); (3) in the alternative, quantum meruit for the reasonable value of Baker's time and services making *GJA* (*id.* ¶ 41); (4) breach of contract for Lappin's failure to honor his obligations under a purported marketing and distribution agreement (*id.* ¶¶ 43–44); (5) unjust enrichment as defendants purportedly received benefits from Baker's work with respect to the website, teaching guide, marketing materials, etc., for which they have not paid Baker (*id.* ¶¶ 46–48); (6) in the alternative, quantum meruit for the reasonable value of Baker's work with respect ***483** to the latter (*id.* ¶ 50); (7) copyright infringement (for which declaratory relief is sought) (*id.* ¶ 52); and (8) conversion as defendants purportedly converted the *GJA* materials and teaching guides that are the property of Baker (*id.* ¶ 54).

Defendants filed an answer denying the principal allegations of the complaint and asserting counterclaims for (1) breach of warranty because two non-Jewish individuals were mistakenly included in *GJA* (Answer Countercls. ¶¶ 41–45); (2) declaratory relief with respect to the ownership to the copyrights (*id.* ¶¶ 47–54); and (3) replevin for the return of the "master" copy of *GJA* (*id.* ¶¶ 56–60).

The parties engaged in discovery and these motions followed. Defendants seek partial summary judgment on the grounds that: (1) the breach of contract claim for funding for *Bungalow 6* fails as a matter of law because the agreement is not sufficiently definite and certain to be enforceable; (2) the breach of contract claim for funding for *Bungalow 6* is barred by the statute of frauds; (3) the quasi-contractual claims relating to the production of *GJA* fail because the parties' rights are governed by an express contract; (4) the claims against Lappin for compensation for additional work fail because any agreement concerning any such additional work was with the Foundation and not Lappin individually; and (5) the copyright claim fails as a matter of law because *GJA* was a "joint work" of Baker and the Foundation. Baker moves for partial summary judgment in his favor on his copyright claim and dismissing defendants' counterclaims.

DISCUSSION

I address defendants' motion first and Baker's motion second.

A. ***Defendant's Motion***

I address each prong of defendants' summary judgment motion, with the exception that I do not reach the statute of frauds issue.

1. ***Indefiniteness***

The first issue presented by defendants' motion is whether Lappin's purported agreement to provide funding for *Bungalow 6* is barred by the doctrine of indefiniteness.

a. ***Applicable Law***

Under New York law,[5] contracts are unenforceable unless the parties reach a meeting of the minds on all material terms. *See Shann v. Dunk,* 84 F.3d 73, 78 (2d Cir.1996) (under New York law, "contracts are unenforceable unless they cover all essential terms"). As the New York State Court of Appeals has held:

> Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract.
> *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.,* 74 N.Y.2d 475, 482, 548 N.Y.S.2d 920, 548 N.E.2d 203 (1989).

Courts are "loath to refuse enforcement of agreements on indefiniteness grounds," *Best Brands Beverage v. Falstaff Brewing Corp.,* 842 F.2d 578, 588 (2d Cir.1987) (citation omitted), but they will do so " 'if the terms of the agreement are so vague and indefinite that there is no basis or standard for deciding whether the agreement had been kept or broken, or to ***484** fashion a remedy, and no means by which such terms may be made certain.,' " *id.* (quoting *Candid Prods., Inc. v. Int'l Skating Union,* 530 F.Supp. 1330, 1333–34 (S.D.N.Y.1982)). Where essential terms are missing, a court may not rewrite a contract for the parties to impose obligations not bargained for, but the court must consider whether the missing terms can be supplied in a reasonable fashion consistent with the intent of the parties. *B. Lewis Prods., Inc. v. Angelou,* No. 01 Civ. 0530(MBM), 2005 WL 1138474, at *5, 2005 U.S. Dist. LEXIS 9032, at *14–15 (S.D.N.Y. May 12, 2005). Terms that may be essential include, for example: "the price to be paid, the work to be done, and the time of performance." *Id.* at *6, 2005 U.S. Dist. LEXIS 9032, at *17.

b. ***Application***

On the record before the Court, even accepting as true Baker's version of his conversations with Lappin, no reasonable jury could find that the parties reached a meeting of the minds on the essential elements of a financing agreement for *Bungalow 6.* As Baker conceded at his deposition, there was no discussion, much less any agreement, on critical items such as the nature of the investment (whether loan or equity or otherwise); the time of performance (when Lappin was to provide the $500,000); the manner of performance (whether the funds would be paid in a lump sum or installments); the terms of repayment (if the monies were to be repaid at all); whether interest would be paid and if so at what rate; whether Lappin would share in profits and if so in what manner and to what extent; whether and to what extent Lappin would have any control over content, casting, or other creative issues; and who would own the copyrights.

These are matters that "seriously affect[ ] the rights and obligations of the parties." *Ginsberg Mach. Co. v. J & H Label Processing Corp.,* 341 F.2d 825, 828 (2d Cir.1965). The absence of any agreement or discussion of these critical matters is fatal to Baker's assertion that the parties intended to be bound, and makes it impossible for any court or jury to fashion "a proper remedy." *Cobble Hill Nursing Home,* 74 N.Y.2d at 482, 548 N.Y.S.2d 920, 548 N.E.2d 203. Nor are there any reasonable means for filling in the missing terms; the intent of the parties simply cannot be ascertained. Hence, because of its indefiniteness, the purported agreement is unenforceable.

In this respect, Baker relies heavily on the testimony of Stephen Mortell, who testified that Baker told him that Lappin had agreed to finance *Bungalow 6.* (Mortell Dep. 62). This reliance is misplaced. First, what Baker told Mortell is clearly hearsay; Mortell was simply repeating what he heard from Baker. To the extent Baker was describing to Mortell what Lappin purportedly said to Baker, the description is still hearsay. Second, even if it is admissible, Mortell's testimony does not help Baker, for the purported agreement is still fatally indefinite.

Accordingly, defendants' motion for summary judgment is granted to the extent that Baker's claim that Lappin is contractually bound to finance *Bungalow 6* is dismissed.[6]

2. ***The Contract as a Bar***

Defendants argue that Baker's quasi-contractual claims

for additional compensation for work on *GJA* are barred ***485** because an express contract exists between the parties, citing cases that hold that where a valid, express agreement governs the relationship between the parties, no implied contractual claims are viable. (Def. Supp. Mem. at 11–12) (citing, *e.g.*, *Data–Stream AS/RS Techs., LLC v. China Int'l Marine Containers, Ltd.,* No. 02 Civ. 6530(JFK), 2004 WL 830062, at *6–7, 2004 U.S. Dist. LEXIS 6594, at *20–21 (S.D.N.Y. Apr. 13, 2004), and *Leber Assocs., LLC v. Entm't Group Fund, Inc.,* No. 00 Civ. 3759(LTS), 2003 WL 21750211, at *20, 2003 U.S. Dist. LEXIS 13009, at *62 (S.D.N.Y. July 29, 2003)).

The argument is rejected. While I have no quarrel with the legal proposition, it does not apply here. First, I have held that there was no enforceable agreement by Lappin to provide funding for *Bungalow 6.* Hence, there is no valid, express agreement in this respect. Second, although there is a valid agreement between the parties to the extent that Baker agreed to provide services to the Foundation and the Foundation agreed to accept and pay for those services, it is not clear what the agreement was. Factual issues exist as to the terms of the parties' agreement—if they agreed at all—on the compensation to be paid to Baker for his creative services.

Baker contends that he essentially agreed to work on an expenses-only basis in return for Lappin's promise to fund *Bungalow 6.* There is some evidence in the record to support that contention. Although I conclude that Lappin's promise (even assuming it was made) was unenforceable, a reasonable factfinder could conclude that Baker was entitled to be paid something to reasonably compensate him for his creative services. In other words, a reasonable jury could conclude that under all the circumstances, in the absence of a clear, express, enforceable agreement as to his compensation, Baker is entitled to be paid on a quantum meruit basis.

Defendants argue that Baker was paid for his creative services, and it is true that the record contains evidence to show, for example, that Baker was paid something "less than $9,000" for his time as of April 15, 2002, and that Foundation funds were applied to seemingly personal expenses such as the mortgage and co-op maintenance fees on Baker's Manhattan apartment. Genuine issues of fact exist, however, as to what he was paid and whether he received fair value for his services. Even though Baker is not entitled to be paid damages for the failure of Lappin to provide funding for *Bungalow 6,* he arguably would be entitled to additional compensation from the Foundation for the fair value of his services if indeed he waived his fees with the expectation that he would receive that funding. At trial, defendants are free to argue that Lappin never made a promise, enforceable or otherwise, to provide funding for *Bungalow 6;* even assuming such a promise was made, it was wholly unconnected to *GJA;* Baker was paid all that he was entitled to be paid; and he was paid the reasonable value of his services in any event. These are issues for the jury to decide.

Accordingly, this prong of defendants' summary judgment motion is denied.

3. *The Claims Against Lappin*

Defendants next argue that Baker's claims for compensation for the additional work he did with respect to marketing and distribution, the teaching guide for *GJA,* and the website must be dismissed as to Lappin individually, for Baker was hired by and the work was done for the Foundation. I agree.

On the record before the Court, a reasonable jury could only find that Baker ***486** was hired to provide services to the Foundation and that Lappin was acting merely as a representative of the Foundation. Baker was in privity not with Lappin but with the Foundation.

The initial April 30, 2001, e-mail soliciting Baker's involvement was sent on behalf of the Foundation, and it clearly contemplated that the work was to be done for the Foundation and not for Lappin individually. (Schacter 7/11/05 Decl. Ex. E). The seven bills sent by Baker in December 2002 for the additional work were all addressed to the Foundation. (Schacter 6/9/05 Decl. Ex. B). Baker was seeking payment from the Foundation. From the outset, the concept was that this was a documentary to be funded and distributed by the Foundation to further its goals and mission. The additional work for which Baker seeks compensation was performed for the Foundation to assist it in its efforts to market and distribute *GJA.*

Although Lappin negotiated the arrangement with Baker, a reasonable jury could only find that he was acting not in his individual capacity but in his representative capacity on behalf of the Foundation.

Baker argues that Lappin was the trustee and sole benefactor of the Foundation and that the Foundation bears Lappin's name. (Pl. Opp. Mem. at 19–20). While these assertions are correct, they do not change the indisputable fact that Baker was engaged by the Foundation to provide services on behalf of the Foundation. Baker's conclusory assertion that the work was performed for Lappin as an individual and not for the Foundation is simply belied by the documentary invoices, including seven invoices

prepared by Baker himself seeking payment not from Lappin but from the Foundation.

Moreover, to the extent Baker seems to be proceeding on an "alter ego" theory, the claim is rejected. First, the complaint does not assert an "alter ego" or "veil-piercing" claim. Hence, no such claim is in the case. Second, the complaint alleges only that the Foundation is a charitable organization with its principal place of business in Massachusetts. It does not specify whether the Foundation is a not-for-profit corporation or a partnership or a trust or some other entity. The Court is unable to consider whether there is a basis for disregarding the form or shell of the entity to reach the assets of the principal, without knowing what the form of the entity is. This prong of defendants' motion is granted.

4. *The Copyright Claim*

Finally, defendants argue that Baker's copyright infringement claim must be dismissed because the indisputable facts show, as a matter of law, that Lappin and Coltin, working on behalf of the Foundation, were joint authors of *GJA* and that *GJA* was a joint work.[7]

487 a. *Applicable Law

Under the Copyright Act, a joint work is one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. Co-authors of a joint work are each entitled to distribute a joint work, for "[i]n a joint work each author automatically acquires an undivided ownership in the entire work." *Weissmann v. Freeman*, 868 F.2d 1313, 1318 (2d Cir.1989) (citation and quotation marks omitted); *see* 17 U.S.C. § 201(a) ("The authors of a joint work are co-owners of copyright in the work."). Each joint author has the right to license or otherwise use the work as he or she wishes, subject only to an obligation to account to the other joint authors for any profits. *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir.1998).

To prove co-authorship status, a co-authorship claimant must show that each putative co-author to the work (1) made independently copyrightable contributions and (2) fully intended to be a co-author. *Thomson*, 147 F.3d at 200; *see Robinson v. Buy–Rite Costume Jewelry, Inc.*, No. 03 Civ. 3619(DC), 2004 WL 1878781, *3, 2004 U.S. Dist. LEXIS 16675, *7–8 (S.D.N.Y. Aug. 23, 2004). *But see* Nimmer on Copyright § 6.07[A][3][a], at 22 (suggesting that each author's contribution need not be copyrightable). The key is the intent of the parties at the time the work is done. *Thomson*, 147 F.3d at 199. There is no requirement that "the several authors must necessarily work in physical propinquity, or in concert, nor that the respective contributions made by each joint author must be equal either in quantity or quality." Nimmer on Copyright § 6.03, at 7. Each author's contribution, however, must be more than *de minimis. Id.* § 6.07[A][1], at 21. The contribution must be one of authorship, and merely contributing financing does not suffice. *Id.* § 6.07[A][2], at 21.

b. *Application*

Here, a reasonable jury could only find that Lappin and Coltin (working on behalf of the Foundation) were joint authors of *GJA*. I reach this conclusion for the following reasons.

First, Lappin and Coltin made independently copyrightable contributions to *GJA*. Their input clearly was more than *de minimis* and involved at least a "minimal degree of creativity." *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). As Baker conceded, *GJA* was Lappin's "brainchild." Both Lappin and Coltin made specific suggestions with respect to the script and to individuals to include or omit. They both played a role in writing the script and asked for dozens of changes. The script and film were revised to reflect those requests. The documents, and the e-mail exchanges in particular, show that Lappin and Coltin provided extensive comments and feedback and made many specific suggestions, including on how to express certain ideas. Moreover, Lappin and Coltin made the final decisions. (*See* Baker Dep. 172 ("Bob could have pulled the plug on this project any time he wanted to if his confidence in me was not what he thought it should be.")).

Although Baker apparently did the vast majority of the work, equality in quantity of contribution is not required, and a reasonable jury could only find that Lappin and Coltin were "true collaborators ***488** in the creative process." *Childress v. Taylor*, 945 F.2d 500, 504 (2d Cir.1991). Similarly, even assuming Lappin and Coltin were not present in the editing room when the film was edited, as Baker alleges, the law does not require that joint authors work together or in the same place or contribute to every aspect of a project. *See Gillespie v. AST Sportswear, Inc.*, No. 97 Civ. 1911(PKL), 2001 WL 180147, at *6, 2001 U.S. Dist. LEXIS 1997, at *19 (S.D.N.Y. Feb. 22, 2001) ("[A] person need not hold the camera or push a

button to be considered the author of a visual work, since one can exercise control over the content of a work without holding the camera.").

Second, a reasonable jury could only find that Lappin and Coltin intended to be joint authors. They clearly intended to merge their respective contributions into a unitary whole with the product that Baker was creating, and Baker even acknowledged at his deposition that *GJA* was the product of joint work by him, Lappin, and Coltin. (Baker Dep. 203). Baker chose not to take any credit for any of his work on *GJA*, even though he created the closing credits himself. (*Id.* 225–28). On the other hand, the credits list Lappin and Coltin as the Executive Produce and Associate Producer, and the Foundation is mentioned both as the source of the funding and also as the entity to contact for consent to broadcast. (CX 1 at 55:33–56:05).

Third, although defendants cannot take advantage of the work for hire provisions of the Copyright Act because of the absence of a signed instrument, the overall circumstances are still relevant to ascertaining the parties' intent. If not in the strict sense of the Copyright Act, this project still was a work for hire in a practical sense. The Foundation hired Baker to make the film, and both the Foundation and Baker fully expected that the Foundation would take control of the film to distribute it free of charge to Jewish educational and religious organizations. In the end, the Foundation paid some $177,500 to make the film. It did not do so with the expectation that Baker would retain the sole rights to the film, and Baker surely had no such expectation himself. Indeed, to the contrary, Baker testified at his deposition that he believed that Lappin or the Foundation owned "the rights to the film." (Baker Dep. 230).

Accordingly, summary judgment will be granted in favor of defendants dismissing Baker's copyright infringement claim. Baker's eighth claim for relief, alleging conversion, is also dismissed as it is dependent on the copyright claim.[8]

B. *Baker's Motion*

Baker's motion for partial summary judgment seeks judgment granting him relief on his copyright claim and dismissing all defendants' counterclaims. The first part of the motion is denied, for the reasons I discussed above in granting defendants' motion for summary judgment dismissing Baker's copyright claim.

The second part of the motion seeks dismissal of defendants' five counterclaims. First, I discuss the three copyright counterclaims and the dependent counterclaim for replevin, which seeks return of the "master" of *GJA*. Second, I discuss the counterclaim for breach of warranty.

489 1. *The Copyright and Replevin Counterclaims

Defendants have asserted three copyright counterclaims (the second, third, and fourth counterclaims). The second counterclaim seeks a declaratory judgment that the Foundation is "the sole owner to and author" of *GJA* and related works. The third counterclaim seeks a declaratory judgment that the Foundation and Baker are "joint owners" of *GJA* and the related works. The fourth counterclaim seeks a declaratory judgment that the Foundation had and still has an implied license to copy and distribute *GJA* and the related works. The fifth counterclaim is for replevin—return of the "master" of *GJA* based on the theory that the Foundation is entitled to the master.

Baker's motion is denied as to the second counterclaim. Although Baker clearly made independently copyrightable contributions to *GJA* and the works, it is not clear that he intended to retain an interest in the copyrights. Certain of his actions—he did not want his name associated with *GJA*—belie any intent to be a co-author for copyright purposes.

Baker's motion is denied as to the third counterclaim. At a minimum, the Foundation is a joint author of *GJA* and the related materials.

Baker's motion is granted as to the fourth counterclaim, as the issue of an implied license is now moot.

Baker's motion is denied as to the fifth counterclaim for replevin, as his argument that he is entitled to possession of the master of *GJA* is premised on the incorrect assertion that he is the sole author of the film. (Pl. Supp. Mem. at 20 n. 15).

2. *The Breach of Warranty Counterclaim*

In their first counterclaim, defendants allege that they had a binding agreement with Baker, the agreement contained an express warranty that *GJA* would be completed to the Foundation's "complete satisfaction," Baker breached that warranty by including two non-Jewish persons in the film, and defendants therefore are entitled to damages. (Answer ¶¶ 41–45). Baker moves for summary judgment dismissing the claim.

The motion is granted. On the record before the Court, no reasonable jury could find that Baker made an express warranty that would give rise to a breach of warranty claim for damages.

Acknowledging that there is not a single, signed agreement governing the rights of the parties, defendants rely on two e-mails as the bases for the breach of warranty claim. First, they cite an e-mail from Baker to Lappin dated May 7, 2001, in which Baker writes:

> While busy ..., I may have the time to write at least [ ] one or two of the segments you need. My fee for research, writing and a re-write, wouldn't exceed $2,500 per fifteen minute script. A writer who wanted much more than that, might be asking too much.
>
> I might add that it's very important to have the four scripts *completely finished to your satisfaction,* and in hand, before contracting for production work.

(Schacter 7/11/05 Decl. Ex. F) (emphasis added). Taking the underscored language out-of-context, defendants argue that "Baker expressly warranted that GJA would be 'completely finished to [the Foundation's] satisfaction.' " (Def. Opp. Mem. at 20 (quoting Schacter 7/11/05 Decl. Ex. F)). Of course, Baker was not warranting that he would finish *GJA* completely to the Foundation's satisfaction, and he was not even undertaking to do all four scripts; he was merely saying that the Foundation ***490** should have all four scripts in hand and completed to its satisfaction before it contracted for production work. No reasonable jury could conclude that this was an express warranty as alleged in the first counterclaim.

Second, the Foundation relies on an e-mail dated October 3, 2001, in which Baker was apparently responding to complaints that Lappin had made about the expenses. After explaining certain expenses, Baker wrote:

> if i gave the impression that i expect you to pay for material that doesn't meet your approval, i apologize ... the point is, i HAD NO CHOICE but to invest another $2,000 so that i could even show you what i saw in my mind ... at no time have i ever expected you, or any other client i've ever worked for, to pay for material that isn't perfectly acceptable.

(Schacter 7/11/05 Decl. Ex. G). Defendants argue that this e-mail constitutes an express warranty by Baker that "the Foundation would not have to 'pay for material that isn't perfectly acceptable.' " (Def. Opp. Mem. at 20–21 (quoting Schacter 7/11/05 Decl. Ex. G)). Again, this is simply not so. In explaining an expense, Baker was merely saying that he had never expected the Foundation or any other client to pay for material that was not perfectly acceptable. This expectation was not an express warranty as alleged in the first counterclaim, the breach of which could provide a basis for an award of damages.

Defendants are free to rely at trial on the alleged deficiencies in Baker's work to seek to defeat his claims for damages or to reduce the amount of any award. They may not, however, pursue the breach of warranty counterclaim to seek recovery of their own purported damages.

CONCLUSION

For the foregoing reasons, the parties' cross-motions for summary judgment are granted in part and denied in part. The first, seventh, and eighth claims for relief in the complaint are dismissed, with prejudice, as to both defendants. The second, third, fourth, fifth, and sixth claims for relief are dismissed as to Lappin individually. The first counterclaim is dismissed, with prejudice. The fourth counterclaim is dismissed as moot, without prejudice to re-filing in the event the Court's dismissal of Baker's copyright claim is reversed on appeal.

Counsel for the parties shall appear for a status conference on March 3, 2006, at 10:30 a.m.

SO ORDERED.

All Citations

415 F.Supp.2d 473

Footnotes

1 Baker concedes that these mortgage and maintenance payments were for his Manhattan apartment, but contends that he was living

in Queens and kept the Manhattan apartment "in part because I needed office space to complete [*GJA*]." (Baker 7/8/05 Aff. ¶ 30). Similarly, he contends that his "cell phone, long distance and Internet bills" were properly *GJA* expenses because he had to communicate with his staff and with the Foundation in Boston regarding *GJA's* progress and he did "extensive research" for *GJA* through his "internet connection." (*Id.* ¶ 31). A reasonable jury could only be troubled by these assertions. Baker does not and cannot contend that the Manhattan apartment and his cell phone, land phone, and Internet service were used *solely* for *GJA*, and it is difficult to understand how he could justify charging the entirety of these expenses to *GJA*. Moreover, the commingling of *GJA* expenses with personal expenses and of *GJA* funds with funds received from other sources, as shown by the check register, is questionable.

2 The DVD has been marked Court Exhibit ("CX") 1.

3 Lappin denies that he or the Foundation ever agreed to finance *Bungalow 6* and denies that the subject was ever discussed until the dispute that led to this lawsuit arose. (Lappin 6/9/05 Decl. ¶ 14). Baker testified to other conversations he purportedly had with Lappin, after the initial conversation on September 9, 2001, about funding for *Bungalow 6*. (*See, e.g.*, Baker Dep. 39–41). For purposes of these motions, I assume the conversations occurred as Baker describes them.

4 Baker contends that Lappin "reneged" on his prior agreement to finance *Bungalow 6*, while Lappin contends that Baker made an "overture" for funding for *Bungalow 6*, to which Lappin purportedly responded that neither he nor the Foundation had any interest in funding a commercial movie. (Baker 7/8/05 Aff. ¶ 23; Lappin 6/9/05 Decl. ¶¶ 17–18).

5 Both sides apply New York law. (*See* Def. Supp. Mem. at 9–10; Pl. Opp. Mem. at 10). Moreover, here there clearly is a significant connection to New York, as Baker performed much if not most of his work on *GJA* in New York. (*See* Baker 7/8/05 Aff. ¶ 30).

6 In light of my ruling on the issue of the indefiniteness of the purported agreement, I do not reach defendants' statute of frauds argument.

7 Although defendants commissioned Baker to make *GJA*, defendants have not relied on the theory that they own the copyright to the film because it is a "work made for hire." *See* 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."). A "work specially ordered or commissioned" qualifies as a "work made for hire" only if "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101. Here, no such instrument exists, and hence defendants rely instead on the theory that *GJA* is a joint work. If a work is prepared by an independent contractor on commission, no written instrument exists between the parties, and "the commissioning party also materially contributed as an author to the creation of the work, he may be held to be a joint author together with the independent contractor." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 5.03[B][2][b], at 55 (2005) ("Nimmer on Copyright").

8 For the most part, the parties have not discussed the website, teaching guide, and other materials separately from *GJA* itself. My ruling as to the claim for copyright ownership to *GJA* applies to the website and other materials as well, as they were part of the same overall project and were to be used hand in hand with *GJA*.

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United States District Court,
S.D. New York.

BANK MIDWEST, N.A., Plaintiff,
v.
HYPO REAL ESTATE CAPITAL CORP.,
Defendant.

No. 10 Civ. 232(WHP).
|
Oct. 13, 2010.

Attorneys and Law Firms

Eric Rieder, Esq., Bryan Cave LLP, New York, NY, for Plaintiff.

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MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge.

***1** Plaintiff Bank Midwest, N.A. ("Bank Midwest") brings this diversity action against Defendant Hypo Real Estate Capital Corporation ("Hypo") for breach of contract and unjust enrichment. Defendant moves to dismiss the Complaint for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b) (6). Plaintiff moves for a preliminary injunction under Fed.R.Civ.P. 65. For the following reasons, Defendant's motion to dismiss is granted in part and denied in part, and Plaintiff's motion for a preliminary injunction is denied.

BACKGROUND

For the purposes of Hypo's motion to dismiss, the allegations of the Complaint are accepted as true and summarized here. On April 30, 2007, Bank Midwest, Hypo, and PrivateBank and Trust Company ("PrivateBank"; collectively, the "Lenders") entered into a Loan and Security Agreement (the "Agreement") with 7677 East Berry Avenue Associates L.P. ("East Berry"). (Complaint dated Jan. 12, 2010 ("Compl.") ¶ 1; Compl. Ex. A: Loan and Security Agreement dated Apr. 30, 2007 ("Agreement").) Under the Agreement, the Lenders extended a credit facility to East Berry for the purpose of financing a luxury residential, retail, and entertainment development in Greenwood Village, Colorado. (Compl.¶¶ 12–13.) The credit facility was secured by certain real property in the Greenwood Village development. (Compl.¶ 15.) East Berry gave the Lenders first priority on their loans up to $184,241,000. (Compl.¶¶ 15–16.) The Lenders' security interest in Greenwood Village could not be subordinated without their unanimous consent. (Agreement § 13.9.2.) Hypo is the administrative agent for the Lenders:

> [E]ach Lender hereby irrevocably authorizes [Hypo] to act as agent for Lenders and to take such actions as Lenders are obligated or entitled to take under the provisions of this Agreement and the other Loan Documents and to exercise such powers as are set forth herein or therein, together with such other powers as are reasonably incidental thereto.
>
> All acts of and communications by [Hypo], as agent for the Lenders, shall be deemed legally conclusive and binding on the Lenders....

(Agreement § 13.1.) The Agreement is governed by New York law. (Agreement § 11.3.)

On or about August 30, 2009, East Berry filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the District of Colorado. (Compl.¶¶ 2, 18.) At that time, East Berry owed approximately $90,000,000 to the Lenders. (Compl.¶ 17.) Prior to the filing, it made the interest and principal reduction payments required under the Agreement. (Compl.¶ 17.) After filing its Chapter 11 petition, East Berry sought approval from the Bankruptcy Court as a debtor-in-possession ("DIP") for a $15,000,000 loan from Carmel Landmark LLC ("Carmel"). (Compl.¶ 18.)

On September 22, 2009, Hypo, as agent for the Lenders, filed an objection to East Berry's motion for post-petition financing from Carmel. Hypo argued, in part, that the Carmel loan would not adequately protect the Lenders' security interest in East Berry's property. (Compl.¶¶ 22–23.) Three days later, Hypo submitted an Initial Term Sheet to East Berry, purportedly on behalf of the Lenders, proposing terms for a DIP loan of $30,000,000. (Compl.¶¶ 26–28.) The proposal was made without Bank Midwest or PrivateBank's involvement or consent. (Compl.¶ 27.) Hypo's proposed DIP financing would receive priority and the security interest in the Agreement's credit facility would be subordinated to that of the DIP loan. (Compl.¶¶ 28–29.)

***2** By letter dated September 30, 2009, Bank Midwest informed Hypo that it did not consent. (Compl.¶ 31.) Nevertheless, Hypo advised the Bankruptcy Court that the Lenders were willing to provide a DIP loan to East Berry, as an alternative to the Carmel loan. (Compl.¶¶ 33–34.)

On October 7, 2009, East Berry filed a Motion for Approval of Post–Petition Financing from Hypo Real Estate Capital Corporation with the Bankruptcy Court (Compl.¶ 35.) This loan (the "Hypo Loan") was made pursuant to an agreement between Hypo and East Berry. (Compl.¶ 43.) Under the terms of the Hypo Loan, the Lenders' security interest under the Agreement was subordinated to Hypo's security interest in the same property under the Hypo Loan. (Compl.¶¶ 37, 43.) On October 10, 2009, Bank Midwest again advised Hypo that it did not consent to the proposed subordination and that absent the unanimous consent of all Lenders, subordination of the Lenders' security interest would constitute a breach of the Agreement. (Compl.¶¶ 37, 40.)

On October 29, 2009, the Bankruptcy Court issued a Final Order approving the Hypo Loan and granting Hypo an automatically perfected, first-priority security interest DIP Loan in the amount of $30,000,000. (Compl.¶ 43.) The Bankruptcy Court found that the terms of the new loan adequately protected the Lenders against diminution in the value of their security interest (*See* Compl. 143.)

Bank Midwest alleges that Hypo breached the Agreement by issuing a loan to East Berry that subordinated the Lenders' security interest without their consent. (Compl.¶ 53.) Bank Midwest further avers that the Hypo Loan "halted" East Berry's payment of principal and related fees to the Lenders under the Agreement and jeopardizes payment in full of the Lenders' secured claim. (Compl.¶ 44.) In addition, Bank Midwest alleges that this breach has "compromised and impaired the value of the security interest of the [Agreement]" and forced the Lenders to accept "the additional risk associated with the [Hypo] Loan," effectively "transform[ing] Bank Midwest's fully secured claim against the Borrower into a mere unsecured claim against Hypo." (Compl.¶¶ 45–46, 48.) Bank Midwest seeks to enjoin Hypo to "apply all proceeds ... it receives from [East Berry] ... on account of [the Hypo Loan] to pay the Lenders the amounts they are owed under the original Agreement ... [or] the creation of an escrow account for the receipt of proceeds under the DIP Loan...." (Compl.¶ 63.) Alternatively, Bank Midwest seeks damages for breach of contract and unjust enrichment. (Compl.¶¶ 64–74.)

DISCUSSION

I. *Legal Standard*

On a motion to dismiss, a court must accept all facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir.1998). Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 540 U.S. 544, 556 (2007) (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [his claim]"). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 555 U.S. at 570). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S.Ct. at 1949 (citation omitted). A court's "consideration [on a motion to dismiss] is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Allen v. WestPoint–Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991).

II. *Breach of Contract*

***3** To state a claim for breach of contract under New York law, a plaintiff must allege "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir.2004). A plaintiff must also establish that the breach caused the damages. *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank*, 392 F.3d 520, 525 (2d Cir.2004). Hypo argues that Bank Midwest has not alleged damages or causation.

a. *Damages*

Failure to plead damages is fatal to a breach of contract action. *LNC Invs., Inc. v. First Fid. Bank, N.A. N.J.*, 173 F.3d 454, 465 (2d Cir.1999). Ordinarily, the purpose of contract damages is to give the injured party the benefit of the bargain by awarding a sum of money that will, to the

extent possible, put that party in the position it would have been in had the contract been performed. *Terwilliger v. Terwilliger*, 206 F.3d 240, 248 (2d Cir.2000). Damages may not be speculative. *Ostano Commerzansalt v. Telewide Sys., Inc.*, 794 F.2d 763, 767 (2d Cir.1986). Bank Midwest alleges that it suffered damages from the subordination of its security interest, the concomitant increase in risk, and the cessation of payments under the Agreement.

Hypo's extension of post-petition financing has placed Bank Midwest in a less secure position. Nevertheless, any potential loss based on increased risk is contingent on future events that may not occur. East Berry could continue to develop the Greenwood Village project and ultimately repay its obligations under both the Hypo DIP Loan and the Agreement. Absent a default, Bank Midwest's claim for damages based on the subordination of its security interest is an "undefined future harm [that] is too speculative to constitute a compensable injury." *Cherny v. Emigrant Bank*, 604 F.Supp.2d 605, 609 (S.D.N.Y.2009).

Bank Midwest also alleges that the Hypo Loan has "halted" East Berry's payment of principal and related fees under the Agreement. Nonpayment is a quintessential form of contract damages. *See, e.g .*, *Graham v. James*, 144 F.3d 229, 235 (2d Cir.1998) (upholding damages award for failing to pay as promised under a contract). The Agreement provided for a repayment schedule, and repayment was ongoing at the time of the alleged breach. After the breach, repayment was replaced with a promise to pay. Accordingly, contract damages are adequately pled.

b. *Causation*

"Causation is an essential element of damages in a breach of contract action ... and a plaintiff must prove that a defendant's breach directly and proximately caused his or her damages." *Nat'l Mkt. Share,* 392 F.3d at 525. A breach is a proximate cause of damages if it is a substantial factor in producing those damages. *Point Prods. A.G. v. Sony Music Entm't, Inc.,* 215 F.Supp.2d 336, 344 (S.D.N.Y.2002). If the damages are the "natural and probable consequence" of the breach, then the defendant's actions are a proximate cause of that injury, even if other factors also contributed. *Point Prods.*, 215 F.Supp.2d at 342–43.

***4** Hypo contends that causation cannot be established because any damages were also proximately caused by the current economic and real estate climate, the failure of East Berry's business, and East Berry's voluntary filing for Chapter 11 relief. This argument fails. The existence of other potential causes does not negate a finding that Hypo's actions were a proximate cause of Bank Midwest's injury. *See Coastal Power Int'l, Ltd. v. Transcon, Capital Corp.*, 10 F.Supp.2d 345, 366 (S.D.N.Y.1998) (defendant's failure to provide information to insurers was a proximate cause of plaintiff's damages, despite the existence of other potential causes). Here, Bank Midwest's damages were the "natural and probable consequence[ ]" of Hypo's alleged breach. *Point Prods.*, 215 F.Supp.2d at 342–43. While the factors mentioned by Hypo may have contributed to the circumstances surrounding Bank Midwest's injury, Bank Midwest was not injured until Hypo provided a DIP Loan to East Berry, which "halted" loan payments under the Agreement. Thus, Hypo's breach of the Agreement was a proximate cause of those damages, albeit perhaps not the exclusive cause. *See Point Prods.*, 215 F.Supp. at 343.

Bank Midwest has alleged a plausible theory of causation sufficient to withstand a motion to dismiss. And issues of proximate cause are often "fact-laden, requiring a fully developed factual record, and not [a] bare-bones motion to dismiss." *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F.Supp.2d 508, 525 (S.D.N.Y.2006). Accordingly, Hypo's motion to dismiss Bank Midwest's breach of contract claim for failure to state a claim is denied.

III. *Unjust Enrichment*

To state a claim for unjust enrichment, a plaintiff must allege that "(1) the defendant was enriched; (2) the enrichment was at the plaintiff's expense; and (3) the circumstances are such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Golden Pac. Bankcorp v. F.D.I.C.*, 273 F.3d 509, 519 (2d Cir.2001). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract [i.e., unjust enrichment] for events arising out of the same subject matter." *McDraw, Inc. v. The CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 964 (2d Cir.1998) (brackets in original). However, a plaintiff may proceed on a theory of unjust enrichment despite the existence of a valid contract where "the contract does not cover the dispute in issue." *Mid–Hudson Catskill Migrant Ministry, Inc. v. Fine Hosp. Corp.*, 418 F.3d 168, 175 (2d Cir.2005).

Bank Midwest contends that the Agreement does not cover this dispute because Hypo's breach of its agency duties is separate and distinct from its breach of the Agreement. Specifically, Bank Midwest argues that in proposing a DIP loan, Hypo violated its implied duty to comply with its

principals' instructions and acted outside the scope of its actual authority. Bank Midwest draws a fine distinction between proposing a DIP loan, which it argues is outside the scope of the Agreement, and executing a DIP loan.

***5** This argument is unavailing. Apart from requiring the consent of all Lenders prior to executing a loan that subordinated the Agreement's security interest, the Agreement also sets forth the terms of the agency relationship itself. (*See* Agreement § 13 ("Agent shall have no implied duties to Lenders....").) Thus, the Agreement covers a dispute arising from violations of the agency relationship. *See G.K. Alan Assocs. v. Lazzari,* 840 N.Y.S.2d 378, 384 (N.Y.App.Div.2007) ("The duties of an agent are defined by the terms of the agreement that gave rise to the agency."). Accordingly, Bank Midwest's unjust enrichment claim is dismissed.

IV. *Collateral Estoppel*

"Collateral estoppel bars a plaintiff from relitigating an issue that has already been fully and fairly litigated in a prior proceeding." *Bank of N.Y. v. First Millennium, Inc.,* 607 F.3d 905, 918 (2d Cir.2010). Four elements must be met for issue preclusion to apply:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

Bank of N.Y., 607 F.3d at 918 (internal quotations omitted).

Hypo argues that the Bankruptcy Court's determination of (1) adequate protection and (2) priority of distribution precludes this Court from hearing Bank Midwest's breach of contract claim.[1] Because the issues before the Bankruptcy Court were not "identical" to those presented here, this Court disagrees. Nothing in this action requires this Court to revisit the Bankruptcy Court's determination of adequate protection or subordination of the original loan to the Hypo Loan. Those determinations are not relevant to the validity and interpretation of the Agreement, the legality of Hypo's actions under the Agreement, and the damages incurred by Bank Midwest.

A similar claim preclusion argument was addressed in *American Manufacturing Services, Inc. v. The Official Committee of Unsecured Creditors of the Match Electronics Group* No. 05 Civ. 242(TJM), 2006 WL 839550 (N.D.N.Y. Mar. 28, 2006). There, the plaintiff, American Manufacturing Services ("AMS") contracted with the Official Committee of Unsecured Creditors (the "Committee") during the course of a bankruptcy proceeding to enlist its cooperation in AMS's efforts to secure financing. Later, the Committee instituted an adversary proceeding against AMS and a proposed settlement was rejected by the court. AMS then sued the Committee for breach of contract, and the Committee argued that collateral estoppel barred the claim because "the Bankruptcy Court approved of the commencement of the Adversary Proceeding against AMS and ... rejected the proposed settlement agreement." *Am. Mfg.,* 2006 WL 839550, at *7. The district court was not persuaded. Although the bankruptcy court authorized the Committee to commence the adversary proceeding, the district court held that:

> ***6** [i]t did not ... rule on the issue of whether such a proceeding was in contravention of any agreements with the Plaintiff. Similarly, the Bankruptcy Court ... did not address whether the Committee's conduct in opposing the settlement agreement constitute[d] a breach of contract.

Am. Mfg., 2006 WL 839550, at *7. Thus, the district court concluded that the two proceedings lacked "identity of issues." *Am. Mfg.,* 2006 WL 839550, at *7. That reasoning applies with equal force here. Although the Bankruptcy Court ruled on issues related to the contract, it did not address the questions that this Court must decide in a breach of contract action. Accordingly, Bank Midwest's breach of contract claim is not barred by collateral estoppel.

V. *Plaintiff's Application for a Preliminary Injunction*

Bank Midwest seeks a preliminary injunction (1) directing Hypo to apply all proceeds from the Hypo Loan to pay the Lenders the amounts they are owed under the Agreement, or, in the alternative, (2) creating an escrow account for the receipt of proceeds from East Berry under the Hypo Loan until the rights of the parties can be determined. For

purposes of deciding whether Bank Midwest is entitled to a preliminary injunction, this Court considers the declarations and exhibits submitted in connection with the motion.

A preliminary injunction may be granted where the moving party establishes "(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir.2010). Irreparable harm is "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2d Cir.2003). "If an injury can be appropriately compensated by an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir.2004). Furthermore, the injury must not be "remote or speculative." *Reuters Ltd. v. United Press Int'l, Inc .*, 903 F.2d 904, 907 (2d Cir.1990).

Impairment of a security interest or a shift in bargained-for risk may constitute irreparable harm where the lender's only recourse is against the borrower. *See Citibank, N.A. v. Singer Co .*, 684 F.Supp. 382, 385–86 (S.D.N.Y.1988) (irreparable harm found where a credit agreement required provision of security on lender's request, and the borrower refused to provide that security); *E. N.Y. Sav. Bank v. 520 W. 50th St., Inc.*, 611 N.Y.S.2d 459, 462 (N.Y.Sup.Ct.1994) (irreparable harm found where rent decrease would impair the value of a mortgagee's security interest). In this case, Bank Midwest is suing Hypo, not the borrower, East Berry. If Bank Midwest prevails here, it will have recourse against Hypo and cannot assert that its only hope of repayment lies in the collateral under the Agreement. Moreover, Bank Midwest's damages are easily quantifiable as the amount due to Bank Midwest under the Agreement. Accordingly, because Bank Midwest fails to establish that a monetary remedy would be inadequate in this breach of contract action, its motion for a preliminary injunction is denied.

CONCLUSION

***7** For the foregoing reasons, Defendant Hypo Real Estate Capital Corporation's motion to dismiss Plaintiff Bank Midwest's breach of contract claim is denied, and its motion to dismiss Plaintiff's unjust enrichment claim is granted. Plaintiff's motion for a preliminary injunction is denied.

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2010 WL 4449366

Footnotes

1 While Hypo's arguments confuse claim preclusion and issue preclusion, this Court is satisfied that Hypo asserts a defense of *issue* preclusion:

> The Court: You're asserting claim preclusion here. But isn't it really issue preclusion?
> [Hypo's atty.]: It is, your Honor, it is.

Tr. Oral Arg. Dated May 7, 2010; *see also* Def.'s Reply Memo. 4 ("Hypo does not contest that when, and if, Plaintiff's breach of contract claim is ripe for adjudication and Plaintiff has suffered actual damages, it may pursue that claim in this Court.").

130 S.Ct. 876
Supreme Court of the United States

CITIZENS UNITED, Appellant,
v.
FEDERAL ELECTION COMMISSION.

No. 08–205.
|
Argued March 24, 2009.
|
Reargued Sept. 9, 2009.
|
Decided Jan. 21, 2010.

Synopsis
Background: Nonprofit corporation brought action against Federal Election Commission (FEC) for declaratory and injunctive relief, asserting that it feared it could be subject to civil and criminal penalties if it made through video-on-demand, within 30 days of primary elections, a film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election. The United States District Court for the District of Columbia, A. Raymond Randolph, Circuit Judge, and Royce C. Lamberth and Richard W. Roberts, District Judges, 2008 WL 2788753, denied corporation's motion for preliminary injunction and granted summary judgment to Commission. Probable jurisdiction was noted.

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

government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity, overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652;

federal statute barring independent corporate expenditures for electioneering communications violated First Amendment, overruling *McConnell v. Federal Election Com'n,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491;

disclaimer and disclosure provisions of Bipartisan Campaign Reform Act of 2002 did not violate First Amendment, as applied to nonprofit corporation's film and three advertisements for the film.

Affirmed in part, reversed in part, and remanded.

Justice Thomas joined as to all of Justice Kennedy's opinion except for Part IV.

Justices Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined as to Part IV of Justice Kennedy's opinion.

Chief Justice Roberts filed a concurring opinion, in which Justice Alito joined.

Justice Scalia filed a concurring opinion, in which Justice Alito joined and Justice Thomas joined in part.

Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg, Breyer, and Sotomayor, joined.

Justice Thomas filed an opinion concurring in part and dissenting in part.

West Codenotes

Held Unconstitutional
2 U.S.C.A. § 441b

Prior Version Recognized as Unconstitutional
18 U.S.C.A. § 608(e)

****880** *Syllabus*[*]
As amended by § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from using their general treasury ****881** funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. 2 U.S.C. § 441b. An electioneering communication is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election, § 434(f)(3)(A), and that is "publicly distributed," 11 CFR § 100.29(a)(2), which in "the case of a candidate for nomination for President ... means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days," § 100.29(b)(3)(ii). Corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes. 2 U.S.C. § 441b(b)(2). In *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 203–209, 124 S.Ct. 619, 157 L.Ed.2d 491, this Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, that political speech may be banned based on the speaker's corporate identity.

In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereinafter *Hillary*) critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination. Anticipating that it would

make *Hillary* available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced television ads to run on broadcast and cable television. Concerned about possible civil and criminal penalties for violating § 441b, it sought declaratory and injunctive relief, arguing that (1) § 441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer, disclosure, and reporting requirements, BCRA §§ 201 and 311, were unconstitutional as applied to *Hillary* and the ads. The District Court denied Citizens United a preliminary injunction and granted appellee Federal Election Commission (FEC) summary judgment.

Held:

1. Because the question whether § 441b applies to *Hillary* cannot be resolved on other, narrower grounds without chilling political speech, this Court must consider the continuing effect of the speech suppression upheld in *Austin*. Pp. 888 – 896.

(a) Citizens United's narrower arguments—that *Hillary* is not an "electioneering communication" covered by § 441b because it is not "publicly distributed" under 11 CFR § 100.29(a)(2); that § 441b may not be applied to *Hillary* under *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 *(WRTL)*, which found § 441b unconstitutional as applied to speech that was not "express advocacy or its functional equivalent," *id.*, at 481, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.), determining that a communication "is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.*, at 469–470, 127 S.Ct. 2652; that § 441b should be invalidated as applied to movies shown through video-on-demand because this delivery system has a lower risk of distorting the political process than do television ads; and that there should be an exception to § 441b's ban for nonprofit corporate political speech funded overwhelmingly by individuals—are not sustainable under a fair reading of the statute. Pp. 888 – 892.

(b) Thus, this case cannot be resolved on a narrower ground without chilling political ****882** speech, speech that is central to the First Amendment's meaning and purpose. Citizens United did not waive this challenge to *Austin* when it stipulated to dismissing the facial challenge below, since (1) even if such a challenge could be waived, this Court may reconsider *Austin* and § 441b's facial validity here because the District Court "passed upon" the issue, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379, 115 S.Ct. 961, 130 L.Ed.2d 902; (2) throughout the litigation, Citizens United has asserted a claim that the FEC has violated its right to free speech; and (3) the parties cannot enter into a stipulation that prevents the Court from considering remedies necessary to resolve a claim that has been preserved. Because Citizens United's narrower arguments are not sustainable, this Court must, in an exercise of its judicial responsibility, consider § 441b's facial validity. Any other course would prolong the substantial, nationwide chilling effect caused by § 441b's corporate expenditure ban. This conclusion is further supported by the following: (1) the uncertainty caused by the Government's litigating position; (2) substantial time would be required to clarify § 441b's application on the points raised by the Government's position in order to avoid any chilling effect caused by an improper interpretation; and (3) because speech itself is of primary importance to the integrity of the election process, any speech arguably within the reach of rules created for regulating political speech is chilled. The regulatory scheme at issue may not be a prior restraint in the strict sense. However, given its complexity and the deference courts show to administrative determinations, a speaker wishing to avoid criminal liability threats and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. The restrictions thus function as the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit. The ongoing chill on speech makes it necessary to invoke the earlier precedents that a statute that chills speech can and must be invalidated where its facial invalidity has been demonstrated. Pp. 892 – 896.

2. *Austin* is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures. Hence, § 441b's restrictions on such expenditures are invalid and cannot be applied to *Hillary*. Given this conclusion, the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on independent corporate expenditures is also overruled. Pp. 896 – 914.

(a) Although the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech," § 441b's prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation. Because speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people—political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, *supra*, at 464, 127 S.Ct. 2652. This language provides a sufficient

framework for protecting the interests in this case. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which ****883** may be a means to control content. The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion. Pp. 896 – 899.

(b) The Court has recognized that the First Amendment applies to corporations, *e.g.*, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, 98 S.Ct. 1407, 55 L.Ed.2d 707, and extended this protection to the context of political speech, see, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 428–429, 83 S.Ct. 328, 9 L.Ed.2d 405. Addressing challenges to the Federal Election Campaign Act of 1971, the Court in *Buckley v. Valeo*, 424 U.S. 1 *(per curiam)*, upheld limits on direct contributions to candidates, 18 U.S.C. § 608(b), recognizing a governmental interest in preventing *quid pro quo* corruption. 424 U.S., at 25–26, 96 S.Ct. 612. However, the Court invalidated § 608(e)'s expenditure ban, which applied to individuals, corporations, and unions, because it "fail[ed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47–48, 96 S.Ct. 612. While *Buckley* did not consider a separate ban on corporate and union independent expenditures found in § 610, had that provision been challenged in *Buckley* 's wake, it could not have been squared with the precedent's reasoning and analysis. The *Buckley* Court did not invoke the overbreadth doctrine to suggest that § 608(e)'s expenditure ban would have been constitutional had it applied to corporations and unions but not individuals. Notwithstanding this precedent, Congress soon recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b, the provision at issue. Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government lacks the power to restrict political speech based on the speaker's corporate identity. 435 U.S., at 784–785, 98 S.Ct. 1407. Thus the law stood until *Austin* upheld a corporate independent expenditure restriction, bypassing *Buckley* and *Bellotti* by recognizing a new governmental interest in preventing "the corrosive and distorting effects of immense aggregations of [corporate] wealth ... that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391. Pp. 899 – 903.

(c) This Court is confronted with conflicting lines of precedent: a pre-*Austin* line forbidding speech restrictions based on the speaker's corporate identity and a post-*Austin* line permitting them. Neither *Austin* 's antidistortion rationale nor the Government's other justifications support § 441b's restrictions. Pp. 903 – 911.

(1) The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech, but *Austin*'s antidistortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form. Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation." *Bellotti, supra,* at 777, 98 S.Ct. 1407 (footnote omitted). This protection is inconsistent with *Austin*' s rationale, which is meant to prevent corporations from obtaining " 'an unfair advantage in the political marketplace' " by using " 'resources amassed in the economic marketplace.' " 494 U.S., at 659, 110 S.Ct. 1391. First Amendment protections do not depend on the speaker's "financial ability to engage in public discussion." *Buckley, supra,* at 49, 96 S.Ct. 612. These conclusions were reaffirmed when the Court invalidated ****884** a BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. *Davis v. Federal Election Comm'n,* 554 U.S. 724, 742, 128 S.Ct. 2759, 171 L.Ed.2d 737. Distinguishing wealthy individuals from corporations based on the latter's special advantages of, *e.g.*, limited liability, does not suffice to allow laws prohibiting speech. It is irrelevant for First Amendment purposes that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Austin, supra,* at 660, 110 S.Ct. 1391. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech. Under the antidistortion rationale, Congress could also ban political speech of media corporations. Although currently exempt from § 441b, they accumulate wealth with the help of their corporate form, may have aggregations of wealth, and may express views "hav[ing] little or no correlation to the public's support" for those views. Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' political speech. *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665. Its censorship is vast in its reach, suppressing the speech of both for-profit and nonprofit, both small and large, corporations. Pp. 903 – 908.

(2) This reasoning also shows the invalidity of the Government's other arguments. It reasons that corporate political speech can be banned to prevent corruption or its appearance. The *Buckley* Court found this rationale

"sufficiently important" to allow contribution limits but refused to extend that reasoning to expenditure limits, 424 U.S., at 25, 96 S.Ct. 612, and the Court does not do so here. While a single *Bellotti* footnote purported to leave the question open, 435 U.S., at 788, n. 26, 98 S.Ct. 1407, this Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208, distinguished. Pp. 908 – 911.

(3) The Government's asserted interest in protecting shareholders from being compelled to fund corporate speech, like the antidistortion rationale, would allow the Government to ban political speech even of media corporations. The statute is underinclusive; it only protects a dissenting shareholder's interests in certain media for 30 or 60 days before an election when such interests would be implicated in any media at any time. It is also overinclusive because it covers all corporations, including those with one shareholder. P. 911.

(4) Because § 441b is not limited to corporations or associations created in foreign countries or funded predominately by foreign shareholders, it would be overbroad even if the Court were to recognize a compelling governmental interest in limiting foreign influence over the Nation's political process. P. 911.

(d) The relevant factors in deciding whether to adhere to *stare decisis*, beyond workability—the precedent's antiquity, the reliance interests at stake, and whether ****885** the decision was well reasoned—counsel in favor of abandoning *Austin*, which itself contravened the precedents of *Buckley* and *Bellotti*. As already explained, *Austin* was not well reasoned. It is also undermined by experience since its announcement. Political speech is so ingrained in this country's culture that speakers find ways around campaign finance laws. Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. In addition, no serious reliance issues are at stake. Thus, due consideration leads to the conclusion that *Austin* should be overruled. The Court returns to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech based on the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. Pp. 911 – 913.

3. BCRA §§ 201 and 311 are valid as applied to the ads for *Hillary* and to the movie itself. Pp. 913 – 917.

(a) Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley, supra*, at 64, 96 S.Ct. 612, or " ' "prevent anyone from speaking," ' " *McConnell*, 540 U.S., at 201, 124 S.Ct. 619. The *Buckley* Court explained that disclosure can be justified by a governmental interest in providing "the electorate with information" about election-related spending sources. 424 U.S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to §§ 201 and 311. 540 U.S., at 196, 124 S.Ct. 619. However, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosing its contributors' names would " 'subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id.*, at 198, 124 S.Ct. 619. Pp. 913 – 914.

(b) The disclaimer and disclosure requirements are valid as applied to Citizens United's ads. They fall within BCRA's "electioneering communication" definition: They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. Section 311 disclaimers provide information to the electorate, *McConnell, supra*, at 196, 124 S.Ct. 619, and "insure that the voters are fully informed" about who is speaking, *Buckley, supra*, at 76, 96 S.Ct. 612. At the very least, they avoid confusion by making clear that the ads are not funded by a candidate or political party. Citizens United's arguments that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising and that § 311 decreases the quantity and effectiveness of the group's speech were rejected in *McConnell*. This Court also rejects their contention that § 201's disclosure requirements must be confined to speech that is the functional equivalent of express advocacy under *WRTL*'s test for restrictions on independent expenditures, 551 U.S., at 469–476, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). Disclosure is the less restrictive alternative to more comprehensive speech regulations. Such requirements have been upheld in *Buckley* and *McConnell*. Citizens United's argument that no informational interest justifies applying § 201 to its ads is similar to the argument this Court rejected with regard to disclaimers. Citizens United finally claims that disclosure requirements can chill donations by exposing donors to retaliation, but offers no evidence that its members face the type of threats, harassment, or reprisals that might make § 201 unconstitutional as applied. Pp. 914 – 916.

****886** (c) For these same reasons, this Court affirms the application of the §§ 201 and 311 disclaimer and disclosure

requirements to *Hillary*. Pp. 916 – 917.

Reversed in part, affirmed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA and ALITO, JJ., joined, in which THOMAS, J., joined as to all but Part IV, and in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined as to Part IV. ROBERTS, C.J., filed a concurring opinion, in which ALITO, J., joined, *post*, pp. 917 – 925. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined, and in which THOMAS, J., joined in part, *post*, pp. 925 – 929. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, pp. 929 – 979. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, pp. 979 – 982.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

***318** Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures ***319** for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 203–209, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that "*Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 490, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) *(WRTL)* (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It brought this action in the United States District Court for the District of ****887** Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

Citizens United has an annual budget of about $12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90–minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator ***320** Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or

pause the program. In December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." App. 255a–257a. Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10–second ads and one 30–second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Web site address. *Id.*, at 26a–27a. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U.S.C. § 441b (2000 ed.); see *McConnell*, *supra*, at 204, and n. 87, 124 S.Ct. 619; *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) *(MCFL)*. BCRA § 203 amended ***321** § 441b to prohibit any "electioneering communication" as well. 2 U.S.C. § 441b(b)(2) (2006 ed.). An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. § 434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." 11 CFR § 100.29(a)(2) (2009). "In the case of a candidate for nomination for President ... *publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days." § 100.29(b)(3)(ii)(A). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. ****888** 2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary;* and (2) BCRA's disclaimer and disclosure requirements, BCRA §§ 201 and 311, 116 Stat. 88, 105, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

***322** The District Court denied Citizens United's motion for a preliminary injunction, 530 F.Supp.2d 274 (D.D.C.2008) *(per curiam)*, and then granted the FEC's motion for summary judgment, App. 261a–262a. See *id.*, at 261a ("Based on the reasoning of our prior opinion, we find that the [FEC] is entitled to judgment as a matter of law. *See Citizen[s] United v. FEC*, 530 F.Supp.2d 274 (D.D.C.2008) (denying Citizens United's request for a preliminary injunction)"). The court held that § 441b was facially constitutional under *McConnell*, and that § 441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." 530 F.Supp.2d, at 279. The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.*, at 281.

We noted probable jurisdiction. 555 U.S. 1028, 128 S.Ct. 1471, 170 L.Ed.2d 294 (2008). The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U.S.C. § 441b. See 557 U.S. 932, 128 S.Ct. 1732, 170 L.Ed.2d 511 (2009).

II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds.

A

Citizens United contends that § 441b does not cover *Hillary*, as a matter of statutory interpretation, because the film ***323** does not qualify as an "electioneering communication." § 441b(b)(2). Citizens United raises this issue for the first time before us, but we consider the issue because "it was addressed by the court below." *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995); see 530 F.Supp.2d, at 277, n. 6. Under the definition of electioneering communication, the video-on-demand showing of *Hillary* on cable television would have been a "cable ... communication" that "refer[red] to a clearly identified candidate for Federal office" and that was made within 30 days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i). Citizens United, however, argues that *Hillary* was not "publicly ****889** distributed," because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household—not 50,000 or more persons. 11 CFR § 100.29(a)(2); see § 100.29(b)(3)(ii).

This argument ignores the regulation's instruction on how to determine whether a cable transmission "[c]an be received by 50,000 or more persons." § 100.29(b)(3)(ii). The regulation provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area. §§ 100.29(b)(7)(i)(G), (ii). Here, Citizens United wanted to use a cable video-on-demand system that had 34.5 million subscribers nationwide. App. 256a. Thus, *Hillary* could have been received by 50,000 persons or more.

One *amici* brief asks us, alternatively, to construe the condition that the communication "[c]an be received by 50,000 or more persons," § 100.29(b)(3)(ii)(A), to require "a plausible likelihood that the communication will be viewed by 50,000 or more potential voters"—as opposed to requiring only that the communication is "technologically capable" of being seen by that many people, Brief for Former Officials of the American Civil Liberties Union 5. Whether the population and demographic statistics in a proposed viewing area consisted ***324** of 50,000 registered voters—but not "infants, pre-teens, or otherwise electorally ineligible recipients"—would be a required determination, subject to judicial challenge and review, in any case where the issue was in doubt. *Id.*, at 6.

In our view the statute cannot be saved by limiting the reach of 2 U.S.C. § 441b through this suggested interpretation. In addition to the costs and burdens of litigation, this result would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation. We must reject the approach suggested by the *amici*. Section 441b covers *Hillary*.

B

Citizens United next argues that § 441b may not be applied to *Hillary* under the approach taken in *WRTL*. *McConnell* decided that § 441b(b)(2)'s definition of an "electioneering communication" was facially constitutional insofar as it restricted speech that was "the functional equivalent of express advocacy" for or against a specific candidate. 540 U.S., at 206, 124 S.Ct. 619. *WRTL* then found an unconstitutional application of § 441b where the speech was not "express advocacy or its functional equivalent." 551 U.S., at 481, 127 S.Ct. 2652 (opinion of ROBERTS, C. J.). As explained by THE CHIEF JUSTICE's controlling opinion in *WRTL*, the functional-equivalent test is objective: "[A] court should find that [a communication] is ***325** the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an ****890** appeal to vote for or against a specific

candidate." *Id.*, at 469–470, 127 S.Ct. 2652.

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton "Machiavellian," App. 64a, and asks whether she is "the most qualified to hit the ground running if elected President," *id.*, at 88a. The narrator reminds viewers that "Americans have never been keen on dynasties" and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House," *id.*, at 143a–144a.

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking "could [Senator Clinton] become the first female President in the history of the United States?" App. 35a. And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of ... what's at stake—the well being and prosperity of our nation." *Id.*, at 144a–145a.

***326** As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

C

Citizens United further contends that § 441b should be invalidated as applied to movies shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do television ads. Cf. *McConnell, supra,* at 207, 124 S.Ct. 619. On what we might call conventional television, advertising spots reach viewers who have chosen a channel or a program for reasons unrelated to the advertising. With video-on-demand, by contrast, the viewer selects a program after taking "a series of affirmative steps": subscribing to cable; navigating through various menus; and selecting the program. See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

****891** Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a ***327** law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S., at 469, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

D

Citizens United also asks us to carve out an exception to § 441b's expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. As an alternative to reconsidering *Austin*, the Government also seems to prefer this approach. This line of analysis, however, would be unavailing.

In *MCFL*, the Court found unconstitutional § 441b's restrictions on corporate expenditures as applied to nonprofit corporations that were formed for the sole

purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions. 479 U.S., at 263–264, 107 S.Ct. 616; see also 11 CFR § 114.10. BCRA's so-called Wellstone Amendment applied § 441b's expenditure ban to all nonprofit corporations. See 2 U.S.C. § 441b(c)(6); *McConnell*, 540 U.S., at 209, 124 S.Ct. 619. *McConnell* then interpreted the Wellstone Amendment to retain the *MCFL* exemption to § 441b's expenditure prohibition. 540 U.S., at 211, 124 S.Ct. 619. Citizens United does not qualify for the *MCFL* exemption, however, since some funds used to make the movie were donations from for-profit corporations.

The Government suggests we could find BCRA's Wellstone Amendment unconstitutional, sever it from the statute, and hold that Citizens United's speech is exempt from § 441b's ban under BCRA's Snowe–Jeffords Amendment, § 441b(c)(2). See Tr. of Oral Arg. 37–38 (Sept. 9, 2009). The Snowe–Jeffords Amendment operates as a backup provision that ***328** only takes effect if the Wellstone Amendment is invalidated. See *McConnell*, *supra*, at 339, 124 S.Ct. 619 (KENNEDY, J., concurring in judgment in part and dissenting in part). The Snowe–Jeffords Amendment would exempt from § 441b's expenditure ban the political speech of certain nonprofit corporations if the speech were funded "exclusively" by individual donors and the funds were maintained in a segregated account. § 441b(c)(2). Citizens United would not qualify for the Snowe–Jeffords exemption, under its terms as written, because *Hillary* was funded in part with donations from for-profit corporations.

Consequently, to hold for Citizens United on this argument, the Court would be required to revise the text of *MCFL*, sever BCRA's Wellstone Amendment, § 441b(c)(6), and ignore the plain text of BCRA's Snowe–Jeffords Amendment, § 441b(c)(2). If the Court decided to create a *de minimis* exception to *MCFL* or the Snowe–Jeffords Amendment, the result would be to allow for-profit corporate general treasury funds to be spent for independent expenditures that support candidates. There is no principled basis ****892** for doing this without rewriting *Austin*'s holding that the Government can restrict corporate independent expenditures for political speech.

Though it is true that the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute. In addition to those difficulties the Government's suggestion is troubling for still another reason. The Government does not say that it agrees with the interpretation it wants us to consider. See Supp. Brief for Appellee 3, n. 1 ("Some courts" have implied a *de minimis* exception, and "appellant would appear to be covered by these decisions"). Presumably it would find textual difficulties in this approach too. The Government, like any party, can make arguments in the alternative; but it ought to say if there is merit to an alternative proposal instead of ***329** merely suggesting it. This is especially true in the context of the First Amendment. As the Government stated, this case "would require a remand" to apply a *de minimis* standard. Tr. of Oral Arg. 39 (Sept. 9, 2009). Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. " 'First Amendment freedoms need breathing space to survive.' " *WRTL*, *supra*, at 468 – 469, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.

E

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. See *Morse v. Frederick*, 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*.

Citizens United stipulated to dismissing count 5 of its complaint, which raised a facial challenge to § 441b, even though count 3 raised an as-applied challenge. See App. 23a (count 3: "As applied to *Hillary*, [§ 441b] is unconstitutional under the First Amendment guarantees of free expression and association"). The Government argues that Citizens United waived its challenge to *Austin* by dismissing count 5. We disagree.

***330** First, even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from reconsidering *Austin* or addressing the facial validity of § 441b in this case. "Our practice 'permit[s] review of an issue not pressed [below]

so long as it has been passed upon....' " *Lebron,* 513 U.S., at 379, 115 S.Ct. 961 (quoting *United States v. Williams,* 504 U.S. 36, 41, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992); first alteration in original). And here, the District Court addressed Citizens United's facial challenge. See 530 F.Supp.2d, at 278 ("Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional burden on the First Amendment ****893** right to freedom of speech"). In rejecting the claim, it noted that it "would have to overrule *McConnell* " for Citizens United to prevail on its facial challenge and that "[o]nly the Supreme Court may overrule its decisions." *Ibid.* (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). The District Court did not provide much analysis regarding the facial challenge because it could not ignore the controlling Supreme Court decisions in *Austin* and/or *McConnell*. Even so, the District Court did " 'pas[s] upon' " the issue. *Lebron, supra,* at 379, 115 S.Ct. 961. Furthermore, the District Court's later opinion, which granted the FEC summary judgment, was "[b]ased on the reasoning of [its] prior opinion," which included the discussion of the facial challenge. App. 261a (citing 530 F.Supp.2d 274). After the District Court addressed the facial validity of the statute, Citizens United raised its challenge to *Austin* in this Court. See Brief for Appellant 30 ("*Austin* was wrongly decided and should be overruled"); *id.,* at 30–32. In these circumstances, it is necessary to consider Citizens United's challenge to *Austin* and the facial validity of § 441b's expenditure ban.

Second, throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And " '[o]nce a federal claim is properly ***331** presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron, supra,* at 379, 115 S.Ct. 961 (quoting *Yee v. Escondido,* 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); alteration in original). Citizens United's argument that *Austin* should be overruled is "not a new claim." *Lebron,* 513 U.S., at 379, 115 S.Ct. 961. Rather, it is—at most—"a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment." *Ibid.*

Third, the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. See *United States v. Treasury Employees,* 513 U.S. 454, 477–478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (contrasting "a facial challenge" with "a narrower remedy"). The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge to § 441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise—the permissibility of restricting corporate political speech—that is itself in doubt. See Fallon, As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"); *id.,* at 1327–1328. As our request for supplemental briefing implied, Citizens United's claim implicates the validity of *Austin,* which in turn implicates the facial validity of § 441b.

When the statute now at issue came before the Court in *McConnell,* both the majority and the dissenting opinions considered the question of its facial validity. The holding and validity of *Austin* were ****894** essential to the reasoning of the *McConnell* majority opinion, which upheld BCRA's extension of § 441b. See 540 U.S., at 205, 124 S.Ct. 619 (quoting *Austin,* 494 U.S., at 660, 110 S.Ct. 1391). *McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections. See 540 U.S., at 203–209, 124 S.Ct. 619. Four Members of the *McConnell* Court would have overruled *Austin,* including Chief Justice Rehnquist, who had joined the Court's opinion in *Austin* but reconsidered that conclusion. See 540 U.S., at 256–262, 124 S.Ct. 619 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part); *id.,* at 273–275, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part); *id.,* at 322–338, 124 S.Ct. 619 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and Scalia, J.). That inquiry into the facial validity of the statute was facilitated by the extensive record, which was "over 100,000 pages" long, made in the three-judge District Court. *McConnell v. Federal Election Comm'n,* 251 F.Supp.2d 176, 209 (D.D.C.2003) *(per curiam) (McConnell I).* It is not the case, then, that the Court today is premature in interpreting § 441b " 'on the basis of [a] factually barebones recor[d].' " *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (quoting *Sabri v. United States,* 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004)).

The *McConnell* majority considered whether the statute

was facially invalid. An as-applied challenge was brought in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n,* 546 U.S. 410, 411–412, 126 S.Ct. 1016, 163 L.Ed.2d 990 (2006) *(per curiam),* and the Court confirmed that the challenge could be maintained. Then, in *WRTL*, the controlling opinion of the Court not only entertained an as-applied challenge but also sustained it. Three Justices noted that they would continue to maintain the position that the record in *McConnell* demonstrated the invalidity of the Act on its face. 551 U.S., at 485–504, 127 S.Ct. 2652 (opinion of ***333** SCALIA, J.). The controlling opinion in *WRTL*, which refrained from holding the statute invalid except as applied to the facts then before the Court, was a careful attempt to accept the essential elements of the Court's opinion in *McConnell*, while vindicating the First Amendment arguments made by the *WRTL* parties. 551 U.S., at 482, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.).

As noted above, Citizens United's narrower arguments are not sustainable under a fair reading of the statute. In the exercise of its judicial responsibility, it is necessary then for the Court to consider the facial validity of § 441b. Any other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b's prohibitions on corporate expenditures. Consideration of the facial validity of § 441b is further supported by the following reasons.

First is the uncertainty caused by the litigating position of the Government. As discussed above, see Part II–D, *supra*, the Government suggests, as an alternative argument, that an as-applied challenge might have merit. This argument proceeds on the premise that the nonprofit corporation involved here may have received only *de minimis* donations from for-profit corporations and that some nonprofit corporations may be exempted from the operation of the statute. The Government also suggests that an as-applied challenge to § 441b's ban on books may be successful, although it would defend § 441b's ban as applied to almost every other form of media ****895** including pamphlets. See Tr. of Oral Arg. 65–66 (Sept. 9, 2009). The Government thus, by its own position, contributes to the uncertainty that § 441b causes. When the Government holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address the question of statutory validity.

Second, substantial time would be required to bring clarity to the application of the statutory provision on these points ***334** in order to avoid any chilling effect caused by some improper interpretation. See Part II–C, *supra*. It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is "capable of repetition, yet evading review." *WRTL, supra,* at 462, 126 S.Ct. 1016 (opinion of ROBERTS, C.J.) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911)). Here, Citizens United decided to litigate its case to the end. Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.

Third is the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled. See Part II–A, *supra*. Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11–12. These entities are subject to separate rules for 33 different types of political speech. *Id.*, at 14–15, n. 10. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. See *id.*, at 6, n. 7. In fact, after this Court in ***335** *WRTL* adopted an objective "appeal to vote" test for determining whether a communication was the functional equivalent of express advocacy, 551 U.S., at 470, 127 S.Ct. 2652 (opinion of ROBERTS, C. J.), the FEC adopted a two-part, 11–factor balancing test to implement *WRTL* 's ruling. See 11 CFR § 114.15; Brief for Wyoming Liberty Group et al. as *Amici Curiae* 17–27 (filed Jan. 15, 2009).

This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. Cf. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712–713, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. See 2 U.S.C. § 437f; 11 CFR § 112.1. These onerous

****896** restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002); *Lovell v. City of Griffin*, 303 U.S. 444, 451–452, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Near*, *supra*, at 713–714, 51 S.Ct. 625. Because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57–58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." ***336** *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (citation omitted). Consequently, "the censor's determination may in practice be final." *Freedman*, *supra*, at 58, 85 S.Ct. 734.

This is precisely what *WRTL* sought to avoid. *WRTL* said that First Amendment standards "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.' " 551 U.S., at 469, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); alteration in original). Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11–factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.

The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. See *WRTL*, *supra*, at 482–483, 127 S.Ct. 2652 (ALITO, J., concurring); *Thornhill v. Alabama*, 310 U.S. 88, 97–98, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). For these reasons we find it necessary to reconsider *Austin*.

III

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process—all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower* ***337** *Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 123, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan*, 376 U.S., at 267, 84 S.Ct. 710; and subjecting the ****897** speaker to criminal penalties, *Brandenburg v. Ohio*, 395 U.S. 444, 445, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)*.

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See *McConnell*, 540 U.S., at 330–333, 124 S.Ct. 619 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC ***338** must appoint a

treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See *id.*, at 330–332, 124 S.Ct. 619 (quoting *MCFL*, 479 U.S., at 253–254, 107 S.Ct. 616 (opinion of Brennan, J.)).

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

> " 'These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.' " 540 U.S., at 331–332, 124 S.Ct. 619 (quoting *MCFL, supra*, at 253–254, 107 S.Ct. 616).

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. See Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11 (citing FEC, Summary of PAC Activity 1990–2006, online at http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf (as visited Jan. 18, 2010, and available in Clerk ****898** of Court's case file)); IRS, Statistics of Income: 2006, Corporation Income ***339** Tax Returns 2 (2009) (hereinafter Statistics of Income) (5.8 million for-profit corporations filed 2006 tax returns). PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*. Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell, supra*, at 251, 124 S.Ct. 619 (opinion of SCALIA, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra*, at 14–15, 96 S.Ct. 612 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." ***340** *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971)); see *Buckley, supra*, at 14, 96 S.Ct. 612 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U.S., at 464, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see *Simon & Schuster*, 502 U.S., at 124, 112 S.Ct. 501 (KENNEDY, J., concurring in judgment), the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, *e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (striking down content-

based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See *First Nat. Bank of Boston v.* ****899** *Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, ***341** standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. See, *e.g.*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (protecting the "function of public school education"); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (furthering "the legitimate penological objectives of the corrections system" (internal quotation marks omitted)); *Parker v. Levy*, 417 U.S. 733, 759, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (ensuring "the capacity of the Government to discharge its [military] responsibilities" (internal quotation marks omitted)); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 557, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) ("[F]ederal service should depend upon meritorious performance rather than political service"). The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite. These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech. By contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before *Austin*, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

***342** A

1

The Court has recognized that First Amendment protection extends to corporations. *Bellotti*, *supra*, at 778, n. 14, 98 S.Ct. 1407 (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) *(per curiam)*; *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; *Kingsley Int'l Pictures Corp.* ****900** *v. Regents of Univ. of N. Y.*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952)); see, *e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996); *Turner*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497; *Simon & Schuster*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); *Florida Star v. B.J. F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

This protection has been extended by explicit holdings to the context of political speech. See, *e.g.*, *Button*, 371 U.S., at 428–429, 83 S.Ct. 328; *Grosjean v. American Press Co.*,

297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *Bellotti, supra,* at 784, 98 S.Ct. 1407; see *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. ***343** Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting *Bellotti,* 435 U.S., at 783, 98 S.Ct. 1407)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons." *Id.,* at 776, 98 S.Ct. 1407; see *id.,* at 780, n. 16, 98 S.Ct. 1407. Cf. *id.,* at 828, 98 S.Ct. 1407 (Rehnquist, J., dissenting).

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. See B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 23 (2001). Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act, 1947, 61 Stat. 159 (codified at 2 U.S.C. § 251 (1946 ed., Supp. I)). In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a "dangerous intrusion on free speech." Message from the President of the United States, H.R. Doc. No. 334, 80th Cong., 1st Sess., 9 (1947).

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. See *WRTL,* 551 U.S., at 502, 127 S.Ct. 2652 (opinion of SCALIA, J.). The question was in the background of *United States v. CIO,* 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948). There, a labor union endorsed a congressional candidate in its weekly periodical. The Court stated that "the gravest doubt would arise in our minds as to [the federal expenditure prohibition's] constitutionality" if it were construed to suppress that writing. *Id.,* at 121, 68 S.Ct. 1349. The Court engaged in statutory interpretation ****901** and found the statute did not cover the publication. *Id.,* at 121–122, and n. 20, 68 S.Ct. 1349. Four Justices, however, said they would reach the constitutional question and invalidate the Labor-Management Relations Act's expenditure ***344** ban. *Id.,* at 155, 68 S.Ct. 1349 (Rutledge, J., joined by Black, Douglas, and Murphy, JJ., concurring in result). The concurrence explained that any " 'undue influence' " generated by a speaker's "large expenditures" was outweighed "by the loss for democratic processes resulting from the restrictions upon free and full public discussion." *Id.,* at 143, 68 S.Ct. 1349.

In *United States v. Automobile Workers,* 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957), the Court again encountered the independent expenditure ban, which had been recodified at 18 U.S.C. § 610 (1952 ed.). See 62 Stat. 723–724. After holding only that a union television broadcast that endorsed candidates was covered by the statute, the Court "[r]efus[ed] to anticipate constitutional questions" and remanded for the trial to proceed. 352 U.S., at 591, 77 S.Ct. 529. Three Justices dissented, arguing that the Court should have reached the constitutional question and that the ban on independent expenditures was unconstitutional:

> "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id.,* at 593, 77 S.Ct. 529 (opinion of Douglas, J., joined by Warren, C.J., and Black, J.).

The dissent concluded that deeming a particular group "too powerful" was not a "justificatio[n] for withholding First Amendment rights from any group—labor or corporate." *Id.,* at 597, 77 S.Ct. 529. The Court did not get another opportunity to consider the constitutional question in that case; for after a remand, a jury found the defendants not guilty. See Hayward, Revisiting the Fable of Reform, 45 Harv. J. Legis. 421, 463 (2008).

Later, in *Pipefitters v. United States,* 407 U.S. 385, 400–401, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972), the Court reversed a conviction for expenditure of union funds for political speech—again without reaching the constitutional question. The Court would not resolve that question for another four years.

2

In *Buckley,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. These amendments created 18 U.S.C. § 608(e) (1970 ed., Supp. V), see 88 Stat. 1265, an independent expenditure ban separate from § 610 that applied to individuals as well as

corporations and labor unions, *Buckley*, 424 U.S., at 23, 39, and n. 45, 96 S.Ct. 612.

Before addressing the constitutionality of § 608(e)'s independent expenditure ban, *Buckley* first upheld § 608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption." *Id.*, at 25, 96 S.Ct. 612; see *id.*, at 26, 96 S.Ct. 612. This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." *Ibid.*

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished ****902** direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47–48, 96 S.Ct. 612, because "[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id.*, at 47, 96 S.Ct. 612. *Buckley* invalidated § 608(e)'s restrictions on independent expenditures, with only one Justice dissenting. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 105 S.Ct. 1459, 84 L.Ed.2d 455, n. 3 (1985) *(NCPAC)*.

***346** *Buckley* did not consider § 610's separate ban on corporate and union independent expenditures, the prohibition that had also been in the background in *CIO*, *Automobile Workers*, and *Pipefitters*. Had § 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent. See *WRTL*, 551 U.S., at 487, 127 S.Ct. 2652 (opinion of SCALIA, J.) ("*Buckley* might well have been the last word on limitations on independent expenditures"); *Austin*, 494 U.S., at 683, 110 S.Ct. 1391 (SCALIA, J., dissenting). The expenditure ban invalidated in *Buckley*, § 608(e), applied to corporations and unions, 424 U.S., at 23, 39, n. 45, 96 S.Ct. 612; and some of the prevailing plaintiffs in *Buckley* were corporations, *id.*, at 8., 96 S.Ct. 612 The *Buckley* Court did not invoke the First Amendment's overbreadth doctrine, see *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), to suggest that § 608(e)'s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals, 424 U.S., at 50, 96 S.Ct. 612. *Buckley* cited with approval the *Automobile Workers* dissent, which argued that § 610 was unconstitutional. 424 U.S., at 43, 96 S.Ct. 612 (citing 352 U.S., at 595–596, 77 S.Ct. 529 (opinion of Douglas, J.)).

Notwithstanding this precedent, Congress recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* was decided. See 90 Stat. 490. Section 441b is the independent expenditure restriction challenged here.

Less than two years after *Buckley*, *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

> "We thus find no support in the First ... Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because ***347** its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.... [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

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> "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.*, at 784–785, 98 S.Ct. 1407.

****903** It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti* 's central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity. See *ibid.*

Thus the law stood until *Austin*. *Austin* "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." 494 U.S., at 695, 110 S.Ct. 1391 (KENNEDY, J., dissenting). There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

***348** To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391; see *id.*, at 659, 110 S.Ct. 1391 (citing *MCFL*, 479 U.S., at 257, 107 S.Ct. 616; *NCPAC*, 470 U.S., at 500–501, 105 S.Ct. 1459).

B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin*, Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court. See *MCFL*, *supra*, at 257, 107 S.Ct. 616 (FEC posited that Congress intended to "curb the political influence of 'those who exercise control over large aggregations of capital' " (quoting *Automobile Workers*, 352 U.S., at 585, 77 S.Ct. 529)); *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 201, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (Congress believed that "differing structures and purposes" of corporations and unions "may require different forms of regulation in order to protect the integrity of the electoral process"). In neither of these cases did the Court adopt the proposition.

In its defense of the corporate-speech restrictions in § 441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions are constitutional: an anticorruption interest, see 494 U.S., at 678, 110 S.Ct. 1391 (STEVENS, J., concurring), and a ***349** shareholder-protection interest, see *id.*, at 674–675, 110 S.Ct. 1391 (Brennan, J., ****904** concurring). We consider the three points in turn.

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As for *Austin*'s antidistortion rationale, the Government does little to defend it. See Tr. of Oral Arg. 45–48 (Sept. 9, 2009). And with good reason, for the rationale cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. See Part II–E, *supra;* Tr. of Oral Arg. 66 (Sept. 9, 2009); see also *id.*, at 26–31 (Mar. 24, 2009). If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Bellotti*, 435 U.S., at 777, 98 S.Ct. 1407 (footnote omitted); see *ibid.* (the worth of speech "does not depend upon the identity of its source, whether corporation, association, union, or individual"); *Buckley*, 424 U.S., at 48–49, 96 S.Ct. 612 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance ***350** the relative voice of others is wholly foreign to the First Amendment"); *Automobile Workers*, *supra*, at 597, 77 S.Ct. 529 (Douglas, J., dissenting); *CIO*, 335 U.S., at 154–155, 68 S.Ct. 1349 (Rutledge, J., concurring in result). This protection for speech is inconsistent with *Austin* 's antidistortion rationale. *Austin* sought to defend the

antidistortion rationale as a means to prevent corporations from obtaining " 'an unfair advantage in the political marketplace' " by using " 'resources amassed in the economic marketplace.' " 494 U.S., at 659, 110 S.Ct. 1391 (quoting *MCFL, supra,* at 257, 107 S.Ct. 616). But *Buckley* rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48, 96 S.Ct. 612; see *Bellotti, supra,* at 791, n. 30, 98 S.Ct. 1407. *Buckley* was specific in stating that "the skyrocketing cost of political campaigns" could not sustain the governmental prohibition. 424 U.S., at 26, 96 S.Ct. 612. The First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion." *Id.,* at 49, 96 S.Ct. 612.

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. See *Davis v. Federal Election Comm'n,* 554 U.S. 724, 742, 128 S.Ct. 2759, 2774, 171 L.Ed.2d 737 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence ****905** the voters' choices"). The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.

Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish ***351** wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." 494 U.S., at 658–659, 110 S.Ct. 1391. This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights." *Id.,* at 680, 110 S.Ct. 1391 (SCALIA, J., dissenting).

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Id.,* at 660, 110 S.Ct. 1391 (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas. See *id.,* at 707, 110 S.Ct. 1391 (KENNEDY, J., dissenting) ("Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary").

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. See *McConnell,* 540 U.S., at 283, 124 S.Ct. 619 (opinion of THOMAS, J.) ("The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press"). Cf. *Tornillo,* 418 U.S., at 250, 94 S.Ct. 2831 (alleging the existence of "vast accumulations of unreviewable power in the modern media empires"). Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. *Austin,* 494 U.S., at 660, 110 S.Ct. 1391. ***352** Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Id.,* at 691, 110 S.Ct. 1391 (SCALIA, J., dissenting) (citing *Bellotti,* 435 U.S., at 782, 98 S.Ct. 1407); see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 784, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (Brennan, J., joined by Marshall, Blackmun, and STEVENS, JJ., dissenting); *id.,* at 773, 105 S.Ct. 2939 (White, J., concurring in judgment). With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to ****906** comment on political and social issues becomes far more blurred.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations

that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or ***353** inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern business and media corporations. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 360–361, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (Thomas, J., concurring in judgment). Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the Colonies. See *McConnell,* 540 U.S., at 252–253, 124 S.Ct. 619 (opinion of SCALIA, J.); *Grosjean,* 297 U.S., at 245–248, 56 S.Ct. 444; *Near,* 283 U.S., at 713–714, 51 S.Ct. 625. The great debates between the Federalists and the Anti–Federalists over our founding document were published and expressed in the most important means of mass communication of that era—newspapers owned by individuals. See *McIntyre,* 514 U.S., at 341–343, 115 S.Ct. 1511; *id.,* at 367, 115 S.Ct. 1511 (THOMAS, J., concurring in judgment). At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge. See B. Bailyn, Ideological Origins of the American Revolution 5 (1967) ("Any number of people could join in such proliferating polemics, and rebuttals could come from all sides"); G. Wood, Creation of the American Republic 1776–1787, p. 6 (1969) ("[I]t is not surprising that the intellectual sources of [the Americans'] Revolutionary thought were profuse and various"). The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers ***354** and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

Austin interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008); see *ibid.* (ideas "may compete" in this marketplace "without government interference"); *McConnell, supra,* at 274, 124 S.Ct. 619 (opinion of THOMAS, J.). It permits the ****907** Government to ban the political speech of millions of associations of citizens. See Statistics of Income 2 (5.8 million for-profit corporations filed 2006 tax returns). Most of these are small corporations without large amounts of wealth. See Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 1, 3 (96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees); M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, see 26 U.S.C. § 301, have less than $1 million in receipts per year). This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." *Austin,* 494 U.S., at 660, 110 S.Ct. 1391. It is not even aimed at amassed wealth.

The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." *McConnell, supra,* at 257–258, 124 S.Ct. 619 (opinion of SCALIA, J.). And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." *CIO,* 335 U.S., at 144, 68 S.Ct. 1349 (Rutledge, J., concurring in result). By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of ***355** some factions is "worse than the disease." The Federalist No. 10, p. 130 (B. Wright ed.1961) (J. Madison). Factions should be checked by permitting them all to speak, see *ibid.,* and by entrusting the people to judge what is true and what is false.

The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Bellotti,* 435 U.S., at 792, n. 31, 98 S.Ct. 1407 (citing *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510–511, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127,

137–138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)). Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis. Brief for State of Montana et al. 19. When that phenomenon is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation ****908** of this law. Rhetoric ought not obscure reality.

Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although ***356** smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, *e.g., WRTL,* 551 U.S., at 503–504, 127 S.Ct. 2652 (opinion of SCALIA, J.) ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to [26 U.S.C. § 527 organizations]"). Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley,* the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. 424 U.S., at 25, 96 S.Ct. 612. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." *Id.,* at 45, 96 S.Ct. 612.

With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo*," *id.,* at 26, 96 S.Ct. 612, and that "the scope of such pernicious practices can never be reliably ascertained," *id.,* at 27, 96 S.Ct. 612. The practices *Buckley* noted would be covered by bribery laws, see, *e.g.,* 18 U.S.C. § 201, if a *quid pro quo* arrangement were proved. See *Buckley, supra,* at 27, and n. 28, 96 S.Ct. 612 (citing ***357** *Buckley v. Valeo,* 519 F.2d 821, 839–840, and nn. 36–38 (CADC 1975) (en banc) *(per curiam)*). The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. *MCFL,* 479 U.S., at 260, 107 S.Ct. 616; *NCPAC,* 470 U.S., at 500, 105 S.Ct. 1459; *Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 210, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) *(NRWC).* The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

"The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley,* 424 U.S., at 47, 96 S.Ct. 612; see *ibid.* (independent expenditures have a "substantially diminished potential for abuse"). Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures ****909** by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States. See Supp. Brief for Appellee 18, n. 3; Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 8–9, n. 5.

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S., at 788, n. 26, 98 S.Ct. 1407. For the reasons explained above, we now conclude that independent expenditures, including those

made by corporations, do not give rise to corruption or the appearance of corruption. Dicta in *Bellotti*'s footnote suggested that "a corporation's right to speak on issues of general public interest implies no ***358** comparable right in the quite different context of participation in a political campaign for election to public office." *Ibid.* Citing the portion of *Buckley* that invalidated the federal independent expenditure ban, 424 U.S., at 46, 96 S.Ct. 612, and a law review student comment, *Bellotti* surmised that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U.S., at 788, n. 26, 98 S.Ct. 1407. *Buckley*, however, struck down a ban on independent expenditures to support candidates that covered corporations, 424 U.S., at 23, 39, n. 45, 96 S.Ct. 612, and explained that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *id.*, at 42, 96 S.Ct. 612. *Bellotti* ' s dictum is thus supported only by a law review student comment, which misinterpreted *Buckley*. See Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L.Rev. 386, 408 (1977) (suggesting that "corporations and labor unions should be held to different and more stringent standards than an individual or other associations under a regulatory scheme for campaign financing").

Seizing on this aside in *Bellotti*'s footnote, the Court in *NRWC* did say there is a "sufficient" governmental interest in "ensur[ing] that substantial aggregations of wealth amassed" by corporations would not "be used to incur political debts from legislators who are aided by the contributions." 459 U.S., at 207–208, 103 S.Ct. 552 (citing *Automobile Workers*, 352 U.S., at 579, 77 S.Ct. 529); see 459 U.S., at 210, and n. 7, 103 S.Ct. 552; *NCPAC, supra*, at 500–501, 105 S.Ct. 1459 (*NRWC* suggested a governmental interest in restricting "the influence of political war chests funneled through the corporate form"). *NRWC*, however, has little relevance here. *NRWC* decided no more than that a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the ***359** First Amendment. 459 U.S., at 206, 103 S.Ct. 552. *NRWC* thus involved contribution limits, see *NCPAC, supra*, at 495–496, 105 S.Ct. 1459, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption, see *McConnell*, 540 U.S., at 136–138, and n. 40, 124 S.Ct. 619; *MCFL, supra*, at 259–260, 107 S.Ct. 616. Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. See *McConnell, supra*, at 296–298, 124 S.Ct. 619 (opinion of ****910** KENNEDY, J.) (citing *Buckley, supra*, at 26–28, 30, 46–48, 96 S.Ct. 612); *NCPAC*, 470 U.S., at 497, 105 S.Ct. 1459 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors"); *id.*, at 498, 105 S.Ct. 1459. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

> "Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell*, 540 U.S., at 297, 124 S.Ct. 619 (opinion of KENNEDY, J.).

Reliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.*, at 296, 124 S.Ct. 619.

***360** The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. See *Buckley, supra*, at 46, 96 S.Ct. 612. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse " 'to take part in democratic governance' " because of additional political speech made by a corporation or any other speaker. *McConnell, supra*, at 144, 124 S.Ct. 619 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)).

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.*, at 884, 129 S.Ct., at 2263–2264. The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See *Withrow*

v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). *Caperton* 's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

The *McConnell* record was "over 100,000 pages" long, *McConnell I*, 251 F.Supp.2d, at 209, yet it "does not have any direct examples of votes being exchanged for ... expenditures," *id.*, at 560 (opinion of Kollar–Kotelly, J.). This confirms *Buckley* 's reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. See 251 F.Supp.2d, at 555–557 (opinion of Kollar–Kotelly, J.). Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft ***361** money," were made to gain access to elected officials. *McConnell, supra*, at 125, 130–131, 146–152, 124 S.Ct. 619; see *McConnell I*, 251 F.Supp.2d, at 471–481, 491–506 (opinion of Kollar–Kotelly, J.); *id.*, at 842–843, 858–859 (opinion of Leon, J.). This case, however, is about ****911** independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*'s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. See *supra*, at 905 – 906. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. See *Austin*, 494 U.S., at 687, 110 S.Ct. 1391 (SCALIA, J., dissenting). Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of ***362** abuse that cannot be corrected by shareholders "through the procedures of corporate democracy." *Bellotti*, 435 U.S., at 794, 98 S.Ct. 1407; see *ibid.*, n. 34.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process. See *Broadrick*, 413 U.S., at 615, 93 S.Ct. 2908.

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us ****912** on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to

adhere to the principle of *stare* ***363** *decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792 – 793, 129 S.Ct. 2079, 2088–2089, 173 L.Ed.2d 955 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)). We have also examined whether "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *WRTL*, 551 U.S., at 500, 127 S.Ct. 2652 (opinion of SCALIA, J.). "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

For the reasons above, it must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on "the quid pro quo interest, the corruption interest or the shareholder interest," and not *Austin*'s expressed antidistortion rationale. Tr. of Oral Arg. 48 (Sept. 9, 2009); see *id.*, at 45–46. When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished. *Austin* abandoned First Amendment principles, furthermore, by relying on language in some of our precedents that traces back to the *Automobile Workers* Court's flawed historical account of campaign finance laws, see Brief for Campaign Finance Scholars as *Amici Curiae;* Hayward, 45 Harv. J. Legis. 421; R. Mutch, Campaigns, Congress, and Courts 33–35, 153–157 (1988). See *Austin, supra*, at 659, 110 S.Ct. 1391 (citing *MCFL*, 479 U.S., at 257–258, 107 S.Ct. 616; *NCPAC*, 470 U.S., at 500–501, 105 S.Ct. 1459); *MCFL, supra*, at 257, 107 S.Ct. 616 (citing *Automobile Workers*, 352 U.S., at 585, 77 S.Ct. 529); *NCPAC, supra*, at 500, 105 S.Ct. 1459 (citing *NRWC*, 459 U.S., at 210, 103 S.Ct. 552); *id.*, at 208, 103 S.Ct. 552 ("The history of the movement to regulate the political contributions and expenditures of corporations ***364** and labor unions is set forth in great detail in *[Automobile Workers], supra*, at 570–584, 77 S.Ct. 529, and we need only summarize the development here").

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, *e.g.*, *McConnell*, 540 U.S., at 176–177, 124 S.Ct. 619 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives ... to exploit [26 U.S.C. § 527] organizations will only increase"). Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24–hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology—and the creative dynamic inherent in the concept of ****913** free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. See Part II–C, *supra*. Today, 30–second television ads may be the most effective way to convey a political message. See *McConnell, supra*, at 261, 124 S.Ct. 619 (opinion of SCALIA, J.). Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. See 2 U.S.C. § 441b(a); *MCFL, supra*, at 249, 107 S.Ct. 616. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

***365** No serious reliance interests are at stake. As the Court stated in *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions. Here, though, parties have been prevented from acting—corporations have been banned from making independent expenditures. Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

Due consideration leads to this conclusion: *Austin*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

Austin is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* "effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy." Brief for Appellee 33, n. 12. Section 441b's restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures. See 540 U.S., at 203–209, 124 S.Ct. 619. The *McConnell* Court relied on ***366** the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, see 540 U.S., at 205, 124 S.Ct. 619, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV

A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that ****914** " '_____ is responsible for the content of this advertising.' " 2 U.S.C. § 441d(d)(2). The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. *Ibid.* It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S., at 64, 96 S.Ct. 612, and "do not prevent anyone from speaking," *McConnell, supra*, at 201, 124 S.Ct. 619 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental ***367** interest. *Buckley, supra*, at 64, 66, 96 S.Ct. 612 (internal quotation marks omitted); see *McConnell, supra*, at 231–232, 124 S.Ct. 619.

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U.S., at 66, 96 S.Ct. 612. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. 540 U.S., at 196, 124 S.Ct. 619. There was evidence in the record that independent groups were running election-related advertisements " 'while hiding behind dubious and misleading names.' " *Id.*, at 197, 124 S.Ct. 619 (quoting *McConnell I*, 251 F.Supp.2d, at 237). The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens " 'make informed choices in the political marketplace.' " 540 U.S., at 197, 124 S.Ct. 619 (quoting *McConnell I, supra*, at 237); see 540 U.S., at 231, 124 S.Ct. 619.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosure of its contributors' names " 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id.*, at 198, 124 S.Ct. 619 (quoting *Buckley, supra*, at 74, 96 S.Ct. 612).

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

B

Citizens United sought to broadcast one 30–second and

two 10–second ads to promote *Hillary*. Under FEC regulations, a communication that "[p]roposes a commercial transaction" was not subject to 2 U.S.C. § 441b's restrictions on corporate or union funding of electioneering communications. 11 CFR § 114.15(b)(3)(ii). The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311. See 72 Fed.Reg. 72901 (2007).

***368** Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate does not justify requiring disclaimers for ****915** any commercial advertisements, including the ones at issue here. We disagree. The ads fall within BCRA's definition of an "electioneering communication": They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. See 530 F.Supp.2d, at 276, nn. 2–4. The disclaimers required by § 311 "provid[e] the electorate with information," *McConnell, supra,* at 196, 124 S.Ct. 619, and "insure that the voters are fully informed" about the person or group who is speaking, *Buckley, supra,* at 76, 96 S.Ct. 612; see also *Bellotti,* 435 U.S., at 792, n. 32, 98 S.Ct. 1407 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

Citizens United argues that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that § 311 decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell, supra,* at 230–231, 124 S.Ct. 619. And we now adhere to that decision as it pertains to the disclosure provisions.

As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U.S., at 469–476, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). Citizens United seeks to import a similar ***369** distinction into BCRA's disclosure requirements. We reject this contention.

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, *e.g., MCFL,* 479 U.S., at 262, 107 S.Ct. 616. In *Buckley,* the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U.S., at 75–76, 96 S.Ct. 612. In *McConnell,* three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U.S., at 321, 124 S.Ct. 619 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss,* 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of § 201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational ****916** interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests.

***370** Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. See Brief for Institute for Justice as *Amicus Curiae* 13–16; Brief for Alliance Defense Fund as *Amicus Curiae* 16–22. In *McConnell,* the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. 540 U.S., at 198, 124 S.Ct. 619. The examples cited by *amici* are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

Shareholder objections raised through the procedures of corporate democracy, see *Bellotti, supra,* at 794, and n. 34,

98 S.Ct. 1407, can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. See *McConnell*, 540 U.S., at 128, 124 S.Ct. 619 ("[T]he public may not have been fully informed about the sponsorship of so-called issue ads"); *id.*, at 196–197, 124 S.Ct. 619 (citing *McConnell I*, 251 F.Supp.2d, at 237). With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are " 'in the pocket' of so-called moneyed interests." 540 U.S., at 259, 124 S.Ct. 619 (opinion of SCALIA, J.); see ***371** *MCFL*, *supra*, at 261, 107 S.Ct. 616. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. See Smoodin, "Compulsory" Viewing for Every Citizen: *Mr. Smith* and the Rhetoric of Reception, 35 Cinema Journal 3, 19, and n. 52 (Winter 1996) (citing Mr. Smith Riles Washington, Time, Oct. 30, 1939, p. 49); Nugent, Capra's Capitol Offense, N.Y. Times, Oct. 29, 1939, p. X5. Under *Austin*, though, officials could have done more than discourage ****917** its distribution—they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on YouTube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made ***372** the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell*, *supra*, at 341, 124 S.Ct. 619 (opinion of KENNEDY, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice ALITO joins,

concurring.

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, ***373** posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations—as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

I

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." ****918** *Blodgett v. Holden*, 275 U.S. 142, 147–148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. See *Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice " 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)).

The majority and dissent are united in expressing allegiance to these principles. *Ante*, at 892; *post*, at 936 – 937 (STEVENS, J., concurring in part and dissenting in part). ***374** But I cannot agree with my dissenting colleagues on how these principles apply in this case.

The majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary to decide the case before us. The majority begins by addressing—and quite properly rejecting—Citizens United's statutory claim that 2 U.S.C. § 441b does not actually cover its production and distribution of *Hillary: The Movie* (hereinafter *Hillary*). If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so. Indeed, that is precisely the approach the Court took just last Term in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009), when eight Members of the Court agreed to decide the case on statutory grounds instead of reaching the appellant's broader argument that the Voting Rights Act is unconstitutional.

It is only because the majority rejects Citizens United's statutory claim that it proceeds to consider the group's various constitutional arguments, beginning with its narrowest claim (that *Hillary* is not the functional equivalent of express advocacy) and proceeding to its broadest claim (that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), should be overruled). This is the same order of operations followed by the controlling opinion in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL*). There the appellant was able to prevail on its narrowest constitutional argument because its broadcast ads did not qualify as the functional equivalent of express advocacy; there was thus no need to go on to address the broader claim that *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), should be overruled. *WRTL*, 551 U.S., at 482, 127 S.Ct. 2652; *id.*, at 482–483, 127 S.Ct. 2652 (ALITO, J., concurring). This case is different—not, as the dissent suggests, because the approach taken in *WRTL* has been deemed a "failure," *post*, at 935, ***375** but because, in the absence of any valid narrower ground of decision, there is no way to avoid Citizens United's broader constitutional argument.

The dissent advocates an approach to addressing Citizens United's claims that I find quite perplexing. It presumably agrees with the majority that Citizens United's narrower statutory and constitutional arguments lack merit—otherwise its conclusion that the group should lose this case would make no sense. Despite agreeing ****919** that these narrower arguments fail, however, the dissent argues that the majority should nonetheless latch on to one of them in order to avoid reaching the broader constitutional question of whether *Austin* remains good law. It even suggests that the Court's failure to adopt one of these concededly

meritless arguments is a sign that the majority is not "serious about judicial restraint." *Post*, at 938.

This approach is based on a false premise: that our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," *post*, at 937 (internal quotation marks omitted), sometimes it *is* necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them." *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.).

Because it is necessary to reach Citizens United's broader argument that *Austin* should be overruled, the debate over whether to consider this claim on an as-applied or facial basis strikes me as largely beside the point. Citizens United has standing—it is being injured by the Government's enforcement of the Act. Citizens United has a constitutional ***376** claim—the Act violates the First Amendment, because it prohibits political speech. The Government has a defense—the Act may be enforced, consistent with the First Amendment, against corporations. Whether the claim or the defense prevails is the question before us.

Given the nature of that claim and defense, it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or only as applied to Citizens United. Even if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United—because corporations as well as individuals enjoy the pertinent First Amendment rights—would mean that any other corporation raising the same challenge would also win. Likewise, a conclusion that the Act may be applied to Citizens United—because it is constitutional to prohibit corporate political speech—would similarly govern future cases. Regardless whether we label Citizens United's claim a "facial" or "as-applied" challenge, the consequences of the Court's decision are the same.[1]

II

The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union. What makes this case difficult is the need to confront our prior decision in *Austin*.

This is the first case in which we have been asked to overrule *Austin*, and thus it is also the first in which we have had reason to consider how much weight to give *stare decisis* in assessing its continued validity. The dissent erroneously ****920 *377** declares that the Court "reaffirmed" *Austin*'s holding in subsequent cases—namely, *Federal Election Comm'n v. Beaumont,* 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003); *McConnell*; and *WRTL*. *Post*, at 956 – 957. Not so. Not a single party in any of those cases asked us to overrule *Austin*, and as the dissent points out, *post*, at 931 – 932, the Court generally does not consider constitutional arguments that have not properly been raised. *Austin*'s validity was therefore not directly at issue in the cases the dissent cites. The Court's unwillingness to overturn *Austin* in those cases cannot be understood as a *reaffirmation* of that decision.

A

Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

At the same time, *stare decisis* is neither an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940), especially in constitutional cases, see *United States v. Scott*, 437 U.S. 82, 101, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), overruled by *Brown v.*

Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), overruled by ***378** *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms. *Post*, at 938 – 939; see also, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 274–281, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting) (urging the Court to overrule its invalidation of limits on independent expenditures on political speech in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*)).

Stare decisis is instead a "principle of policy." *Helvering, supra*, at 119, 60 S.Ct. 444. When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, Decisional Law and *Stare Decisis*, 30 A.B.A.J. 334 (1944).

In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." ****921** *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Thus, for example, if the precedent under consideration itself departed from the Court's jurisprudence, returning to the " 'intrinsically sounder' doctrine established in prior cases" may "better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); see also *Helvering, supra*, at 119, 60 S.Ct. 444; *Randall, supra*, at 274, 126 S.Ct. 2479 (STEVENS, J., dissenting). Abrogating the errant precedent, rather than ***379** reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake. See, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 235, 129 S.Ct. 808, 817, 172 L.Ed.2d 565 (2009); *Montejo v. Louisiana*, 556 U.S. 778, 792, 129 S.Ct. 2079, 2088–2089, 173 L.Ed.2d 955 (2009) (*stare decisis* does not control when adherence to the prior decision requires "fundamentally revising its theoretical basis").

B

These considerations weigh against retaining our decision in *Austin*. First, as the majority explains, that decision was an "aberration" insofar as it departed from the robust protections we had granted political speech in our earlier cases. *Ante*, at 907; see also *Buckley, supra*; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). *Austin* undermined the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech. *Buckley* rejected the asserted government interest in regulating independent expenditures, concluding that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S., at 48–49, 96 S.Ct. 612; see also *Bellotti, supra*, at 790–791, 98 S.Ct. 1407; *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). *Austin*, however, allowed the Government to prohibit these same expenditures out of concern for "the corrosive and distorting effects of immense aggregations ***380** of wealth" in the marketplace of ideas. 494 U.S., at 660, 110 S.Ct. 1391. *Austin*'s reasoning was—and remains—inconsistent with *Buckley*'s explicit repudiation of any government interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48–49, 96 S.Ct. 612.

Austin was also inconsistent with *Bellotti*'s clear rejection of the idea that "speech that otherwise would be within the protection of the First Amendment loses that ****922** protection simply because its source is a corporation." 435

U.S., at 784, 98 S.Ct. 1407. The dissent correctly points out that *Bellotti* involved a referendum rather than a candidate election, and that *Bellotti* itself noted this factual distinction, *id.*, at 788, n. 26, 98 S.Ct. 1407; *post,* at 958. But this distinction does not explain why corporations may be subject to prohibitions on speech in candidate elections when individuals may not.

Second, the validity of *Austin*'s rationale—itself adopted over two "spirited dissents," *Payne,* 501 U.S., at 829, 111 S.Ct. 2597—has proved to be the consistent subject of dispute among Members of this Court ever since. See, *e.g.*, *WRTL,* 551 U.S., at 483, 127 S.Ct. 2652 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment); *McConnell,* 540 U.S., at 247, 264, 286, 124 S.Ct. 619 (opinions of SCALIA, THOMAS, and KENNEDY, JJ.); *Beaumont,* 539 U.S., at 163, 164, 123 S.Ct. 2200 (opinions of KENNEDY and THOMAS, JJ.). The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent's ability to contribute to the stable and orderly development of the law. In such circumstances, it is entirely appropriate for the Court—which in this case is squarely asked to reconsider *Austin* 's validity for the first time—to address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing.

Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court's decisions even outside the particular context of corporate express advocacy. ***381** The First Amendment theory underlying *Austin*'s holding is extraordinarily broad. *Austin*'s logic would authorize government prohibition of political speech by a category of speakers in the name of equality—a point that most scholars acknowledge (and many celebrate), but that the dissent denies. Compare, *e.g.*, Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 How. L.J. 655, 669 (2009) (*Austin* "has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the language of 'political corruption' "), with *post,* at 970 (*Austin*'s rationale "is manifestly not just an 'equalizing' ideal in disguise").[2]

It should not be surprising, then, that Members of the Court have relied on *Austin*'s expansive logic to justify greater incursions on the First Amendment, even outside the original context of corporate advocacy on behalf of candidates running for office. See, *e.g.*, *Davis v. Federal Election Comm'n,* 554 U.S. 724, 756, 128 S.Ct. 2759, 2780, 171 L.Ed.2d 737 (2008) (STEVENS, J., concurring in part and dissenting in part) (relying on *Austin* and other cases to justify restrictions on campaign spending by individual candidates, explaining that "there is no reason that their logic—specifically, their concerns about the corrosive and distorting effects of wealth on our political process—is not ****923** equally applicable in the context of individual wealth"); *McConnell, supra,* at 203–209, 124 S.Ct. 619 (extending *Austin* beyond its original context to cover not only the "functional equivalent" of express advocacy by corporations, but also ***382** electioneering speech conducted by labor unions). The dissent in this case succumbs to the same temptation, suggesting that *Austin* justifies prohibiting corporate speech because such speech might unduly influence "the market for legislation." *Post,* at 975. The dissent reads *Austin* to permit restrictions on corporate speech based on nothing more than the fact that the corporate form may help individuals coordinate and present their views more effectively. *Post,* at 975. A speaker's ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be.

If taken seriously, *Austin*'s logic would apply most directly to newspapers and other media corporations. They have a more profound impact on public discourse than most other speakers. These corporate entities are, for the time being, not subject to § 441b's otherwise generally applicable prohibitions on corporate political speech. But this is simply a matter of legislative grace. The fact that the law currently grants a favored position to media corporations is no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech. See generally *McConnell, supra,* at 283–286, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part).

These readings of *Austin* do no more than carry that decision's reasoning to its logical endpoint. In doing so, they highlight the threat *Austin* poses to First Amendment rights generally, even outside its specific factual context of corporate express advocacy. Because *Austin* is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high.

Finally and most importantly, the Government's own effort to defend *Austin*—or, more accurately, to defend something that is not quite *Austin*—underscores its weakness as ***383** a precedent of the Court. The Government concedes that *Austin* "is not the most lucid opinion," yet asks us to reaffirm its holding. Tr. of Oral Arg. 62 (Sept. 9, 2009). But while invoking *stare decisis* to support this position, the Government never once even *mentions* the compelling interest that *Austin* relied upon in the first place: the need to diminish "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and

that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391.

Instead of endorsing *Austin* on its own terms, the Government urges us to reaffirm *Austin*'s specific holding on the basis of two new and potentially expansive interests—the need to prevent actual or apparent *quid pro quo* corruption, and the need to protect corporate shareholders. See Supp. Brief for Appellee 8–10, 12–13. Those interests may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied.

To its credit, the Government forthrightly concedes that *Austin* did not embrace either of the new rationales it now urges upon us. See, *e.g.*, Supp. Brief for Appellee 11 ("The Court did not decide in *Austin* ... whether the compelling interest in preventing actual or apparent corruption provides a constitutionally sufficient justification ****924** for prohibiting the use of corporate treasury funds for independent electioneering"); Tr. of Oral Arg. 45 (Sept. 9, 2009) ("*Austin* did not articulate what we believe to be the strongest compelling interest"); *id*., at 61 ("[The Court:] I take it we have never accepted your shareholder protection interest. This is a new argument. [The Government:] I think that that's fair"); *id*., at 64 ("[The Court:] In other words, you are asking us to uphold *Austin* on the basis of two arguments, two principles, two compelling interests we have never accepted, in [the context of limits on political expenditures]. [The Government:] [I]n this particular context, fair enough").

***384** To be clear: The Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision. In fact, the only opinion in *Austin* endorsing the Government's argument based on the threat of *quid pro quo* corruption was Justice STEVENS's concurrence. 494 U.S., at 678, 110 S.Ct. 1391. The Court itself did not do so, despite the fact that the concurrence highlighted the argument. Moreover, the Court's only discussion of shareholder protection in *Austin* appeared in a section of the opinion that sought merely to distinguish *Austin*'s facts from those of *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). *Austin, supra*, at 663, 110 S.Ct. 1391. Nowhere did *Austin* suggest that the goal of protecting shareholders is itself a compelling interest authorizing restrictions on First Amendment rights.

To the extent that the Government's case for reaffirming *Austin* depends on radically reconceptualizing its reasoning, that argument is at odds with itself. *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.

Doing so would undermine the rule-of-law values that justify *stare decisis* in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court's past missteps to spawn future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect.

None of this is to say that the Government is barred from making new arguments to support the outcome in *Austin*. ***385** On the contrary, it is free to do so. And of course the Court is free to accept them. But the Government's new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. They are, as grounds to support *Austin*, literally *un* precedented. Moreover, to the extent the Government relies on new arguments—and declines to defend *Austin* on its own terms—we may reasonably infer that it lacks confidence in that decision's original justification.

Because continued adherence to *Austin* threatens to subvert the "principled and intelligible" development of our First Amendment jurisprudence, *Vasquez*, 474 U.S., at 265, 106 S.Ct. 617, I support the Court's determination to overrule that decision.

* * *

We have had two rounds of briefing in this case, two oral arguments, and 54 *amicus* ****925** briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues. This careful consideration convinces me that Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.

Justice SCALIA, with whom Justice ALITO joins, and with whom Justice THOMAS joins in part, concurring.

I join the opinion of the Court.[1]

I write separately to address Justice STEVENS' discussion of "*Original Understandings*," *post,* at 948 (opinion concurring in part and dissenting in part) (hereinafter referred to as the dissent). This section of the dissent purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent attempts ***386** this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment's meaning, the dissent embarks on a detailed exploration of the Framers' views about the "role of corporations in society." *Post,* at 949. The Framers did not like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted—not, as the dissent suggests, as a freestanding substitute for that text. But the dissent's distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on appellant to bring forward statements showing that they *are*. *Ibid.* ("[T]here is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form").

Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them? The dissent's statement that there were few business corporations during the 18th century—"only a few hundred during all of the 18th century"—is misleading. *387 Post,* at 949, n. 53. There were approximately 335 charters issued to business corporations in the United States by the end of the 18th century.[2] See 2 J. & Davis, Essays ****926** in the Earlier History of American Corporations 24 (1917) (reprinted 2006) (hereinafter Davis). This was a "considerable extension of corporate enterprise in the field of business," *id.,* at 8, and represented "unprecedented growth," *id.,* at 309. Moreover, what seems like a small number by today's standards surely does not indicate the relative importance of corporations when the Nation was considerably smaller. As I have previously noted, "[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life." *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 256, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting C. Cooke, Corporation Trust and Company 92 (1951) (hereinafter Cooke; internal quotation marks omitted)).

Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations, modern corporations might not qualify for exclusion. Most of the Founders' resentment toward corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.[3] Modern corporations do not have such ***388** privileges, and would probably have been favored by most of our enterprising Founders—excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.[4] See Davis 16–17; R. Seavoy, Origins of the American Business Corporation, 1784–1855, p. 5 (1982); Cooke 94. There were also small unincorporated business associations, which some have argued were the " 'true progenitors' " of today's business corporations. Friedman 200 (quoting S. Livermore, Early American Land Companies: Their Influence on Corporate Development 216 (1939)); see also Davis 33. Were all of these silently excluded from the protections of the First Amendment?

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter, see 1 W. Blackstone, Commentaries on the Laws of England 455–473 (1765); 1 S. Kyd, A ****927** Treatise on the Law of Corporations 1–32, 63 (1793) (reprinted 2006), and as ***389** I have discussed, the practice of incorporation only expanded in the United States. Both corporations and voluntary associations actively petitioned

the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. W. diGiacomantonio, "For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress, 15 J. Early Republic 169 (1995). The New York Sons of Liberty sent a circular to Colonies farther south in 1766. P. Maier, From Resistance to Revolution 79–80 (1972). And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757. Adams, The Colonial German-language Press and the American Revolution, in The Press & the American Revolution 151, 161–162 (B. Bailyn & J. Hench eds.1980). The dissent offers no evidence—none whatever—that the First Amendment's unqualified text was originally understood to exclude such associational speech from its protection.[5]

***390** Historical evidence relating to the textually similar clause "the freedom of ... the press" also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection. The freedom of "the press" was widely understood to protect the publishing activities of individual editors and printers. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 360, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment); see also *McConnell,* 540 U.S., at 252–253, 124 S.Ct. 619 (opinion of SCALIA, J.). But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit. See generally F. ****928** Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 3–164 (1941); J. Smith, Freedom's Fetters (1956). Their activities were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity. And the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind.[6]

***391** In passing, the dissent also claims that the Court's conception of corruption is unhistorical. The Framers "would have been appalled," it says, by the evidence of corruption in the congressional findings supporting the Bipartisan Campaign Reform Act of 2002. *Post,* at 963. For this proposition, the dissent cites a law-review article arguing that "corruption" was originally understood to include "moral decay" and even actions taken by citizens in pursuit of private rather than public ends. Teachout, The Anti–Corruption Principle, 94 Cornell L.Rev. 341, 373, 378 (2009). It is hard to see how this has anything to do with what sort of corruption can be combated by restrictions on political speech. Moreover, if speech can be prohibited because, in the view of the Government, it leads to "moral decay" or does not serve "public ends," then there is no limit to the Government's censorship power.

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." *Post,* at 950. That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual ***392** men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."[7]

****929** But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment. The Amendment is written in terms of "speech," not speakers. Its text offers no foothold ***393** for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the "inherent worth of the speech" and "its capacity for informing the public," *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

Justice STEVENS, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join,

concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned," *ante,* at 886. All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30–day period. The notion that the First Amendment ***394** dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must ****930** rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a ***395** permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) *(NRWC),* and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209–210, 103 S.Ct. 552. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) *(WRTL),* *McConnell v. FEC,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *FEC v. Beaumont,* 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) *(MCFL), NRWC,* 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364, and *California Medical Assn. v. FEC,* 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981).

In his landmark concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936), Justice Brandeis stressed the importance of adhering to rules the Court has "developed ... for its own governance" when deciding constitutional questions. Because departures from those rules always enhance the risk of error, I shall review the background of this case in some detail before explaining why the Court's analysis rests on a faulty understanding of *Austin* and *McConnell* and ****931** of our campaign finance jurisprudence more generally.[1] I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although ***396** I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell,* it is important to

explain why the Court should not be deciding that question.

Scope of the Case

The first reason is that the question was not properly brought before us. In declaring § 203 of BCRA facially unconstitutional on the ground that corporations' electoral expenditures may not be regulated any more stringently than those of individuals, the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. This procedure is unusual and inadvisable for a court.[2] Our colleagues' suggestion that "we are asked to reconsider *Austin* and, in effect, *McConnell*," *ante,* at 886, would be more accurate if rephrased to state that "we have asked ourselves" to reconsider those cases.

In the District Court, Citizens United initially raised a facial challenge to the constitutionality of § 203. App. 23a–24a. ***397** In its motion for summary judgment, however, Citizens United expressly abandoned its facial challenge, 1:07–cv–2240–RCL–RWR, Docket Entry No. 52, pp. 1–2 (May 16, 2008), and the parties stipulated to the dismissal of that claim, *id.*, Nos. 53 (May 22, 2008), 54 (May 23, 2008), App. 6a. The District Court therefore resolved the case on alternative grounds,[3] and in its ****932** jurisdictional statement to this Court, Citizens United properly advised us that it was raising only "an as-applied challenge to the constitutionality of ... BCRA § 203." Juris. Statement 5. The jurisdictional statement never so much as cited *Austin*, the key case the majority today overrules. And not one of the questions presented suggested that Citizens United was surreptitiously raising the facial challenge to § 203 that it previously agreed to dismiss. In fact, not one of those questions raised an issue based on Citizens United's corporate status. Juris. Statement (i). Moreover, even in its merits briefing, when Citizens United injected its request to overrule *Austin*, it never sought a declaration that § 203 was facially unconstitutional as to all corporations and unions; instead it argued only that the statute could not be applied to it because it was "funded overwhelmingly by individuals." Brief for Appellant 29; see also *id.*, at 10, 12, 16, 28 (affirming "as applied" character of challenge to § 203); Tr. of Oral Arg. 4–9 (Mar. 24, 2009) (counsel ***398** for Citizens United conceding that § 203 could be applied to General Motors); *id.*, at 55 (counsel for Citizens United stating that "we accept the Court's decision in [*WRTL*] ").

" 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed,' " *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) *(per curiam)* (quoting *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927)), and it is "only in the most exceptional cases" that we will consider issues outside the questions presented, *Stone v. Powell*, 428 U.S. 465, 481, n. 15, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The appellant in this case did not so much as assert an exceptional circumstance, and one searches the majority opinion in vain for the mention of any. That is unsurprising, for none exists.

Setting the case for reargument was a constructive step, but it did not cure this fundamental problem. Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.

As–Applied and Facial Challenges

This Court has repeatedly emphasized in recent years that "[f]acial challenges are disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); see also *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact' " (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); alteration in original)). By declaring § 203 facially unconstitutional, our colleagues have turned an as-applied challenge into a facial challenge, in defiance of this principle.

This is not merely a technical defect in the Court's decision. The unnecessary resort to a facial inquiry "run[s] contrary ***399** to the fundamental principle of judicial ****933** restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange*, 552 U.S., at 450, 128 S.Ct. 1184 (internal quotation marks omitted). Scanting that principle "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*, at 451, 128 S.Ct. 1184. These concerns are heightened when judges overrule settled doctrine upon which the legislature has relied. The

Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.

The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had Citizens United maintained a facial challenge, and thus argued that there are virtually no circumstances in which BCRA § 203 can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions.[4] "Claims of facial invalidity often rest on speculation," and consequently "raise the risk of premature interpretation of statutes on the ***400** basis of factually barebones records." *Id.*, at 450, 128 S.Ct. 1184 (internal quotation marks omitted). In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than Citizens United.[5]

Faced with this gaping empirical hole, the majority throws up its hands. Were we to confine our inquiry to Citizens United's as-applied challenge, it protests, we would commence an "extended" process of "draw[ing], and then redraw[ing], constitutional ****934** lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Ante*, at 891. While tacitly acknowledging that some applications of § 203 might be found constitutional, the majority thus posits a future in which novel First Amendment standards must be devised on an ad hoc basis, and then leaps from this unfounded prediction to the unfounded conclusion that such complexity counsels the abandonment of all normal restraint. Yet it is a pervasive ***401** feature of regulatory systems that unanticipated events, such as new technologies, may raise some unanticipated difficulties at the margins. The fluid nature of electioneering communications does not make this case special. The fact that a Court can hypothesize situations in which a statute might, at some point down the line, pose some unforeseen as-applied problems, does not come close to meeting the standard for a facial challenge.[6]

The majority proposes several other justifications for the sweep of its ruling. It suggests that a facial ruling is necessary because, if the Court were to continue on its normal course of resolving as-applied challenges as they present themselves, that process would itself run afoul of the First Amendment. See, *e.g.*, *ante*, at 890 (as-applied review process "would raise questions as to the courts' own lawful authority"); *ibid.* ("Courts, too, are bound by the First Amendment"). This suggestion is perplexing. Our colleagues elsewhere trumpet "our duty 'to say what the law is,' " even when our predecessors on the bench and our counterparts in Congress have interpreted the law differently. *Ante*, at 913 (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). We do not typically say what the law *is not* as a hedge against future judicial error. The possibility that later courts will misapply a constitutional provision does not give ***402** us a basis for pretermitting litigation relating to that provision.[7]

The majority suggests that a facial ruling is necessary because anything less would chill too much protected speech. See *ante*, at 890 – 891, 892, 894 – 897. In addition to begging the question what types of corporate spending are constitutionally protected and to what extent, this claim rests on the assertion that some significant number of corporations have ****935** been cowed into quiescence by FEC " 'censor[ship].' " *Ante*, at 895 – 896. That assertion is unsubstantiated, and it is hard to square with practical experience. It is particularly hard to square with the legal landscape following *WRTL*, which held that a corporate communication could be regulated under § 203 only if it was "susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S., at 470, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (emphasis added). The whole point of this test was to make § 203 as simple and speech-protective as possible. The Court does not explain how, in the span of a single election cycle, it has determined THE CHIEF JUSTICE's project to be a failure. In this respect, too, the majority's critique of line-drawing collapses into a critique of the as-applied review method generally.[8]

***403** The majority suggests that, even though it expressly dismissed its facial challenge, Citizens United nevertheless preserved it—not as a freestanding "claim," but as a potential argument in support of "a claim that the FEC has violated its First Amendment right to free speech." *Ante*, at 892 – 893; see also *ante*, at 919 (ROBERTS, C.J., concurring) (describing Citizens United's claim as: "[T]he Act violates the First Amendment"). By this novel logic, virtually any submission could be reconceptualized as "a claim that the Government has violated my rights," and it would then be available to the Court to entertain any conceivable issue that might be relevant to that claim's disposition. Not only the as-applied/facial distinction, but the basic relationship between litigants and courts, would be upended if the latter had free rein to construe the former's claims at such high levels of generality. There would be no need for plaintiffs to argue their case; they could just cite the constitutional provisions they think

relevant, and leave the rest to us.[9]

Finally, the majority suggests that though the scope of Citizens United's claim may be narrow, a facial ruling is necessary as a matter of remedy. Relying on a law review article, it asserts that Citizens United's dismissal of the facial challenge does not prevent us " 'from making broader pronouncements of invalidity in properly "as-applied" cases.' " *Ante,* at 893 (quoting Fallon, ***404** As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1339 (2000) (hereinafter Fallon)); accord, *ante,* at 919 (opinion of ROBERTS, C.J.) ("Regardless whether we label Citizens United's claim a 'facial' or 'as-applied' challenge, the consequences of the Court's decision are the same"). The majority is on firmer conceptual ground here. Yet even if one accepts this part of Professor Fallon's thesis, one must proceed ****936** to ask *which* as-applied challenges, if successful, will "properly" invite or entail invalidation of the underlying statute.[10] The paradigmatic case is a judicial determination that the legislature acted with an impermissible purpose in enacting a provision, as this carries the necessary implication that all future as-applied challenges to the provision must prevail. See Fallon 1339–1340.

Citizens United's as-applied challenge was not of this sort. Until this Court ordered reargument, its contention was that BCRA § 203 could not lawfully be applied to a feature-length video-on-demand film (such as *Hillary*) or to a nonprofit corporation exempt from taxation under 26 U.S.C. § 501(c)(4)[11] and funded overwhelmingly by individuals (such as itself). See Brief for Appellant 16–41. Success on either of these claims would not necessarily carry any implications for the validity of § 203 as applied to other types of broadcasts, other ***405** types of corporations, or unions. It certainly would not invalidate the statute as applied to a large for-profit corporation. See Tr. of Oral Arg. 8, 4 (Mar. 24, 2009) (counsel for Citizens United emphasizing that appellant is "a small, nonprofit organization, which is very much like [an *MCFL* corporation]," and affirming that its argument "definitely would not be the same" if *Hillary* were distributed by General Motors).[12] There is no legitimate basis for resurrecting a facial challenge that dropped out of this case 20 months ago.

Narrower Grounds

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens ****937** United, without toppling statutes and precedents. Which is to say, the majority has transgressed yet another "cardinal" principle of the judicial process: "[I]f it is not necessary to decide more, it is necessary not to decide more," ***406** *PDK Labs. Inc. v. Drug Enforcement Admin.,* 362 F.3d 786, 799 (C.A.D.C.2004) (Roberts, J., concurring in part and concurring in judgment).

Consider just three of the narrower grounds of decision that the majority has bypassed. First, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an "electioneering communication" under § 203 of BCRA, 2 U.S.C. § 441b. BCRA defines that term to encompass certain communications transmitted by "broadcast, cable, or satellite." § 434(f)(3)(A). When Congress was developing BCRA, the video-on-demand medium was still in its infancy, and legislators were focused on a very different sort of programming: short advertisements run on television or radio. See *McConnell,* 540 U.S., at 207, 124 S.Ct. 619. The sponsors of BCRA acknowledge that the FEC's implementing regulations do not clearly apply to video-on-demand transmissions. See Brief for Senator John McCain et al. as *Amici Curiae* 17–18. In light of this ambiguity, the distinctive characteristics of video-on-demand, and "[t]he elementary rule ... that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895), the Court could have reasonably ruled that § 203 does not apply to *Hillary*.[13]

Second, the Court could have expanded the *MCFL* exemption to cover § 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. Citizens United professes to be such a group: Its brief says it "is funded predominantly by donations from individuals who support [its] ideological message." Brief for Appellant 5. Numerous Courts of Appeals have held that *de minimis* business support does not, in itself, remove an otherwise ***407** qualifying organization from the ambit of *MCFL*.[14] This Court could have simply followed their lead.[15]

Finally, let us not forget Citizens United's as-applied constitutional challenge. ****938** Precisely because Citizens United looks so much like the *MCFL* organizations we have exempted from regulation, while a feature-length video-on-demand film looks so unlike the types of electoral advocacy Congress has found deserving of regulation, this challenge is a substantial one. As the appellant's own arguments show, the Court could have easily limited the breadth of its constitutional holding had it declined to adopt

the novel notion that speakers and speech acts must always be treated identically—and always spared expenditures restrictions—in the political realm. Yet the Court nonetheless turns its back on the as-applied review process that has been a staple of campaign finance litigation since ***408** *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*, and that was affirmed and expanded just two Terms ago in *WRTL*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329.

This brief tour of alternative grounds on which the case could have been decided is not meant to show that any of these grounds is ideal, though each is perfectly "valid," *ante*, at 892 (majority opinion).[16] It is meant to show that there were principled, narrower paths that a Court that was serious about judicial restraint could have taken. There was also the straightforward path: applying *Austin* and *McConnell*, just as the District Court did in holding that the funding of Citizens United's film can be regulated under them. The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*.

II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason ***409** over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.[17]

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion "was not well reasoned," our colleagues assert, and it conflicts with First Amendment ****939** principles. *Ante*, at 912. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin*, as I explain at length in Parts III and IV, *infra*, at 942 – 978, and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that "*Austin* is undermined by experience since its announcement." *Ante*, at 912. This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been "undermined." Instead it treats the reader to a string of non sequiturs: "Our Nation's speech dynamic is changing," *ante*, at 912; "[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages," *ibid.;* "[c]orporations ... do not have monolithic views," *ibid.* How any ***410** of these ruminations weakens the force of *stare decisis* escapes my comprehension.[18]

The majority also contends that the Government's hesitation to rely on *Austin*' s antidistortion rationale "diminishe[s]" "the principle of adhering to that precedent." *Ante*, at 912; see also *ante*, at 923 (opinion of ROBERTS, C.J.) (Government's litigating position is "most importan[t]" factor undermining *Austin*). Why it diminishes the value of *stare decisis* is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since *Austin*. The task of evaluating the continued viability of precedents falls to this Court, not to the parties.[19]

****940 *411** Although the majority opinion spends several pages making these surprising arguments, it says almost nothing about the standard considerations we have used to determine *stare decisis* value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. It is also conspicuously silent about *McConnell*, even though the *McConnell* Court's decision to uphold BCRA § 203 relied not only on the antidistortion logic of *Austin* but also on the statute's historical pedigree, see, *e.g.*, 540 U.S., at 115–132, 223–224, 124 S.Ct. 619, and the need to preserve the integrity of federal campaigns, see *id.*, at 126–129, 205–208, and n. 88, 124 S.Ct. 619.

We have recognized that "*[s]tare decisis* has special force when legislators or citizens 'have acted in reliance on a

previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.' " *Hubbard v. United States*, 514 U.S. 695, 714, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (plurality opinion) (quoting *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991)). *Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today's decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than a century.[20] The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating ***412** BCRA. The total record it compiled was *100,000 pages* long.[21] Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a coequal branch.

By removing one of its central components, today's ruling makes a hash out of BCRA's "delicate and interconnected regulatory scheme." *McConnell*, 540 U.S., at 172, 124 S.Ct. 619. Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending "soft money," funds that are not subject to the statute's disclosure requirements or its source and amount limitations. 2 U.S.C. § 441i; *McConnell*, 540 U.S., at 122–126, 124 S.Ct. 619. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions—and the narrow interests they represent—vis-à-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office.[22]

Beyond the reliance interests at stake, the other *stare decisis* factors also cut against the Court. Considerations of antiquity ****941** are significant for similar reasons. *McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the statutes called into question by today's opinion have been on the books for a half century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin*. Certainly nothing ***413** relevant has changed since we decided *WRTL* two Terms ago. And the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

In fact, no one has argued to us that *Austin*'s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it. Quite to the contrary, leading groups representing the business community,[23] organized labor,[24] and the nonprofit sector,[25] together with more than half of the States,[26] urge that we preserve *Austin*. As for *McConnell*, the portions of BCRA it upheld may be prolix, but all three branches of Government have worked to make § 203 as user-friendly as possible. For instance, Congress established a special mechanism for expedited review of constitutional challenges, see note following 2 U.S.C. § 437h; the FEC has established a standardized process, with clearly defined safe harbors, for corporations to claim that a particular electioneering communication is permissible under *WRTL*, see 11 CFR § 114.15 (2009);[27] and, as noted above, THE CHIEF JUSTICE crafted his controlling opinion in *WRTL* with the express goal of maximizing clarity and administrability, 551 U.S., at 469–470, 473–474, 127 S.Ct. 2652. The case for *stare decisis* may be bolstered, we have said, when ***414** subsequent rulings "have reduced the impact" of a precedent "while reaffirming the decision's core ruling." *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).[28]

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. ****942** Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. ***415** Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of

these claims is wrong.

The So–Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. *Ante,* at 910. Indeed, the majority invokes the specter of a "ban" on nearly every page of its opinion. *Ante,* at 886 – 887, 889, 891 – 892, 894, 896 – 898, 900 – 907, 909 – 912, 915, 916. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, "[c]ontrary to the [majority's] critical assumptions," the statutes upheld in *Austin* and *McConnell* do "not impose an *absolute* ban on all forms of corporate political spending." *Austin,* 494 U.S., at 660, 110 S.Ct. 1391; see also *McConnell,* 540 U.S., at 203–204, 124 S.Ct. 619; *Beaumont,* 539 U.S., at 162–163, 123 S.Ct. 2200. For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. See 2 U.S.C. § 441b(b)(2)(C); Mich. Comp. Laws Ann. § 169.255 (West 2005). "The ability to form and administer separate segregated funds," we observed in *McConnell,* "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view." 540 U.S., at 203, 124 S.Ct. 619.

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. 2 U.S.C. § 441b(b)(4)(A)(i). A significant and growing number of corporations avail themselves of this option;[29] during the most recent election cycle, ***416** corporate and union PACs raised nearly a billion dollars.[30] ****943** Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, see *ante,* at 914, and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding, see *ante,* at 897 – 898. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's. If ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an *MCFL* organization that has policies in place to avoid becoming a conduit for business or union interests. See *MCFL,* 479 U.S., at 263–264, 107 S.Ct. 616.

The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech. Consider the statutory provision we are ostensibly evaluating in this case, BCRA § 203. It has no application to genuine issue advertising—a category of corporate speech Congress found to be far more substantial than election-related advertising, see *McConnell,* 540 U.S., at 207, 124 S.Ct. 619—or to Internet, ***417** telephone, and print advocacy.[31] Like numerous statutes, it exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate.[32] See 2 U.S.C. § 434(f)(3)(B)(i); *McConnell,* 540 U.S., at 208–209, 124 S.Ct. 619; see also *Austin,* 494 U.S., at 666–668, 110 S.Ct. 1391. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, § 441b(b)(2)(A); 11 CFR § 114.3(a)(1), to fund additional PAC activity through trade associations, 2 U.S.C. § 441b(b)(4)(D), to distribute voting guides and voting records, ****944** 11 CFR §§ 114.4(c)(4)-(5), to underwrite voter registration and voter turnout activities, § 114.3(c)(4); § 114.4(c)(2), to host fundraising events for candidates within certain limits, ***418** § 114.4(c); § 114.2(f)(2), and to publicly endorse candidates through a press release and press conference, § 114.4(c)(6).

At the time Citizens United brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications;[33] (2) capable of reaching at least 50,000 persons in the relevant electorate;[34] (3) made within 30 days of a primary or 60 days of a general federal election;[35] (4) by a labor union or a non-*MCFL,* nonmedia corporation;[36] (5) paid for with general treasury funds;[37] and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[38] The category of communications meeting all of these criteria is not trivial, but the notion that corporate political speech has been "suppress[ed] ... altogether," *ante,* at 886, that corporations have been "exclu[ded] ... from the general public dialogue," *ante,* at 899, or that a work of fiction such as *Mr. Smith Goes to Washington* might be covered, *ante,* at 916 – 917, is nonsense.[39] Even the plaintiffs in *McConnell,* who had every incentive to depict BCRA as negatively as possible, declined to argue that § 203's prohibition on certain uses of general treasury funds amounts to a complete ban. See 540 U.S., at 204, 124 S.Ct. 619.

***419** In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America," Citizens United Political Victory Fund, http://www.cupvf.org/.[40]

So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these ****945** cases were decided, corporations have continued to play a major role in the national dialogue. Laws such as § 203 target a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter, demanding careful scrutiny. But the majority's incessant talk of a "ban" aims at a straw man.

Identity–Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's ... identity." *Ante*, at 902; accord, *ante*, at 886, 898, 900, 902 – 904, 912 – 913. ***420** The case on which it relies for this proposition is *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As I shall explain, *infra*, at 958 – 960, the holding in that case was far narrower than the Court implies. Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. *WRTL*, 551 U.S., at 482, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students,[41] prisoners,[42] members of the Armed Forces,[43] foreigners,[44] and its own employees.[45] ***421** When such restrictions are justified by a legitimate governmental ****946** interest, they do not necessarily raise constitutional problems.[46] In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers,[47] cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) ("[D]ifferential treatment" is constitutionally suspect "*unless* justified by some special characteristic" of the regulated class of speakers (emphasis added)), and that the constitutional rights of certain categories of speakers, in certain contexts, " 'are not automatically coextensive with the rights' " that are normally accorded to members of our society, ***422** *Morse v. Frederick*, 551 U.S. 393, 396–397, 404, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (quoting *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)).

The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did. It is fair to say that our First Amendment doctrine has "frowned on" certain identity-based distinctions, *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 47, n. 4, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (STEVENS, J., dissenting), particularly those that may reflect invidious discrimination or preferential treatment of a politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close.

The election context is distinctive in many ways, and the Court, of course, is right that the First Amendment closely guards political speech. But in this context, too, the authority of legislatures to enact viewpoint-neutral regulations based on content and identity is well settled. We have, for example, allowed state-run broadcasters to exclude independent candidates from televised debates. *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998).[48] We have upheld statutes that prohibit the distribution or display of campaign materials near a polling place. ****947** *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).[49] Although we have not reviewed ***423** them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. See, *e.g.*, 2 U.S.C. § 441e(a)(1). And we have consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities. See n. 45, *supra*. These statutes burden the political expression of one class of speakers, namely, civil servants. Yet we have sustained

them on the basis of longstanding practice and Congress' reasoned judgment that certain regulations which leave "untouched full participation ... in political decisions at the ballot box," *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (internal quotation marks omitted), help ensure that public officials are "sufficiently free from improper influences," *id.*, at 564, 93 S.Ct. 2880, and that "confidence in the system of representative Government is not ... eroded to a disastrous extent," *id.*, at 565, 93 S.Ct. 2880.

The same logic applies to this case with additional force because it is the identity of corporations, rather than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. *NRWC,* 459 U.S., at 209–210, 103 S.Ct. 552.[50] Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely ***424** from those of their members and of the public in receiving information," *Beaumont,* 539 U.S., at 161, n. 8, 123 S.Ct. 2200 (citation omitted). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations ****948** controlled by foreigners as to individual Americans: To do otherwise, after all, could " 'enhance the relative voice' " of some (*i.e.,* humans) over others (*i.e.,* nonhumans). *Ante,* at 904 (quoting *Buckley,* 424 U.S., at 49, 96 S.Ct. 612).[51] Under the ***425** majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.[52]

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, "aberration[s]," in our First Amendment tradition. *Ante,* at 907; see also *ante,* at 910, 916 – 917 (professing fidelity to "our law and our tradition"). The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

1. *Original Understandings*

Let us start from the beginning. The Court invokes "ancient First Amendment principles," *ante,* at 886 (internal quotation marks omitted), and original understandings, *ante,* at 906 – 907, to defend today's ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or ***426** understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see ****949** Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter.[53] Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes and "authoritatively fixed ***427** the scope and content of corporate organization," including

"the internal structure of the corporation." J. Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780–1970, pp. 15–16 (1970) (reprinted 2004). Corporations were created, supervised, and conceptualized as quasi-public entities, "designed to serve a social function for the state." Handlin & Handlin, Origins of the American Business Corporation, 5 J. Econ. Hist. 1, 22 (1945). It was "assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare." R. Seavoy, Origins of the American Business Corporation, 1784–1855, p. 5 (1982).

The individualized charter mode of incorporation reflected the "cloud of disfavor under which corporations labored" in the early years of this Nation. 1 W. Fletcher, Cyclopedia of the Law of Corporations § 2, p. 8 (rev. ed.2006); see also *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–549, 53 S.Ct. 481, 77 L.Ed. 929 (1933) (Brandeis, J., dissenting) (discussing fears of the "evils" of business corporations); L. Friedman, A History of American Law 194 (2d ed.1985) ("The word 'soulless' constantly recurs in debates over corporations.... Corporations, it was feared, could concentrate the worst urges of whole groups of men"). Thomas Jefferson famously fretted that corporations would subvert the Republic.[54] General incorporation statutes, and widespread acceptance of business corporations as socially useful actors, did not emerge until the 1800's. See Hansmann & Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 440 (2001) (hereinafter Hansmann & Kraakman) ("[A]ll general business corporation statutes appear to date from well after 1800").

***428** The Framers thus took it as a given that corporations could be comprehensively ****950** regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.[55] While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign." Shelledy, Autonomy, Debate, and Corporate Speech, 18 Hastings Const. L.Q. 541, 578 (1991); cf. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819) (Marshall, ***429** C.J.) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"); Eule, Promoting Speaker Diversity: Austin and Metro Broadcasting, 1990 S.Ct. Rev. 105, 129 ("The framers of the First Amendment could scarcely have anticipated its application to the corporation form. That, of course, ought not to be dispositive. What is compelling, however, is an understanding of who was supposed to be the beneficiary of the free speech guaranty—the individual"). In light of these background practices and understandings, it seems to me implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. *Ante*, at 906. From these (accurate) observations, the Court concludes that "[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media." *Ibid.* This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to "prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare." ****951** *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) (internal quotation marks omitted). Yet, even if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in* certain media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by* corporations, *and to what extent*.

***430** As a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy. As a matter of original meaning, it likewise seems baseless—unless one evaluates the First Amendment's "principles," *ante*, at 886, 912, or its "purpose," *ante*, at 919 –920 (opinion of ROBERTS, C.J.), at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task. This case sheds a revelatory light on the assumption of some that an impartial judge's application of an originalist methodology is likely to yield more determinate answers, or to play a more decisive role in the decisional process, than his or her views about sound policy.

Justice SCALIA criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the

First Amendment's free speech guarantee. *Ante,* at 925 – 926, 929. Of course, Justice SCALIA adduces no statements to suggest the contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although Justice SCALIA makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, cf. *MCFL,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no "common cause." *Ante,* at 928. Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights (not that they "despised" corporations, *ante,* at 925), and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—if ***431** not also the very notion of "corporate speech"—was inconceivable.[56]

Justice SCALIA also emphasizes the unqualified nature of the First Amendment text. *Ante,* at 925, 928 – 929. Yet he would seemingly read out the Free Press Clause: How else could he claim that my purported views on newspapers must track my views on corporations generally? *Ante,* at 927.[57] Like virtually all modern lawyers, Justice ****952** SCALIA presumably believes that the First Amendment restricts the Executive, even though its language refers to Congress alone. In any event, the text only leads us back to the questions who or what is guaranteed "the freedom of speech," and, just as critically, what that freedom consists of and under what circumstances it may be limited. Justice SCALIA appears to believe that because corporations are created and utilized by individuals, it follows (as night the day) that their electioneering must be equally protected by the First Amendment ***432** and equally immunized from expenditure limits. See *ante,* at 928 – 929. That conclusion certainly does not follow as a logical matter, and Justice SCALIA fails to explain why the original public meaning leads it to follow as a matter of interpretation.

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment.[58] I have given several reasons why I believe the Constitution would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering, and I will give many more reasons in the pages to come. The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, see *Randall v. Sorrell,* 548 U.S. 230, 280, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting), whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But "historical context is usually relevant," *ibid.* (internal quotation marks omitted), and in light of the Court's effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

2. *Legislative and Judicial Interpretation*

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. ***433** At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any ****953** argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S.Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906). President Roosevelt, in his 1905 annual message to Congress, declared:

> " 'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.' " *United States v. Automobile Workers,* 352 U.S. 567, 572, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957) (quoting 40 Cong. Rec. 96).

The Court has surveyed the history leading up to the Tillman Act several times, see *WRTL,* 551 U.S., at 508–510, 127 S.Ct. 2652 (Souter, J., dissenting); *McConnell,* 540 U.S., at 115, 124 S.Ct. 619; *Automobile Workers,* 352

U.S., at 570–575, 77 S.Ct. 529, and I will refrain from doing so again. It is enough to say that the Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed. See *ibid.; United States v. CIO,* 335 U.S. 106, 113, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948); Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Geo. L.J. 871 (2004).

***434** Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. Justice Souter recently traced these developments at length.[59] *WRTL,* 551 U.S., at 507–519, 127 S.Ct. 2652 (dissenting opinion); see also *McConnell,* 540 U.S., at 115–133, 124 S.Ct. 619; *McConnell,* 251 F.Supp.2d, at 188–205. The Taft–Hartley Act of 1947 is of special significance for this case. In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. Labor Management Relations Act, 1947, § 304, 61 Stat. 159. The bar on contributions "was being so narrowly construed" that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means. *WRTL,* 551 U.S., at 511, 127 S.Ct. 2652 (Souter, J., dissenting) (citing S.Rep. No. 1, 80th Cong., 1st Sess., 38–39 (1947)).

Our colleagues emphasize that in two cases from the middle of the 20th century, several Justices wrote separately to criticize the expenditure restriction as applied to unions, even though the Court declined to pass on its constitutionality. *Ante,* at 900 – 901. Two features of these cases are of far greater relevance. First, those Justices were writing separately; which is to ****954** say, their position failed to command a majority. Prior to today, this was a fact we found significant ***435** in evaluating precedents. Second, each case in this line expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds.[60]

This principle was carried forward when Congress enacted comprehensive campaign finance reform in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, which retained the restriction on using general treasury funds for contributions and expenditures, 2 U.S.C. § 441b(a). FECA ***436** codified the option for corporations and unions to create PACs to finance contributions and expenditures forbidden to the corporation or union itself. § 441b(b).

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of FECA in *Buckley,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, *id.,* at 58–59, 96 S.Ct. 612, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures. "Since our decision in *Buckley,* Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell,* 540 U.S., at 203, 124 S.Ct. 619.

Thus, it was unremarkable, in a 1982 case holding that Congress could bar nonprofit corporations from soliciting nonmembers for PAC funds, that then-Justice Rehnquist wrote for a unanimous Court ****955** that Congress' "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations ... warrants considerable deference," and "reflects a permissible assessment of the dangers posed by those entities to the electoral process." *NRWC,* 459 U.S., at 209, 103 S.Ct. 552 (internal quotation marks and citation omitted). "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized," the unanimous Court observed, "and there is no reason why it may not ... be accomplished by treating ... corporations ... differently from individuals." *Id.,* at 210–211, 103 S.Ct. 552.

***437** The corporate/individual distinction was not questioned by the Court's disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *MCFL,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, we stated again "that 'the special characteristics of the corporate structure require particularly careful regulation,' " *id.,* at 256, 107 S.Ct. 616 (quoting *NRWC,* 459 U.S., at 209–210, 103 S.Ct. 552), and again we acknowledged that the Government has a legitimate interest in "regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the corporate form," 479 U.S., at 257, 107 S.Ct. 616 (internal quotation marks omitted). Those

aggregations can distort the "free trade in ideas" crucial to candidate elections, *ibid.* (internal quotation marks omitted), at the expense of members or shareholders who may disagree with the object of the expenditures, *id.*, at 260, 107 S.Ct. 616. What the Court held by a 5–to–4 vote was that a limited class of corporations must be allowed to use their general treasury funds for independent expenditures, because Congress' interests in protecting shareholders and "restrict[ing] 'the influence of political war chests funneled through the corporate form,' " *id.*, at 257, 107 S.Ct. 616 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 501, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) *(NCPAC)*), did not apply to corporations that were structurally insulated from those concerns.[61]

It is worth remembering for present purposes that the four *MCFL* dissenters, led by Chief Justice Rehnquist, thought the Court was carrying the First Amendment *too* ***438** *far*. They would have recognized congressional authority to bar general treasury electioneering expenditures even by this class of nonprofits; they acknowledged that "the threat from corporate political activity will vary depending on the particular characteristics of a given corporation," but believed these "distinctions among corporations" were "distinctions in degree," not "in kind," and thus "more properly drawn by the Legislature than by the Judiciary." 479 U.S., at 268, 107 S.Ct. 616 (opinion of Rehnquist, C.J.) (internal quotation marks omitted). Not a single Justice suggested that regulation of ****956** corporate political speech could be no more stringent than of speech by an individual.

Four years later, in *Austin*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, we considered whether corporations falling outside the *MCFL* exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of "the integrity of the marketplace of political ideas" in candidate elections, *MCFL*, 479 U.S., at 257, 107 S.Ct. 616, we noted that corporations have "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U.S., at 658–659, 110 S.Ct. 1391—that allow them to spend prodigious general treasury sums on campaign messages that have "little or no correlation" with the beliefs held by actual persons, *id.*, at 660, 110 S.Ct. 1391. In light of the corrupting effects such spending might have on the political process, *ibid.*, we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations' PACs, which rely on voluntary contributions and thus "reflect actual public support for the political ideas espoused by corporations," *ibid.* Notwithstanding our colleagues' insinuations that *Austin* deprived the public of general "ideas," "facts," and " 'knowledge,' " *ante*, at 906 – 907, the decision addressed only candidate-focused expenditures and gave the State no license to regulate corporate spending on other matters.

***439** In the 20 years since *Austin*, we have reaffirmed its holding and rationale a number of times, see, *e.g.*, *Beaumont*, 539 U.S., at 153–156, 123 S.Ct. 2200, most importantly in *McConnell*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, where we upheld the provision challenged here, § 203 of BCRA.[62] Congress crafted § 203 in response to a problem created by *Buckley*. The *Buckley* Court had construed FECA's definition of prohibited "expenditures" narrowly to avoid any problems of constitutional vagueness, holding it applicable only to "communications that expressly advocate the election or defeat of a clearly identified candidate," 424 U.S., at 80, 96 S.Ct. 612, *i.e.*, statements containing so-called "magic words" like " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject,' " *id.*, at 43–44, and n. 52, 96 S.Ct. 612. After *Buckley*, corporations and unions figured out how to circumvent the limits on express advocacy by using sham "issue ads" that "eschewed the use of magic words" but nonetheless "advocate[d] the election or defeat of clearly ****957** identified federal candidates." *McConnell*, 540 U.S., at 126, 124 S.Ct. 619. "Corporations and unions spent hundreds ***440** of millions of dollars of their general funds to pay for these ads." *Id.*, at 127, 124 S.Ct. 619. Congress passed § 203 to address this circumvention, prohibiting corporations and unions from using general treasury funds for electioneering communications that "refe[r] to a clearly identified candidate," whether or not those communications use the magic words. 2 U.S.C. § 434(f)(3)(A)(i)(I).

When we asked in *McConnell* "whether a compelling governmental interest justifie[d]" § 203, we found the question "easily answered": "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' " 540 U.S., at 205, 124 S.Ct. 619 (quoting *Austin*, 494 U.S., at 660, 110 S.Ct. 1391). These precedents "represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 540 U.S., at 205, 124 S.Ct. 619 (internal quotation marks omitted). "Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against ' "circumvention of [valid] contribution limits." ' " *Ibid.* (quoting *Beaumont*, 539 U.S., at 155, 123 S.Ct. 2200, in turn quoting *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456, and n. 18, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) *(Colorado II);* alteration in

original). BCRA, we found, is faithful to the compelling governmental interests in " 'preserving the integrity of the electoral process, preventing corruption, ... sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,' " and maintaining " 'the individual citizen's confidence in government.' " 540 U.S., at 206–207, n. 88, 124 S.Ct. 619 (quoting *Bellotti*, 435 U.S., at 788–789, 98 S.Ct. 1407; some internal quotation marks and brackets omitted). What made the answer even easier than it might have been otherwise was the option to form PACs, which give corporations, at the least, ***441** "a constitutionally sufficient opportunity to engage in" independent expenditures. 540 U.S., at 203, 124 S.Ct. 619.

3. *Buckley and Bellotti*

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses *Austin* as "a significant departure from ancient First Amendment principles," *ante*, at 886 (internal quotation marks omitted). How does the majority attempt to justify this claim? Selected passages from two cases, *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, and *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, do all of the work. In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.

The majority emphasizes *Buckley* 's statement that " '[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.' " *Ante*, at 904 (quoting 424 U.S., at 48–49, 96 S.Ct. 612); *ante*, at 921 (opinion of ROBERTS, ****958** C.J.). But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous "restrictions on the speech of some in order to prevent a few from drowning out the many": for example, restrictions on ballot access and on legislators' floor time. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). For another, the *Buckley* Court used this line in evaluating "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48, 96 S.Ct. 612. It is not apparent why this is relevant to the case ***442** before us. The majority suggests that *Austin* rests on the foreign concept of speech equalization, *ante*, at 904 – 905; *ante*, at 921 – 922 (opinion of ROBERTS, C.J.), but we made it clear in *Austin* (as in several cases before and since) that a restriction on the way corporations spend their money is no mere exercise in disfavoring the voice of some elements of our society in preference to others. Indeed, we *expressly* ruled that the compelling interest supporting Michigan's statute was not one of " 'equaliz[ing] the relative influence of speakers on elections,' " *Austin*, 494 U.S., at 660, 110 S.Ct. 1391 (quoting *id.*, at 705, 110 S.Ct. 1391 (KENNEDY, J., dissenting)), but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars, *id.*, at 659–660, 110 S.Ct. 1391.

For that matter, it should go without saying that when we made this statement in *Buckley*, we could not have been casting doubt on the restriction on corporate expenditures in candidate elections, which had not been challenged as "foreign to the First Amendment," *ante*, at 904 (quoting *Buckley*, 424 U.S., at 49, 96 S.Ct. 612), or for any other reason. *Buckley* 's independent expenditure analysis was focused on a very different statutory provision, 18 U.S.C. § 608(e)(1) (1970 ed., Supp. V). It is implausible to think, as the majority suggests, *ante*, at 901 – 902, that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction, § 610 (now codified at 2 U.S.C. § 441b), even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after.

The case on which the majority places even greater weight than *Buckley*, however, is *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, claiming it "could not have been clearer" that *Bellotti*'s holding forbade distinctions between corporate and individual expenditures like the one at issue here, *ante*, at 902. The Court's reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that "our consideration of a corporation's right to ***443** speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S., at 788, n. 26, 98 S.Ct. 1407; see also *id.*, at 787–788, 98 S.Ct. 1407 (acknowledging that the interests in preserving public confidence in Government and protecting dissenting shareholders may be "weighty ... in the context of partisan candidate elections"). *Bellotti*, in other words, did not touch the question presented in *Austin* and *McConnell*, and

the opinion squarely disavowed the proposition for which the majority cites it.

The majority attempts to explain away the distinction *Bellotti* drew—between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office— ****959** as inconsistent with the rest of the opinion and with *Buckley*. *Ante,* at 903, 909 – 910. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the "importance" of which "has never been doubted," 435 U.S., at 788, n. 26, 98 S.Ct. 1407, do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation. Cf. *Austin,* 494 U.S., at 678, 110 S.Ct. 1391 (STEVENS, J., concurring); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). The majority likewise overlooks the fact that, over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. See, *e.g.*, *Austin,* 494 U.S., at 659, 110 S.Ct. 1391; *NCPAC,* 470 U.S., at 495–496, 105 S.Ct. 1459; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 371, n. 9, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); *NRWC,* 459 U.S., at 210, n. 7, 103 S.Ct. 552. The Court's critique of *Bellotti*'s footnote 26 puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti*, apparently, is both the font of all wisdom and internally incoherent.

***444** The*Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred business corporations' expenditures on some referenda but not others. Specifically, the statute barred a business corporation "from making contributions or expenditures 'for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation,' " 435 U.S., at 768, 98 S.Ct. 1407 (quoting Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp.1977); alteration in original), and it went so far as to provide that referenda related to income taxation would not " 'be deemed materially to affect the property, business or assets of the corporation,' " 435 U.S., at 768, 98 S.Ct. 1407. As might be guessed, the legislature had enacted this statute in order to limit corporate speech on a proposed state constitutional amendment to authorize a graduated income tax. The statute was a transparent attempt to prevent corporations from spending money to defeat this amendment, which was favored by a majority of legislators but had been repeatedly rejected by the voters. See *id.*, at 769–770, and n. 3, 98 S.Ct. 1407. We said that "where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.*, at 785–786, 98 S.Ct. 1407 (footnote omitted).

Bellotti thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. Even Justice Rehnquist, in dissent, had to acknowledge that "a very persuasive argument could be made that the [Massachusetts Legislature], desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire." *Id.*, at 827, n. 6, 98 S.Ct. 1407. To make matters ***445** worse, the law at issue did not make any allowance for corporations to spend money through PACs. *Id.*, at 768, n. 2, 98 S.Ct. 1407 (opinion of the Court). This really was a ****960** complete ban on a specific, preidentified subject. See *MCFL,* 479 U.S., at 259, n. 12, 107 S.Ct. 616 (stating that 2 U.S.C. § 441b's expenditure restriction "is *of course distinguishable* from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in ... *Bellotti*" (emphasis added)).

The majority grasps a quotational straw from *Bellotti,* that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. *Ante,* at 902 – 903. Of course not, but no one suggests the contrary, and neither *Austin* nor *McConnell* held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. See *McConnell,* 540 U.S., at 205, 124 S.Ct. 619; *Austin,* 494 U.S., at 658, 660, 110 S.Ct. 1391. We acknowledged in *Bellotti* that numerous "interests of the highest importance" can justify campaign finance regulation. 435 U.S., at 788–789, 98 S.Ct. 1407. But we found no evidence that these interests were served by the Massachusetts law. *Id.*, at 789, 98 S.Ct. 1407. We left open the possibility that our decision might have been different if there had been "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Ibid.*

Austin and *McConnell,* then, sit perfectly well with *Bellotti*. Indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti*, and none so much as hinted in *Austin* that they saw any tension between the decisions. The difference between the cases is not that *Austin* and

McConnell rejected First Amendment protection for corporations whereas *Bellotti* accepted it. The difference is that the statute at issue in *Bellotti* smacked of viewpoint ***446** discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.

* * *

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to " '[p]reserv[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,' " protect the expressive interests of shareholders, and " '[p]reserv [e] ... the individual citizen's confidence in government.' " *McConnell*, 540 U.S., at 206–207, n. 88, 124 S.Ct. 619 (quoting *Bellotti*, 435 U.S., at 788–789, 98 S.Ct. 1407; first alteration in original). These understandings provided the combined impetus behind the Tillman Act in 1907, see *Automobile Workers*, 352 U.S., at 570–575, 77 S.Ct. 529, the Taft–Hartley Act in 1947, see *WRTL*, 551 U.S., at 511, 127 S.Ct. 2652 (Souter, J., dissenting), FECA in 1971, see *NRWC*, 459 U.S., at 209–210, 103 S.Ct. 552, and BCRA in 2002, see *McConnell*, 540 U.S., at 126–132, 124 S.Ct. 619. Continuously for over 100 years, this line of "[c]ampaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries." *WRTL*, 551 U.S., at 522, 127 S.Ct. 2652 (Souter, J., dissenting). Time and again, we have recognized these realities in approving ****961** measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.

***447** IV

Having explained why this is not an appropriate case in which to revisit *Austin* and *McConnell* and why these decisions sit perfectly well with "First Amendment principles," *ante*, at 886, 912, I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. *Ante*, at 903 – 911. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption." *Ante*, at 909 – 910. This is the same "crabbed view of corruption" that was espoused by Justice KENNEDY in *McConnell* and squarely rejected by the Court in that case. 540 U.S., at 152, 124 S.Ct. 619. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an " 'undue influence on an officeholder's judgment' " and from creating " 'the appearance of such influence,' " beyond the sphere of *quid pro quo* relationships. *Id.*, at 150, 124 S.Ct. 619; see also, *e.g.*, *id.*, at 143–144, 152–154, 124 S.Ct. 619; *Colorado II*, 533 U.S., at 441, 121 S.Ct. 2351; *Shrink Missouri*, 528 U.S., at 389, 120 S.Ct. 897. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling ***448** access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs—and which amply supported Congress' determination to target a limited set

of especially destructive practices.

The District Court that adjudicated the initial challenge to BCRA pored over this record. In a careful analysis, Judge Kollar–Kotelly made numerous findings about the corrupting consequences of corporate and union independent expenditures in the years preceding BCRA's passage. See *McConnell*, 251 F.Supp.2d, at 555–560, 622–625; see also *id.*, at 804–805, 813, n. 143 (Leon, J.) (indicating agreement). As summarized in her own words:

> "The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. The record also indicates ****962** that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as 'above the fray.' Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. Likewise, a prominent lobbyist ***449** testifies that these organizations use issue advocacy as a means to influence various Members of Congress.
>
> "The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support.... Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations." *Id.*, at 623–624 (citations and footnote omitted).

Many of the relationships of dependency found by Judge Kollar–Kotelly seemed to have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.

Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues ... on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"—or expenditures—"valued by the officeholder." ***450** *McConnell*, 540 U.S., at 153, 124 S.Ct. 619.[63] When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from what is pure or correct" in the conduct of Government, Webster's Third New International Dictionary 512 (1966) (defining "corruption"), that it amounts to a "subversion ****963** ... of the ... electoral process," *Automobile Workers*, 352 U.S., at 575, 77 S.Ct. 529. At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves," *WRTL*, 551 U.S., at 507, 127 S.Ct. 2652 (Souter, J., dissenting). "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.' " *McConnell*, 540 U.S., at 144, 124 S.Ct. 619 (quoting *Shrink Missouri*, 528 U.S., at 390, 120 S.Ct. 897).[64]

***451** The cluster of interrelated interests threatened by such undue influence and its appearance has been well captured under the rubric of "democratic integrity." *WRTL*, 551 U.S., at 522, 127 S.Ct. 2652 (Souter, J., dissenting). This value has underlined a century of state and federal efforts to regulate the role of corporations in the electoral process.[65]

Unlike the majority's myopic focus on *quid pro quo* scenarios and the free-floating "First Amendment principles" on which it rests so much weight, *ante*, at 886, 912, this broader understanding of corruption has deep roots in the Nation's history. "During debates on the earliest [campaign finance] reform acts, the terms 'corruption' and 'undue influence' were used nearly interchangeably." Pasquale, Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform, 2008 U. Ill. L.Rev. 599, 601. Long before *Buckley*, we appreciated that "[t]o say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *Burroughs v. United States*, 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934). And whereas we have no

evidence to support the notion that the Framers would have wanted corporations to have the same rights as natural persons in the electoral context, we have ample evidence to suggest that they would ***452** have been appalled by the evidence of corruption that Congress unearthed in developing BCRA and that the Court today discounts to irrelevance. It is fair to say that "[t]he Framers were obsessed with corruption," ****964** Teachout 348, which they understood to encompass the dependency of public officeholders on private interests, see *id.*, at 373–374; see also *Randall*, 548 U.S., at 280, 126 S.Ct. 2479 (STEVENS, J., dissenting). They discussed corruption "more often in the Constitutional Convention than factions, violence, or instability." Teachout 352. When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.

Quid Pro Quo Corruption

There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court's merits holding is wrong. Even under the majority's "crabbed view of corruption," *McConnell*, 540 U.S., at 152, 124 S.Ct. 619, the Government should not lose this case.

"The importance of the governmental interest in preventing [corruption through the creation of political debts] has never been doubted." *Bellotti*, 435 U.S., at 788, n. 26, 98 S.Ct. 1407. Even in the cases that have construed the anticorruption interest most narrowly, we have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder. See *McConnell*, 540 U.S., at 143, 124 S.Ct. 619 ("We have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges. In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws 'deal[t] with only the most blatant and specific attempts ***453** of those with money to influence governmental action' " (quoting 424 U.S., at 28, 96 S.Ct. 612; alteration in original)). It has likewise never been doubted that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption." *Id.*, at 27, 96 S.Ct. 612. Congress may "legitimately conclude that the avoidance of the appearance of improper influence is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.* (internal quotation marks omitted; alteration in original). A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

In theory, our colleagues accept this much. As applied to BCRA § 203, however, they conclude "[t]he anticorruption interest is not sufficient to displace the speech here in question." *Ante*, at 908.

Although the Court suggests that *Buckley* compels its conclusion, *ante*, at 908 – 910, *Buckley* cannot sustain this reading. It is true that, in evaluating FECA's ceiling on independent expenditures by all persons, the *Buckley* Court found the governmental interest in preventing corruption "inadequate." 424 U.S., at 45, 96 S.Ct. 612. But *Buckley* did not evaluate corporate expenditures specifically, nor did it rule out the possibility that a future Court might find otherwise. The opinion reasoned that an expenditure limitation covering only express advocacy (*i.e.*, magic words) would likely be ineffectual, *ibid.*, a problem that Congress tackled in BCRA, and it concluded that "the independent advocacy restricted by [FECA § 608(e)(1)] *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions," *id.*, at 46, 96 S.Ct. 612 (emphasis added). *Buckley* expressly contemplated that an anticorruption ****965** rationale might justify restrictions on independent expenditures at a later date, "because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* ***454** arrangements as do large contributions.' " *WRTL*, 551 U.S., at 478, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (quoting *Buckley*, 424 U.S., at 45, 96 S.Ct. 612). Certainly *Buckley* did not foreclose this possibility with respect to electioneering communications made with corporate general treasury funds, an issue the Court had no occasion to consider.

The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan's restriction on corporate electioneering. 494 U.S., at 658–660, 110 S.Ct. 1391. Concurring in that opinion, I took the position that "the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation" of these independent expenditures. *Id.*, at 678, 110 S.Ct. 1391. I did not see this position as inconsistent with *Buckley* 's analysis of individual expenditures. Corporations, as a class, tend to be more attuned to the complexities of the legislative process and

more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. See Supp. Brief for Appellee 17 (stating that the Fortune 100 companies earned revenues of $13.1 trillion during the last election cycle). Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

It is with regret rather than satisfaction that I can now say that time has borne out my concerns. The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting "issue ads" to help ***455** or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over; "candidates and officials knew who their friends were," *McConnell*, 540 U.S., at 129, 124 S.Ct. 619. Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.

The majority appears to think it decisive that the BCRA record does not contain "direct examples of votes being exchanged for ... expenditures." *Ante*, at 910 (internal quotation marks omitted). It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. Yet, even if "[i]ngratiation and access ... are not corruption" themselves, *ibid.*, they are necessary prerequisites to it; they can create both the opportunity for, and the appearance of, *quid pro quo* arrangements. The influx of unlimited corporate money into the electoral ****966** realm also creates new opportunities for the mirror image of *quid pro quo* deals: threats, both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests. The majority both misreads the facts and draws the wrong conclusions when it suggests that the BCRA record provides "only scant evidence that independent expenditures ... ingratiate," and that, "in any event," none of it matters. *Ibid.*

***456** In her analysis of the record, Judge Kollar–Kotelly documented the pervasiveness of this ingratiation and explained its significance under the majority's own touchstone for defining the scope of the anticorruption rationale, *Buckley*. See *McConnell*, 251 F.Supp.2d, at 555–560, 622–625. Witnesses explained how political parties and candidates used corporate independent expenditures to circumvent FECA's "hard-money" limitations. See, *e.g.*, *id.*, at 478–479. One former Senator candidly admitted to the District Court that " '[c]andidates whose campaigns benefit from [phony "issue ads"] greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.' " *Id.*, at 556 (quoting declaration of Sen. Dale Bumpers). One prominent lobbyist went so far as to state, in uncontroverted testimony, that " 'unregulated expenditures—whether soft money donations to the parties or issue ad campaigns—can sometimes generate *far more* influence than direct campaign contributions.' " *Ibid.* (quoting declaration of Wright Andrews; emphasis added). In sum, Judge Kollar–Kotelly found, "[t]he record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting." *Id.*, at 622–623. She concluded that the Government's interest in preventing the appearance of corruption, as that concept was defined in *Buckley*, was itself sufficient to uphold BCRA § 203. 251 F.Supp.2d, at 622–625. Judge Leon agreed. See *id.*, at 804–805 (dissenting only with respect to the Wellstone Amendment's coverage of *MCFL* corporations).

When the *McConnell* Court affirmed the judgment of the District Court regarding § 203, we did not rest our holding on a narrow notion of *quid pro quo* corruption. Instead we relied on the governmental interest in combating the unique forms of corruption threatened by corporations, as recognized ***457** in *Austin*'s antidistortion and shareholder protection rationales, 540 U.S., at 205, 124 S.Ct. 619 (citing *Austin*, 494 U.S., at 660, 110 S.Ct. 1391), as well as the interest in preventing circumvention of contribution limits, 540 U.S., at 128–129, 205, 206, n. 88, 124 S.Ct. 619. Had we felt constrained by the view of today's Court that *quid pro quo* corruption and its appearance are the only interests that count in this field, *ante*, at 903 – 911, we of course would have looked closely at that issue. And as the analysis by Judge Kollar–Kotelly reflects, it is a very real possibility that we would have found one or both of those interests satisfied and § 203 appropriately tailored to them.

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures "do not give rise to *[quid pro quo]* corruption or the appearance of corruption," *ante,* at 909, is thus unfair as well as unreasonable. Congress and outside experts have generated significant evidence corroborating this rationale, and the only reason we do not have any of the relevant materials before us is that the Government had no reason ****967** to develop a record at trial for a facial challenge the plaintiff had abandoned. The Court cannot both *sua sponte* choose to relitigate *McConnell* on appeal and then complain that the Government has failed to substantiate its case. If our colleagues were really serious about the interest in preventing *quid pro quo* corruption, they would remand to the District Court with instructions to commence evidentiary proceedings.[66]

***458** The insight that even technically independent expenditures can be corrupting in much the same way as direct contributions is bolstered by our decision last year in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). In that case, Don Blankenship, the chief executive officer of a corporation with a lawsuit pending before the West Virginia high court, spent large sums on behalf of a particular candidate, Brent Benjamin, running for a seat on that court. "In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to 'And For The Sake Of The Kids,' " a § 527 corporation that ran ads targeting Benjamin's opponent. *Id.*, at 873, 129 S.Ct., at 2257. "This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures ... ' "to support ... Brent Benjamin." ' " *Ibid.* (second alteration in original). Applying its common sense, this Court accepted petitioners' argument that Blankenship's "pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias" when Benjamin later declined to recuse himself from the appeal by Blankenship's corporation. *Id.*, at 882, 129 S.Ct., at 2262. "Though n[o] ... bribe or criminal influence" was involved, we recognized that "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected." *Ibid.* "The difficulties of inquiring into actual bias," we further noted, "simply underscore the need for objective rules," *id.*, at 883, 129 S.Ct., at 2263—rules which will perforce turn on the appearance of bias rather than its actual existence.

In *Caperton*, then, we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption. Indeed, this premise struck the Court as so intuitive that it repeatedly referred to Blankenship's spending on behalf of Benjamin—spending that consisted of ***459** 99.97% independent expenditures ($3 million) and 0.03% direct contributions ($1,000)—as a "contribution." See, *e.g.*, *id.*, at 872, 129 S.Ct., at 2257 ("The basis for the [recusal] motion was that the justice had received campaign contributions in an extraordinary amount from" Blankenship); *id.*, at 873, 129 S.Ct., at 2258 (referencing "Blankenship's $3 million in contributions"); *id.*, at 884, 129 S.Ct., at 2264 ("Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin" ****968**); *id.*, at 885, 129 S.Ct., at 2264 ("Blankenship's campaign contributions ... had a significant and disproportionate influence on the electoral outcome"). The reason the Court so thoroughly conflated expenditures and contributions, one assumes, is that it realized that some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes.

Caperton is illuminating in several additional respects. It underscores the old insight that, on account of the extreme difficulty of proving corruption, "prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption." *Buckley*, 424 U.S., at 30, 96 S.Ct. 612; see also *Shrink Missouri*, 528 U.S., at 392, n. 5, 120 S.Ct. 897. It underscores that "certain restrictions on corporate electoral involvement" may likewise be needed to "hedge against circumvention of valid contribution limits." *McConnell*, 540 U.S., at 205, 124 S.Ct. 619 (internal quotation marks and brackets omitted); see also *Colorado II*, 533 U.S., at 456, 121 S.Ct. 2351 ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption"). It underscores that for-profit corporations associated with electioneering communications will often prefer to use nonprofit conduits with "misleading names," such as And For The Sake Of The Kids, "to conceal their identity" as the sponsor of those communications, thereby frustrating the utility of disclosure ***460** laws. *McConnell*, 540 U.S., at 128, 124 S.Ct. 619; see also *id.*, at 196–197, 124 S.Ct. 619.

And it underscores that the consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, *e.g.*, O'Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as *Amici Curiae* 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps "*Caperton* motions" will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place

modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.

Deference and Incumbent Self–Protection

Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis.[67] Today's opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than "an incumbency protection plan," *McConnell*, 540 U.S., at 306, 124 S.Ct. 619 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *id.*, at 249–250, 260–263, 124 S.Ct. 619 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part), a disreputable attempt at legislative ****969** self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy ***461** of our political system. This possibility, the Court apparently believes, licenses it to run roughshod over Congress' handiwork.

In my view, we should instead start by acknowledging that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 650, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (STEVENS, J., dissenting). Many of our campaign finance precedents explicitly and forcefully affirm the propriety of such presumptive deference. See, *e.g.*, *McConnell*, 540 U.S., at 158, 124 S.Ct. 619; *Beaumont*, 539 U.S., at 155–156, 123 S.Ct. 2200; *NRWC*, 459 U.S., at 209–210, 103 S.Ct. 552. Moreover, "[j]udicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of careful legislative adjustment." *Beaumont*, 539 U.S., at 162, n. 9, 123 S.Ct. 2200 (internal quotation marks omitted); cf. *Shrink Missouri*, 528 U.S., at 391, 120 S.Ct. 897 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). In America, incumbent legislators pass the laws that govern campaign finance, just like all other laws. To apply a level of scrutiny that effectively bars them from regulating electioneering whenever there is the faintest whiff of self-interest, is to deprive them of the ability to regulate electioneering.

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process.[68] ***462** See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 447, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (STEVENS, J., concurring in part and dissenting in part); *Vieth v. Jubelirer*, 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (STEVENS, J., dissenting). Along with our duty to balance competing constitutional concerns, we have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive. But it is the height of recklessness to dismiss Congress' years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U.S., at 31, 96 S.Ct. 612.

We have no record evidence from which to conclude that BCRA § 203, or any of the dozens of state laws that the Court today calls into question, reflects or fosters such invidious discrimination. Our colleagues have opined that " '*any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.' " *McConnell*, 540 U.S., at 249, 124 S.Ct. 619 (opinion of SCALIA, J.). This kind of airy speculation could easily be turned on its head. The electioneering prohibited by ****970** § 203 might well tend to favor incumbents, because incumbents have pre-existing relationships with corporations and unions, and groups that wish to procure legislative benefits may tend to support the candidate who, as a sitting officeholder, is already in a position to dispense benefits and is statistically likely to retain office. If a corporation's goal is to induce officeholders to do its bidding, the corporation would do well to cultivate stable, long-term relationships of dependency.

So we do not have a solid theoretical basis for condemning § 203 as a front for incumbent self-protection, and it seems equally if not more plausible that restrictions on corporate electioneering will be self-denying. Nor do we have a good ***463** empirical case for skepticism, as the Court's failure to cite any empirical research attests. Nor does the legislative history give reason for concern. Congress devoted years of careful study to the issues underlying BCRA; "[f]ew legislative proposals in recent years have received as much sustained public commentary or news coverage"; "[p]olitical scientists and academic experts ... with no self-interest in incumbent protectio[n] were central

figures in pressing the case for BCRA"; and the legislation commanded bipartisan support from the outset. Pildes, The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L.Rev. 28, 137 (2004). Finally, it is important to remember just how incumbent-friendly congressional races were prior to BCRA's passage. As the Solicitor General aptly remarked at the time, "the evidence supports overwhelmingly that incumbents were able to get re-elected under the old system just fine." Tr. of Oral Arg. in *McConnell v. FEC*, O.T. 2003, No. 02–1674, p. 61. "It would be hard to develop a scheme that could be better for incumbents." *Id.*, at 63.

In this case, then, "there is no convincing evidence that th[e] important interests favoring expenditure limits are fronts for incumbency protection." *Randall*, 548 U.S., at 279, 126 S.Ct. 2479 (STEVENS, J., dissenting). "In the meantime, a legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity ... of repetitive speech in the marketplace of ideas." *Id.*, at 279–280, 126 S.Ct. 2479. The majority cavalierly ignores Congress' factual findings and its constitutional judgment: It acknowledges the validity of the interest in preventing corruption, but it effectively discounts the value of that interest to zero. This is quite different from conscientious policing for impermissibly anticompetitive motive or effect in a sensitive First Amendment context. ***464** It is the denial of Congress' authority to regulate corporate spending on elections.

Austin and Corporate Expenditures

Just as the majority gives short shrift to the general societal interests at stake in campaign finance regulation, it also overlooks the distinctive considerations raised by the regulation of *corporate* expenditures. The majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale, see 494 U.S., at 660, 110 S.Ct. 1391 (describing "a different type of corruption"), tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an " 'equalizing' " ideal in disguise. *Ante*, at 904 (quoting *Buckley*, 424 U.S., at 48, 96 S.Ct. 612).[69]

****971 *465** 1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets ... that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." 494 U.S., at 658–659, 110 S.Ct. 1391. Unlike voters in U.S. elections, corporations may be foreign controlled.[70] Unlike other interest groups, business corporations have been "effectively delegated responsibility for ensuring society's economic welfare";[71] they inescapably structure the life of every citizen. " '[T]he resources in the treasury of a business corporation,' " furthermore, " 'are not an indication of popular support for the corporation's political ideas.' " *Id.*, at 659, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S., at 258, 107 S.Ct. 616). " 'They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.' " 494 U.S., at 659, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S., at 258, 107 S.Ct. 616).[72]

****972 *466** It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to "protec[t] the individual's interest in self-expression." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 534, n. 2, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); see also *Bellotti*, 435 U.S., at 777, n. 12, 98 S.Ct. 1407. Freedom of speech helps "make men free to develop their faculties," *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), it respects their "dignity and choice," *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct.

1780, 29 L.Ed.2d 284 (1971), and it facilitates the value of "individual self-realization," Redish, The Value of Free Speech, 130 U. Pa. L.Rev. 591, 594 (1982). Corporate speech, however, is derivative speech, speech by proxy. A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. "Within the realm of [campaign spending] generally," corporate ***467** spending is "furthest from the core of political expression." *Beaumont*, 539 U.S., at 161, n. 8, 123 S.Ct. 2200.

It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

Corporate expenditures are distinguishable from individual expenditures in this respect. I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above, and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. See, *e.g.*, ****973** *Randall*, 548 U.S., at 273, 126 S.Ct. 2479 (dissenting opinion). But those restrictions concededly present a tougher case, because the primary conduct of actual, flesh-and-blood persons is involved. Some of those individuals might feel that they need to spend large sums of money on behalf of a particular candidate to vindicate the intensity of their electoral preferences. This is obviously not the situation with business corporations, as their routine practice of giving "substantial sums to *both* major national ***468** parties" makes pellucidly clear. *McConnell*, 540 U.S., at 148, 124 S.Ct. 619. "[C]orporate participation" in elections, any business executive will tell you, "is more transactional than ideological." Supp. Brief for Committee for Economic Development as *Amicus Curiae* 10.

In this transactional spirit, some corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded. See *id.*, at 10–19. A system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations. It can impose a kind of implicit tax.[73]

In short, regulations such as § 203 and the statute upheld in *Austin* impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader "public dialogue," *ante*, at 899, but also because they leave untouched ***469** the speech of natural persons. Recognizing the weakness of a speaker-based critique of *Austin*, the Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say. The Court's central argument is that laws such as § 203 have " 'deprived [the electorate] of information, knowledge and opinion vital to its function,' " *ante*, at 907 (quoting *CIO*, 335 U.S., at 144, 68 S.Ct. 1349 (Rutledge, J., concurring in result)), and this, in turn, "interferes with the 'open marketplace' of ideas protected by the First Amendment," *ante*, at 906 (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008)).

There are many flaws in this argument. If the overriding concern depends on the interests of the audience, surely the public's perception of the value of corporate speech should be given important weight. That perception today is the same as it ****974** was a century ago when Theodore Roosevelt delivered the speeches to Congress that, in time, led to the limited prohibition on corporate campaign expenditures that is overruled today. See *WRTL*, 551 U.S., at 509–510, 127 S.Ct. 2652 (Souter, J., dissenting) (summarizing President Roosevelt's remarks). The distinctive threat to democratic integrity posed by corporate domination of politics was recognized at "the inception of the republic" and "has been a persistent theme in American political life" ever since. Regan 302. It is only certain Members of this Court, not the listeners themselves, who have agitated for more corporate electioneering.

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process, 494 U.S., at 660, 110

S.Ct. 1391, and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the ***470** corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities," Brief for American Independent Business Alliance as *Amicus Curiae* 11; see also ALI, Principles of Corporate Governance: Analysis and Recommendations § 2.01(a), p. 55 (1992) ("[A] corporation ... should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). In a state election such as the one at issue in *Austin*, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good, 494 U.S., at 660, 110 S.Ct. 1391. The opinions of real people may be marginalized. "The expenditure restrictions of [2 U.S.C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas." *MCFL*, 479 U.S., at 259, 107 S.Ct. 616.

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering, *Austin*, 494 U.S., at 659, 110 S.Ct. 1391, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders " 'call the tune' " and a reduced " 'willingness of voters to take part in democratic governance.' " ***471** *McConnell*, 540 U.S., at 144, 124 S.Ct. 619 (quoting *Shrink Missouri*, 528 U.S., at 390, 120 S.Ct. 897). To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering ****975** might diminish the ability of citizens to "hold officials accountable to the people," *ante*, at 898, and disserve the goal of a public debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm, *Austin*, 494 U.S., at 659, 110 S.Ct. 1391 (internal quotation marks omitted), may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L.Rev. 1103, 1113 (2002). Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of. *472Ibid.* It is for reasons such as these that our campaign finance jurisprudence has long appreciated that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.' " *NRWC*, 459 U.S., at 210, 103 S.Ct. 552 (quoting *California Medical Assn.*, 453 U.S., at 201, 101 S.Ct. 2712).

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on "nothing more" than a fear that corporations have a special "ability to persuade," *ante*, at 923 (opinion of ROBERTS, C.J.), as if corporations were our society's ablest debaters and viewpoint-neutral laws such as § 203 were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like § 203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process. All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech," *Austin*, 494 U.S., at 695, 110 S.Ct. 1391 (SCALIA, J., dissenting).[74] If individuals in our society had

infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to ****976** relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.

***473** None of this is to suggest that corporations can or should be denied an opportunity to participate in election campaigns or in any other public forum (much less that a work of art such as *Mr. Smith Goes to Washington* may be banned), or to deny that some corporate speech may contribute significantly to public debate. What it shows, however, is that *Austin* 's "concern about corporate domination of the political process," *id.*, at 659, 110 S.Ct. 1391, reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral "marketplace" of ideas, *ante*, at 896, 904, 906, 914, 915, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective, *ante*, at 886, 912, it becomes necessary to consider how listeners will actually be affected.

In critiquing *Austin*'s antidistortion rationale and campaign finance regulation more generally, our colleagues place tremendous weight on the example of media corporations. See *ante*, at 905 – 907, 911; *ante*, at 917, 923 (opinion of ROBERTS, C.J.); *ante*, at 927 – 928 (opinion of SCALIA, J.). Yet it is not at all clear that *Austin* would permit § 203 to be applied to them. The press plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse; as the *Austin* Court explained, "media corporations differ significantly from other corporations in that their resources are devoted to the collection ***474** of information and its dissemination to the public," 494 U.S., at 667, 110 S.Ct. 1391. Our colleagues have raised some interesting and difficult questions about Congress' authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us.* Section 203 does not apply to media corporations, and even if it did, Citizens United is not a media corporation. There would be absolutely no reason to consider the issue of media corporations if the majority did not, first, transform Citizens United's as-applied challenge into a facial challenge and, second, invent the theory that legislatures must eschew all "identity"-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors.[75] This calls to mind George Berkeley's description of philosophers: "[W]e have first raised a dust, and then complain we cannot see." Principles of Human Knowledge/Three Dialogues 38, ¶ 3 (R. Woolhouse ed.1988).

It would be perfectly understandable if our colleagues feared that a campaign finance ****977** regulation such as § 203 may be counterproductive or self-interested, and therefore attended carefully to the choices the Legislature has made. But the majority does not bother to consider such practical matters, or even to consult a record; it simply stipulates that "enlightened self-government" can arise only in the absence of regulation. *Ante*, at 898. In light of the distinctive features of corporations identified in *Austin*, there is no valid basis for this assumption. The marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold, and when we move from the realm of economics ***475** to the realm of corporate electioneering, there may be no "reason to think the market ordering is intrinsically good at all," Strauss 1386.

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.

2. *Shareholder Protection*

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin*'s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not "reflec [t] [their] support." 494 U.S., at 660–661, 110 S.Ct.

1391. When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.

The PAC mechanism, by contrast, helps ensure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. *Ibid.* It " 'allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.' " *McConnell*, 540 U.S., at 204, 124 S.Ct. 619 (quoting *Beaumont*, 539 U.S., at 163, 123 S.Ct. 2200). A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; ***476** it also curbs the rent seeking behavior of executives and respects the views of dissenters. *Austin*'s acceptance of restrictions on general treasury spending "simply allows people who have invested in the business corporation for purely economic reasons"—the vast majority of investors, one assumes—"to avoid being taken advantage of, without sacrificing their economic objectives." Winkler, Beyond *Bellotti*, 32 Loyola (LA) L.Rev. 133, 201 (1998).

The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation, see *Pipefitters v. United States*, 407 U.S. 385, 414–415, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); Winkler, 92 Geo. L. J., at 887–900, and it has been endorsed in a long line of our cases, see, *e.g.*, *McConnell*, 540 U.S., at 204–205, 124 S.Ct. 619; *Beaumont*, 539 U.S., at 152–154, 123 S.Ct. 2200; *MCFL*, 479 U.S., at 258, 107 S.Ct. 616; *NRWC*, 459 U.S., at 207–208, 103 S.Ct. 552; ****978** *Pipefitters*, 407 U.S., at 414–416, 92 S.Ct. 2247; see also n. 60, *supra*. Indeed, we have unanimously recognized the governmental interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S., at 207–208, 103 S.Ct. 552.

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," *ante*, at 911 (internal quotation marks omitted), and, it seems, through Internet-based disclosures, *ante*, at 916.[76] I fail to understand ***477** how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. Blair & Stout 320; see also *id.*, at 298–315; Winkler, 32 Loyola (LA) L.Rev., at 165–166, 199–200. Modern technology may help make it easier to track corporate activity, including electoral advocacy, but it is utopian to believe that it solves the problem. Most American households that own stock do so through intermediaries such as mutual funds and pension plans, see Evans, A Requiem for the Retail Investor? 95 Va. L.Rev. 1105 (2009), which makes it more difficult both to monitor and to alter particular holdings. Studies show that a majority of individual investors make no trades at all during a given year. *Id.*, at 1117. Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular ***478** shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which "the interests of unwilling ... corporate shareholders [in not being] forced to subsidize that speech" "are at their zenith." *Austin*, 494 U.S., at 677, 110 S.Ct. 1391 (Brennan, J., concurring). And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications ****979** might similarly be conditioned on voluntariness.

Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale, in two main ways. First, the problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often

compromise the views of others. See, *e.g.*, *id.*, at 663, 110 S.Ct. 1391 (discussing risk that corporation's "members may be ... reluctant to withdraw as members even if they disagree with [its] political expression"). Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these "expenditures reflect actual public support for the political ideas espoused," *id.*, at 660, 110 S.Ct. 1391. The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

V

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories ***479** over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." *Bellotti*, 435 U.S., at 817, n. 13, 98 S.Ct. 1407 (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

***480** Justice THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court's opinion.

****980** Political speech is entitled to robust protection under the First Amendment. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) has never been reconcilable with that protection. By striking down § 203, the Court takes an important first step toward restoring full constitutional protection to speech that is "indispensable to the effective and intelligent use of the processes of popular government." *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 265, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (internal quotation marks omitted). I dissent from Part IV of the Court's opinion, however, because the Court's constitutional analysis does not go far enough. The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional. See *id.*, at 275–277, and n. 10, 124 S.Ct. 619.

Congress may not abridge the "right to anonymous speech" based on the " 'simple interest in providing voters with additional relevant information,' " *id.*, at 276, 124 S.Ct. 619 (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 348, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)). In continuing to hold otherwise, the Court misapprehends the import of "recent events" that some *amici* describe "in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation." *Ante,* at 916. The Court properly recognizes these events as "cause for concern," *ibid.*, but fails to acknowledge their constitutional significance. In my view, *amici*'s submissions show why the Court's insistence on upholding §§ 201 and 311 will ultimately prove as misguided (and ill fated) as was its prior approval of § 203.

Amici's examples relate principally to Proposition 8, a state ballot proposition that California voters narrowly passed in the 2008 general election. Proposition 8 amended ***481** California's Constitution to provide that "[o]nly marriage

between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. Any donor who gave more than $100 to any committee supporting or opposing Proposition 8 was required to disclose his full name, street address, occupation, employer's name (or business name, if self-employed), and the total amount of his contributions.[1] See Cal. Govt.Code Ann. § 84211(f) (West 2005). The California secretary of state was then required to post this information on the Internet. See §§ 84600–84601; §§ 84602–84602.1 (West Supp.2010); §§ 84602.5–84604 (West 2005); § 85605 (West Supp.2010); §§ 84606–84609 (West 2005).

Some opponents of Proposition 8 compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. They cited these incidents in a complaint they filed after the 2008 election, seeking to invalidate California's mandatory disclosure laws. Supporters recounted being told: " 'Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter,' " or, " 'we have plans for you and your friends.' " Complaint in ****981** *ProtectMarriage.com—Yes on 8 v. Bowen,* Case No. 2:09–cv–00058–MCE–DAD (ED Cal.), ¶ 31. Proposition 8 opponents also allegedly harassed the measure's supporters by defacing or damaging their property. *Id.,* ¶ 32. Two religious organizations supporting Proposition 8 reportedly received through the mail envelopes containing a white powdery substance. *Id.,* ¶ 33.

***482** Those accounts are consistent with media reports describing Proposition 8–related retaliation. The director of the nonprofit California Musical Theater gave $1,000 to support the initiative; he was forced to resign after artists complained to his employer. Lott & Smith, Donor Disclosure Has Its Downsides, Wall Street Journal, Dec. 26, 2008, p. A13. The director of the Los Angeles Film Festival was forced to resign after giving $1,500 because opponents threatened to boycott and picket the next festival. *Ibid.* And a woman who had managed her popular, family-owned restaurant for 26 years was forced to resign after she gave $100, because "throngs of [angry] protesters" repeatedly arrived at the restaurant and "shout[ed] 'shame on you' at customers." Lopez, Prop. 8 Stance Upends Her Life, Los Angeles Times, Dec. 14, 2008, p. B1. The police even had to "arriv[e] in riot gear one night to quell the angry mob" at the restaurant. *Ibid.* Some supporters of Proposition 8 engaged in similar tactics; one real estate businessman in San Diego who had donated to a group opposing Proposition 8 "received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the 'Yes on 8' campaign." Donor Disclosure, *supra,* at A13.

The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights. Before the 2008 Presidential election, a "newly formed nonprofit group ... plann[ed] to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions." Luo, Group Plans Campaign Against G.O.P. Donors, N.Y. Times, Aug. 8, 2008, p. A15. Its leader, "who described his effort as 'going for the jugular,' " detailed the group's plan to send a "warning letter ... alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including ***483** legal trouble, public exposure and watchdog groups digging through their lives." *Ibid.*

These instances of retaliation sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements. But *amici* present evidence of yet another reason to do so—the threat of retaliation from *elected officials*. As *amici's* submissions make clear, this threat extends far beyond a single ballot proposition in California. For example, a candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent; in his words, " 'I go to so many people and hear the same thing: "I sure hope you beat [the incumbent], but I can't afford to have my name on your records. He might come after me next." ' " Strassel, Challenging Spitzerism at the Polls, Wall Street Journal, Aug. 1, 2008, p. A11. The incumbent won reelection in 2008.

My point is not to express any view on the merits of the political controversies I describe. Rather, it is to demonstrate—using real-world, recent examples—the fallacy in the Court's conclusion that "[d]isclaimer and disclosure requirements ... impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Ante,* at 914 (internal quotation marks and citation omitted). Of ****982** course they do. Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.

The Court nevertheless insists that as-applied challenges to disclosure requirements will suffice to vindicate those speech rights, as long as potential plaintiffs can "show a reasonable probability that disclosure ... will subject them to threats, harassment, or reprisals from either Government officials ***484** or private parties." *Ante,* at 914 (internal

quotation marks omitted). But the Court's opinion itself proves the irony in this compromise. In correctly explaining why it must address the facial constitutionality of § 203, see *ante,* at 888 – 897, the Court recognizes that "[t]he First Amendment does not permit laws that force speakers to ... seek declaratory rulings before discussing the most salient political issues of our day," *ante,* at 889; that as-applied challenges to § 203 "would require substantial litigation over an extended time" and result in an "interpretive process [that] itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable," *ante,* at 891; that "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling," *ante,* at 892; and that avoiding a facial challenge to § 203 "would prolong the substantial, nationwide chilling effect" that § 203 causes, *ante,* at 894. This logic, of course, applies equally to as-applied challenges to §§ 201 and 311.

Irony aside, the Court's promise that as-applied challenges will adequately protect speech is a hollow assurance. Now more than ever, §§ 201 and 311 will chill protected speech because—as California voters can attest—"the advent of the Internet" enables "prompt disclosure of expenditures," which "provide[s]" political opponents "with the information needed" to intimidate and retaliate against their foes. *Ante,* at 916. Thus, "disclosure permits citizens ... to react to the speech of [their political opponents] in a proper"—or undeniably *improper*—"way" long before a plaintiff could prevail on an as-applied challenge.[2] *Ante,* at 916.

***485** I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.' " *McConnell,* 540 U.S., at 264, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 410–411, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (THOMAS, J., dissenting)). Accordingly, I respectfully dissent from the Court's judgment upholding BCRA §§ 201 and 311.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The dissent suggests that I am "much too quick" to reach this conclusion because I "ignore" Citizens United's narrower arguments. *Post,* at 936, n. 12. But in fact I do not ignore those arguments; on the contrary, I (and my colleagues in the majority) appropriately consider and reject them on their merits, before addressing Citizens United's broader claims. *Supra,* at 918 – 919; *ante,* at 888 – 892.

2 See also, *e.g.,* R. Hasen, The Supreme Court and Election Law: Judging Equality from *Baker v. Carr* to *Bush v. Gore* 114 (2003) ("*Austin* represents the first and only case [before *McConnell*] in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest"); Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L.Rev. 1369, and n. 1 (1994) (noting that *Austin*'s rationale was based on equalizing political speech); Ashdown, Controlling Campaign Spending and the "New Corruption": Waiting for the Court, 44 Vand. L.Rev. 767, 781 (1991); Eule, Promoting Speaker Diversity: Austin and Metro Broadcasting, 1990 S.Ct. Rev. 105, 108–111.

1 Justice THOMAS does not join Part IV of the Court's opinion.

2 The dissent protests that 1791 rather than 1800 should be the relevant date, and that "[m]ore than half of the century's total business charters were issued between 1796 and 1800." *Post,* at 949, n. 53. I used 1800 only because the dissent did. But in any case, it is surely fanciful to think that a consensus of hostility toward corporations was transformed into general favor at some magical moment between 1791 and 1796.

3 "[P]eople in 1800 identified corporations with franchised monopolies." L. Friedman, A History of American Law 194 (2d ed.1985) (hereinafter Friedman). "The chief cause for the changed popular attitude towards business corporations that marked the opening of the nineteenth century was the elimination of their inherent monopolistic character. This was accomplished primarily by an extension of the principle of free incorporation under general laws." 1 W. Fletcher, Cyclopedia of the Law of Corporations § 2, p. 8 (rev. ed.2006).

4 At times (though not always) the dissent seems to exclude such non-"business corporations" from its denial of free-speech rights. See *post,* at 949 – 950. Finding in a seemingly categorical text a distinction between the rights of business corporations and the rights of nonbusiness corporations is even more imaginative than finding a distinction between the rights of *all* corporations and the rights of other associations.

5 The best the dissent can come up with is that "[p]ostratification practice" supports its reading of the First Amendment. *Post,* at 951, n. 56. For this proposition, the dissent cites Justice White's statement (in dissent) that "[t]he common law was generally interpreted as prohibiting corporate political participation," *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 819, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The sole authority Justice White cited for this proposition, *id.,* at 819, n. 14, 98 S.Ct. 1407, was a law-review note that made no such claim. To the contrary, it stated that the cases dealing with the propriety of corporate political expenditures were "few." Note, Corporate Political Affairs Programs, 70 Yale L. J. 821, 852 (1961). More specifically, the note cites only two holdings to that effect, one by a Federal District Court, and one by the Supreme Court of Montana. *Ibid.,* n. 197. Of course even if the common law was "generally interpreted" to prohibit corporate political expenditures as ultra vires, that would have nothing to do with whether political expenditures that *were* authorized by a corporation's charter could constitutionally be suppressed.
As additional "[p]ostratification practice," the dissent notes that the Court "did not recognize *any* First Amendment protections for corporations until the middle part of the 20th century." *Post,* at 951, n. 56. But it did that in *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), a case involving freedom of the press—which the dissent acknowledges *did* cover corporations from the outset. The relative recency of that first case is unsurprising. All of our First Amendment jurisprudence was slow to develop. We did not consider application of the First Amendment to speech restrictions other than prior restraints until 1919, see *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; we did not invalidate a state law on First Amendment grounds until 1931, see *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, and a federal law until 1965, see *Lamont v. Postmaster General,* 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398.

6 The dissent seeks to avoid this conclusion (and to turn a liability into an asset) by interpreting the Freedom of the Press Clause to refer to the institutional press (thus demonstrating, according to the dissent, that the Founders "did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms"). *Post,* at 951 – 952, and n. 57. It is passing strange to interpret the phrase "the freedom of speech, or of the press" to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish. No one thought that is what it meant. Patriot Noah Webster's 1828 dictionary contains, under the word "press," the following entry:
"*Liberty of the press,* in civil policy, is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state." 2 American Dictionary of the English Language (1828) (reprinted 1970).
As the Court's opinion describes, *ante,* at 905 – 906, our jurisprudence agrees with Noah Webster and contradicts the dissent.
"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.... The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin,* 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

7 The dissent says that " 'speech' " refers to oral communications of human beings, and since corporations are not human beings they cannot speak. *Post,* at 950, n. 55. This is sophistry. The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members. The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press.
The same footnote asserts that "it has been 'claimed that the notion of institutional speech ... did not exist in post-revolutionary America.' " This is quoted from a law-review article by a Bigelow Fellow at the University of Chicago (Fagundes, State Actors as First Amendment Speakers, 100 Nw. U.L.Rev. 1637, 1654 (2006)), which offers as the sole support for its statement a treatise dealing with government speech, M. Yudof, When Government Speaks 42–50 (1983). The cited pages of that treatise provide no support whatever for the statement—unless, as seems overwhelmingly likely, the "institutional speech" referred to was speech by the subject of the law-review article, governmental institutions.
The other authority cited in the footnote, a law-review article by a professor at Washington and Lee Law School, Bezanson, Institutional Speech, 80 Iowa L.Rev. 735, 775 (1995), in fact contradicts the dissent, in that it would accord free-speech protection to associations.

1 Specifically, Part I, *infra,* at 931 – 938, addresses the procedural history of the case and the narrower grounds of decision the majority has bypassed. Part II, *infra,* at 938 – 942, addresses *stare decisis*. Part III, *infra,* at 942 – 961, addresses the Court's assumptions that BCRA "bans" corporate speech, that identity-based distinctions may not be drawn in the political realm, and that *Austin* and *McConnell* were outliers in our First Amendment tradition. Part IV, *infra,* at 961 – 979, addresses the Court's treatment of the anticorruption, antidistortion, and shareholder protection rationales for regulating corporate electioneering.

2 See *Yee v. Escondido,* 503 U.S. 519, 535, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) ("[U]nder this Court's Rule 14.1(a), only the questions set forth in the petition, or fairly included therein, will be considered by the Court" (internal quotation marks and alteration

omitted)); *Wood v. Allen, ante,* at 304 130 S.Ct. 841, 175 L.Ed.2d 738, 2010 WL 173369 *5 ("[T]he fact that petitioner discussed [an] issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review" (internal quotation marks and brackets omitted)); *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 168–169, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004) ("We ordinarily do not decide in the first instance issues not decided below" (internal quotation marks omitted)).

3 The majority states that, in denying Citizens United's motion for a preliminary injunction, the District Court "addressed" the facial validity of BCRA § 203. *Ante,* at 892 – 893. That is true, in the narrow sense that the court observed the issue was foreclosed by *McConnell v. FEC,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). See 530 F.Supp.2d 274, 278 (D.D.C.2008) *(per curiam).* Yet as explained above, Citizens United subsequently dismissed its facial challenge, so that by the time the District Court granted the Federal Election Commission's (FEC) motion for summary judgment, App. 261a–262a, any question about statutory validity had dropped out of the case. That latter ruling by the District Court was the "final decision" from which Citizens United appealed to this Court under BCRA § 403(a)(3). As regards the lower court decision that has come before us, the claim that § 203 is facially unconstitutional was neither pressed nor passed upon in any form.

4 Shortly before Citizens United mooted the issue by abandoning its facial challenge, the Government advised the District Court that it "require[d] time to develop a factual record regarding [the] facial challenge." 1:07–cv–2240–RCL–RWR, Docket Entry No. 47, p. 4 (Mar. 26, 2008). By reinstating a claim that Citizens United abandoned, the Court gives it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal.

5 In fact, we do not even have a good evidentiary record of how § 203 has been affecting Citizens United, which never submitted to the District Court the details of *Hillary*'s funding or its own finances. We likewise have no evidence of how § 203 and comparable state laws were expected to affect corporations and unions in the future.
It is true, as the majority points out, that the *McConnell* Court evaluated the facial validity of § 203 in light of an extensive record. See *ante,* at 893 – 894. But that record is not before us in this case. And in any event, the majority's argument for striking down § 203 depends on its contention that the statute has proved too "chilling" in practice—and in particular on the contention that the controlling opinion in *WRTL,* 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007), failed to bring sufficient clarity and "breathing space" to this area of law. See *ante,* at 892, 894 – 897. We have no record with which to assess that claim. The Court complains at length about the burdens of complying with § 203, but we have no meaningful evidence to show how regulated corporations and unions have experienced its restrictions.

6 Our cases recognize a "type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449, n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotation marks omitted). Citizens United has not made an overbreadth argument, and "[w]e generally do not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law," *ibid.* (internal quotation marks omitted). If our colleagues nonetheless concluded that § 203's fatal flaw is that it affects too much protected speech, they should have invalidated it for overbreadth and given guidance as to which applications are permissible, so that Congress could go about repairing the error.

7 Also perplexing is the majority's attempt to pass blame to the Government for its litigating position. By "hold[ing] out the possibility of ruling for Citizens United on a narrow ground yet refrain[ing] from adopting that position," the majority says, the Government has caused "added uncertainty [that] demonstrates the necessity to address the question of statutory validity." *Ante,* at 895. Our colleagues have apparently never heard of an alternative argument. Like every litigant, the Government would prefer to win its case outright; failing that, it would prefer to lose on a narrow ground. The fact that there are numerous different ways this case could be decided, and that the Government acknowledges as much, does not demonstrate anything about the propriety of a facial ruling.

8 The majority's "chilling" argument is particularly inapposite with respect to 2 U.S.C. § 441b's longstanding restriction on the use of corporate general treasury funds for express advocacy. If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the "magic words" test of *Buckley v. Valeo,* 424 U.S. 1, 44, n. 52, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam).* Yet even though Citizens United's briefs never once mention § 441b's restriction on express advocacy; even though this restriction does not generate chilling concerns; and even though no one has suggested that *Hillary* counts as express advocacy; the majority nonetheless reaches out to opine that this statutory provision is "invalid" as well. *Ante,* at 913.

9 The majority adds that the distinction between facial and as-applied challenges does not have "some automatic effect" that mechanically controls the judicial task. *Ante,* at 893. I agree, but it does not follow that in any given case we should ignore the distinction, much less invert it.

10 Professor Fallon proposes an intricate answer to this question that the majority ignores. Fallon 1327–1359. It bears mention that our colleagues have previously cited Professor Fallon's article for the exact opposite point from the one they wish to make today. In

Gonzales v. Carhart, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), the Court explained that "[i]t is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop," and "[f]or this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.' " *Id.*, at 168, 127 S.Ct. 1610 (opinion for the Court by KENNEDY, J.) (quoting Fallon 1328 (second alteration in original)).

11 Internal Revenue Code § 501(c)(4) applies, *inter alia*, to nonprofit organizations "operated exclusively for the promotion of social welfare, ... the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

12 THE CHIEF JUSTICE is therefore much too quick when he suggests that, "[e]ven if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United—because corporations as well as individuals enjoy the pertinent First Amendment rights—would mean that any other corporation raising the same challenge would also win." *Ante*, at 919 (concurring opinion). That conclusion would only follow if the Court were to ignore Citizens United's plausible as-applied arguments and instead take the implausible position that *all* corporations and *all* types of expenditures enjoy the same First Amendment protections, which *always* trump the interests in regulation. At times, the majority appears to endorse this extreme view. At other times, however, it appears to suggest that nonprofit corporations have a better claim to First Amendment protection than for-profit corporations, see *ante*, at 897, 907, "advocacy" organizations have a better claim than other nonprofits, *ante*, at 897, domestic corporations have a better claim than foreign corporations, *ante*, at 911 – 912, small corporations have a better claim than large corporations, *ante*, at 906 – 908, and printed matter has a better claim than broadcast communications, *ante*, at 904. The majority never uses a multinational business corporation in its hypotheticals.

13 The Court entirely ignores this statutory argument. It concludes that § 203 applies to *Hillary* on the basis of the film's content, *ante*, at 889 – 890, without considering the possibility that § 203 does not apply to video-on-demand transmissions generally.

14 See *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1148 (C.A.10 2007) (adopting this rule and noting that "every other circuit to have addressed this issue" has done likewise); Brief for Independent Sector as *Amicus Curiae* 10–11 (collecting cases). The Court rejects this solution in part because the Government "merely suggest[s] it" and "does not say that it agrees with the interpretation." *Ante*, at 892. Our colleagues would thus punish a defendant for showing insufficient excitement about a ground it has advanced, at the same time that they decide the case on a ground the plaintiff expressly abandoned. The Court also protests that a *de minimis* standard would "requir[e] intricate case-by-case determinations." *Ante*, at 892. But *de minimis* tests need not be intricate at all. A test that granted *MCFL* status to § 501(c)(4) organizations if they received less than a fixed dollar amount of business donations in the previous year, or if such donations represent less than a fixed percentage of their total assets, would be perfectly easy to understand and administer.

15 Another bypassed ground, not briefed by the parties, would have been to revive the Snowe–Jeffords Amendment in BCRA § 203(c), allowing certain nonprofit corporations to pay for electioneering communications with general treasury funds, to the extent they can trace the payments to individual contributions. See Brief for National Rifle Association as *Amicus Curiae* 5–15 (arguing forcefully that Congress intended this result).

16 THE CHIEF JUSTICE finds our discussion of these narrower solutions "quite perplexing" because we suggest that the Court should "latch on to one of them in order to avoid reaching the broader constitutional question," without doing the same ourselves. *Ante*, at 918 – 919. There is nothing perplexing about the matter, because we are not similarly situated to our colleagues in the majority. We do not share their view of the First Amendment. Our reading of the Constitution would not lead us to strike down any statutes or overturn any precedents in this case, and we therefore have no occasion to practice constitutional avoidance or to vindicate Citizens United's as-applied challenge. Each of the arguments made above is surely at least as strong as the statutory argument the Court accepted in last year's Voting Rights Act case, *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009).

17 I will have more to say shortly about the merits—about why *Austin* and *McConnell* are not doctrinal outliers, as the Court contends, and why their logic is not only defensible but also compelling. For present purposes, I limit the discussion to *stare-decisis*-specific considerations.

18 THE CHIEF JUSTICE suggests that *Austin* has been undermined by subsequent dissenting opinions. *Ante*, at 934. Under this view, it appears that the more times the Court stands by a precedent in the face of requests to overrule it, the weaker that precedent becomes. THE CHIEF JUSTICE further suggests that *Austin* "is uniquely destabilizing because it threatens to subvert our Court's decisions even outside" its particular facts, as when we applied its reasoning in *McConnell*. *Ante*, at 922. Once again, the theory seems to be that the more we utilize a precedent, the more we call it into question. For those who believe *Austin* was correctly decided—as the Federal Government and the States have long believed, as the majority of Justices to have served on the Court since *Austin* have believed, and as we continue to believe—there is nothing "destabilizing" about the prospect of its continued application. It is gutting campaign finance laws across the country, as the Court does today, that will be destabilizing.

19 Additionally, the majority cites some recent scholarship challenging the historical account of campaign finance law given in *United*

States v. Automobile Workers, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957). *Ante*, at 912. *Austin* did not so much as allude to this historical account, much less rely on it. Even if the scholarship cited by the majority is correct that certain campaign finance reforms were less deliberate or less benignly motivated than *Automobile Workers* suggested, the point remains that this body of law has played a significant and broadly accepted role in American political life for decades upon decades.

20 See Brief for State of Montana et al. as *Amici Curiae* 5–13; see also Supp. Brief for Senator John McCain et al. as *Amici Curiae* 1a–8a (listing 24 States that presently limit or prohibit independent electioneering expenditures from corporate general treasuries).

21 Magleby, The Importance of the Record in *McConnell v. FEC*, 3 Election L. J. 285 (2004).

22 To be sure, the majority may respond that Congress can correct the imbalance by removing BCRA's soft-money limits. Cf. Tr. of Oral Arg. 24 (Sept. 9, 2009) (query of KENNEDY, J.). But this is no response to any legislature that takes campaign finance regulation seriously. It merely illustrates the breadth of the majority's deregulatory vision.

23 See Brief for Committee for Economic Development as *Amicus Curiae;* Brief for American Independent Business Alliance as *Amicus Curiae*. But see Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae*.

24 See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3, 9.

25 See Brief for Independent Sector as *Amicus Curiae* 16–20.

26 See Brief for State of Montana et al. as *Amici Curiae*.

27 The FEC established this process following the Court's June 2007 decision in that case, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329. In the brief interval between the establishment of this process and the 2008 election, corporations and unions used it to make $108.5 million in electioneering communications. Supp. Brief for Appellee 22–23; FEC, Electioneering Communication Summary, online at http://fec.gov/finance/disclosure/ECSummary.shtml (all Internet materials as visited Jan. 18, 2010, and available in Clerk of Court's case file).

28 Concededly, *Austin* and *McConnell* were constitutional decisions, and we have often said that "claims of *stare decisis* are at their weakest in that field, where our mistakes cannot be corrected by Congress." *Vieth v. Jubelirer*, 541 U.S. 267, 305, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). As a general matter, this principle is a sound one. But the principle only takes on real force when an earlier ruling has obstructed the normal democratic process; it is the fear of making "mistakes [that] cannot be corrected by Congress," *ibid.*, that motivates us to review constitutional precedents with a more critical eye. *Austin* and *McConnell* did not obstruct state or congressional legislative power in any way. Although it is unclear how high a bar today's decision will pose to future attempts to regulate corporate electioneering, it will clearly restrain much legislative action.

29 See FEC, Number of Federal PAC's Increases, http://fec.gov/press/ press2008/20080812paccount.shtml.

30 See Supp. Brief for Appellee 16 (citing FEC statistics placing this figure at $840 million). The majority finds the PAC option inadequate in part because "[a] PAC is a separate association from the corporation." *Ante*, at 897. The formal "separateness" of PACs from their host corporations—which administer and control the PACs but which cannot funnel general treasury funds into them or force members to support them—is, of course, the whole point of the PAC mechanism.

31 Roaming far afield from the case at hand, the majority worries that the Government will use § 203 to ban books, pamphlets, and blogs. *Ante*, at 896, 904, 912 – 913. Yet by its plain terms, § 203 does not apply to printed material. See 2 U.S.C. § 434(f)(3)(A)(i); see also 11 CFR § 100.29(c)(1) ("[E]lectioneering communication does not include communications appearing in print media"). And in light of the ordinary understanding of the terms "broadcast, cable, [and] satellite," 2 U.S.C. § 434(f)(3)(A)(i), coupled with Congress' clear aim of targeting "a virtual torrent of televised election-related ads," *McConnell*, 540 U.S., at 207, 124 S.Ct. 619, we highly doubt that § 203 could be interpreted to apply to a Web site or book that happens to be transmitted at some stage over airwaves or cable lines, or that the FEC would ever try to do so. See 11 CFR § 100.26 (exempting most Internet communications from regulation as advertising); § 100.155 (exempting uncompensated Internet activity from regulation as an expenditure); Supp. Brief for Center for Independent Media et al. as *Amici Curiae* 14 (explaining that "the FEC has consistently construed [BCRA's] media exemption to apply to a variety of non-traditional media"). If it should, the Government acknowledges "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009).

32 As the Government points out, with a media corporation there is also a lesser risk that investors will not understand, learn about, or support the advocacy messages that the corporation disseminates. Supp. Reply Brief for Appellee 10. Everyone knows and expects

that media outlets may seek to influence elections in this way.

33 2 U.S.C. § 434(f)(3)(A)(i).

34 § 434(f)(3)(C).

35 § 434(f)(3)(A)(i)(II).

36 § 441b(b); *McConnell*, 540 U.S., at 211, 124 S.Ct. 619.

37 § 441b(b)(2)(C).

38 *WRTL*, 551 U.S. 449, 470, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of Roberts, C.J.).

39 It is likewise nonsense to suggest that the FEC's " 'business is to censor.' " *Ante*, at 896 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). The FEC's business is to administer and enforce the campaign finance laws. The regulatory body at issue in *Freedman* was a state *board of censors* that had virtually unfettered discretion to bar distribution of motion picture films it deemed not to be " 'moral and proper.' " See *id.*, at 52–53, and n. 2, 85 S.Ct. 734. No movie could be shown in the State of Maryland that was not first approved and licensed by the board of censors. *Id.*, at 52, n. 1, 85 S.Ct. 734. It is an understatement to say that *Freedman* is not on point, and the majority's characterization of the FEC is deeply disconcerting.

40 Citizens United has administered this PAC for over a decade. See Defendant FEC's Memorandum in Opposition to Plaintiff's Second Motion for Preliminary Injunction in No. 07–2240 (ARR, RCL, RWR) (DC), p. 20. Citizens United also operates multiple "527" organizations that engage in partisan political activity. See Defendant FEC's Statement of Material Facts as to Which There Is No Genuine Dispute in No. 07–2240(DC), ¶¶ 22–24.

41 See, *e.g.*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

42 See, *e.g.*, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) ("In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (internal quotation marks omitted)).

43 See, *e.g.*, *Parker v. Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").

44 See, *e.g.*, 2 U.S.C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election).

45 See, *e.g.*, *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 550, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding statute prohibiting Executive Branch employees from taking "an active part in political management or in political campaigns" (internal quotation marks omitted)); *Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (same); *United States v. Wurzbach*, 280 U.S. 396, 398, 50 S.Ct. 167, 74 L.Ed. 508 (1930) (upholding statute prohibiting federal employees from making contributions to Members of Congress for "any political purpose whatever" (internal quotation marks omitted)); *Ex parte Curtis*, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882) (upholding statute prohibiting certain federal employees from giving money to other employees for political purposes).

46 The majority states that the cases just cited are "inapposite" because they "stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Ante*, at 899. The majority's creative suggestion that these cases stand only for that one proposition is quite implausible. In any event, the proposition lies at the heart of this case, as Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.

47 Outside of the law, of course, it is a commonplace that the identity and incentives of the speaker might be relevant to an assessment of his speech. See Aristotle, Poetics § 11-2(vi), pp. 43–44 (M. Heath transl. 1996) ("In evaluating any utterance or action, one must

take into account not just the moral qualities of what is actually done or said, but also the identity of the agent or speaker, the addressee, the occasion, the means, and the motive"). The insight that the identity of speakers is a proper subject of regulatory concern, it bears noting, motivates the disclaimer and disclosure provisions that the Court today upholds.

48 I dissented in *Forbes* because the broadcaster's decision to exclude the respondent from its debate was done "on the basis of entirely subjective, ad hoc judgments," 523 U.S., at 690, 118 S.Ct. 1633, that suggested anticompetitive viewpoint discrimination, *id.*, at 693–694, 118 S.Ct. 1633, and lacked a compelling justification. Needless to say, my concerns do not apply to the instant case.

49 The law at issue in *Burson* was far from unusual. "[A]ll 50 States," the Court observed, "limit access to the areas in or around polling places." 504 U.S., at 206, 112 S.Ct. 1846 (plurality opinion); see also Note, 91 Ky. L. J. 715, 729, n. 89, 747–769 (2003) (collecting statutes). I dissented in *Burson* because the evidence adduced to justify Tennessee's law was "exceptionally thin," 504 U.S., at 219, 112 S.Ct. 1846, and "the reason for [the] restriction [had] disappear[ed]" over time, *id.*, at 223, 112 S.Ct. 1846. "In short," I concluded, "Tennessee ha[d] failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression." *Id.*, at 225, 112 S.Ct. 1846. These criticisms are inapplicable to the case before us.

50 They are likewise entitled to regulate media corporations differently from other corporations "to ensure that the law 'does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.' " *McConnell*, 540 U.S., at 208, 124 S.Ct. 619 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)).

51 The Court all but confesses that a categorical approach to speaker identity is untenable when it acknowledges that Congress might be allowed to take measures aimed at "preventing foreign individuals or associations from influencing our Nation's political process." *Ante*, at 911. Such measures have been a part of U.S. campaign finance law for many years. The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country." Teachout, The Anti–Corruption Principle, 94 Cornell L.Rev. 341, 393, n. 245 (2009) (hereinafter Teachout); see also U.S. Const., Art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust ... shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"). Professor Teachout observes that a corporation might be analogized to a foreign power in this respect, "inasmuch as its legal loyalties necessarily exclude patriotism." Teachout 393, n. 245.

52 See A. Bickel, The Supreme Court and the Idea of Progress 59–60 (1978); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 39–40 (1965); Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L.Rev. 2409, 2508–2509 (2003). Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes. Cf. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L.Rev. 1369, 1383–1384 (1994) (hereinafter Strauss).

53 Scholars have found that only a handful of business corporations were issued charters during the colonial period, and only a few hundred during all of the 18th century. See E. Dodd, American Business Corporations Until 1860, p. 197 (1954); L. Friedman, A History of American Law 188–189 (2d ed. 1985); Baldwin, American Business Corporations Before 1789, 8 Am. Hist. Rev. 449, 450–459 (1903). Justice SCALIA quibbles with these figures; whereas we say that "a few hundred" charters were issued to business corporations during the 18th century, he says that the number is "approximately 335." *Ante*, at 925 (concurring opinion). Justice SCALIA also raises the more serious point that it is improper to assess these figures by today's standards, *ibid.*, though I believe he fails to substantiate his claim that "the corporation was a familiar figure in American economic life" by the century's end, *ibid.* (internal quotation marks omitted). His formulation of that claim is also misleading, because the relevant reference point is not 1800 but the date of the First Amendment's ratification, in 1791. And at that time, the number of business charters must have been significantly smaller than 335, because the pace of chartering only began to pick up steam in the last decade of the 18th century. More than half of the century's total business charters were issued between 1796 and 1800. Friedman, History of American Law, at 189.

54 See Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in 12 The Works of Thomas Jefferson 42, 44 (P. Ford ed. 1905) ("I hope we shall ... crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country").

55 In normal usage then, as now, the term "speech" referred to oral communications by individuals. See, *e.g.*, 2 S. Johnson, Dictionary of the English Language 1853–1854 (4th ed. 1773) (reprinted 1978) (listing as primary definition of "speech": "The power of articulate utterance; the power of expressing thoughts by vocal words"); 2 N. Webster, American Dictionary of the English Language (1828) (reprinted 1970) (listing as primary definition of "speech": "The faculty of uttering articulate sounds or words, as in human beings; the faculty of expressing thoughts by words or articulate sounds. *Speech* was given to man by his Creator for the noblest purposes"). Indeed, it has been "claimed that the notion of institutional speech ... did not exist in post-revolutionary America." Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. Rev. 1637, 1654 (2006); see also Bezanson, Institutional Speech, 80 Iowa L. Rev. 735, 775 (1995) ("In the intellectual heritage of the eighteenth century, the idea that free speech was

individual and personal was deeply rooted and clearly manifest in the writings of Locke, Milton, and others on whom the framers of the Constitution and the Bill of Rights drew"). Given that corporations were conceived of as artificial entities and do not have the technical capacity to "speak," the burden of establishing that the Framers and ratifiers understood "the freedom of speech" to encompass corporate speech is, I believe, far heavier than the majority acknowledges.

56 Postratification practice bolsters the conclusion that the First Amendment, "as originally understood," *ante*, at 906, did not give corporations political speech rights on a par with the rights of individuals. Well into the modern era of general incorporation statutes, "[t]he common law was generally interpreted as prohibiting corporate political participation," *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 819, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (White, J., dissenting), and this Court did not recognize *any* First Amendment protections for corporations until the middle part of the 20th century, see *ante*, at 899 – 900 (listing cases).

57 In fact, the Free Press Clause might be turned against Justice SCALIA, for two reasons. First, we learn from it that the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of "speakers," or speech outlets or forms. Second, the Court's strongest historical evidence all relates to the Framers' views on the press, see *ante*, at 906 – 907; *ante*, at 926 – 928 (SCALIA, J., concurring), yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home. The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of "identity"-based distinctions might be permissible after all. Once one accepts that much, the intellectual edifice of the majority opinion crumbles.

58 Cf. L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 4 (1960) ("The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us" as the Free Speech and Press Clause).

59 As the majority notes, there is some academic debate about the precise origins of these developments. *Ante*, at 912; see also n. 19, *supra*. There is *always* some academic debate about such developments; the motives of legislatures are never entirely clear or unitary. Yet the basic shape and trajectory of 20th-century campaign finance reform are clear, and one need not take a naïve or triumphalist view of this history to find it highly relevant. The Court's skepticism does nothing to mitigate the absurdity of its claim that *Austin* and *McConnell* were outliers. Nor does it alter the fact that five Justices today destroy a longstanding American practice.

60 See *Pipefitters v. United States*, 407 U.S. 385, 409, 414–415, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972) (reading the statutory bar on corporate and union campaign spending not to apply to "the voluntary donations of employees," when maintained in a separate account, because "[t]he dominant [legislative] concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member"); *Automobile Workers*, 352 U.S., at 592, 77 S.Ct. 529 (advising the District Court to consider on remand whether the broadcast in question was "paid for out of the general dues of the union membership or [whether] the funds [could] be fairly said to have been obtained on a voluntary basis"); *United States v. CIO*, 335 U.S. 106, 123, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (observing that "funds voluntarily contributed [by union members or corporate stockholders] for election purposes" might not be covered by the expenditure bar). Both the *Pipefitters* and the *Automobile Workers* Courts approvingly referenced Congress' goal of reducing "the effect of aggregated wealth on federal elections," understood as wealth drawn from a corporate or union general treasury without the stockholders' or members' "free and knowing choice." *Pipefitters*, 407 U.S., at 416, 92 S.Ct. 2247; see *Automobile Workers*, 352 U.S., at 582, 77 S.Ct. 529.
The two dissenters in *Pipefitters* would not have read the statutory provision in question, a successor to § 304 of the Taft–Hartley Act, to allow such robust use of corporate and union funds to finance otherwise prohibited electioneering. "This opening of the door to extensive corporate and union influence on the elective and legislative processes," Justice Powell wrote, "must be viewed with genuine concern. This seems to me to be a regressive step as contrasted with the numerous legislative and judicial actions in recent years designed to assure that elections are indeed free and representative." 407 U.S., at 450, 92 S.Ct. 2247 (opinion of Powell, J., joined by Burger, C.J.).

61 Specifically, these corporations had to meet three conditions. First, they had to be formed "for the express purpose of promoting political ideas," so that their resources reflected political support rather than commercial success. *MCFL*, 479 U.S., at 264, 107 S.Ct. 616. Next, they had to have no shareholders, so that "persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Ibid.* Finally, they could not be "established by a business corporation or a labor union," nor "accept contributions from such entities," lest they "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *Ibid.*

62 According to THE CHIEF JUSTICE, we are "erroneou[s]" in claiming that *McConnell* and *Beaumont* " 'reaffirmed' " *Austin*. *Ante*, at 919 – 920. In both cases, the Court explicitly relied on *Austin* and quoted from it at length. See 540 U.S., at 204–205, 124 S.Ct. 619, 539 U.S., at 153–155, 158, 160, 163, 123 S.Ct. 2200; see also *ante*, at 893 – 894 (opinion of the Court) ("The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion"); Brief for Appellants National Rifle Association et al., O.T. 2003, No. 02–1675, p. 21 ("*Beaumont* reaffirmed ... the *Austin* rationale for restricting expenditures"). The *McConnell* Court did so in the teeth of vigorous protests by Justices in today's majority that *Austin* should be overruled. See *ante*, at 893 – 894 (citing relevant passages); see also *Beaumont*, 539 U.S., at 163–164, 123 S.Ct. 2200 (KENNEDY, J., concurring in judgment). Both Courts also heard criticisms of *Austin* from parties or *amici*. See Brief for Appellants Chamber of Commerce of the

United States et al., O.T.2003, No. 02–1756, p. 35, n. 22; Reply Brief for Appellants/Cross–Appellees Senator Mitch McConnell et al., O.T. 2003, No. 02–1674, pp. 13–14; Brief for Pacific Legal Foundation as *Amicus Curiae* in *FEC v. Beaumont,* O.T. 2002, No. 02–403, *passim*. If this does not qualify as reaffirmation of a precedent, then I do not know what would.

63 Cf. *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (recognizing "the broader threat from politicians too compliant with the wishes of large contributors"). Though discrete in scope, these experiments must impose some meaningful limits if they are to have a chance at functioning effectively and preserving the public's trust. "Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." *McConnell,* 540 U.S., at 153, 124 S.Ct. 619. There should be nothing controversial about the proposition that the influence being targeted is "undue." In a democracy, officeholders should not make public decisions with the aim of placating a financial benefactor, except to the extent that the benefactor is seen as representative of a larger constituency or its arguments are seen as especially persuasive.

64 The majority declares by fiat that the appearance of undue influence by high-spending corporations "will not cause the electorate to lose faith in our democracy." *Ante,* at 910. The electorate itself has consistently indicated otherwise, both in opinion polls, see *McConnell v. FEC,* 251 F.Supp.2d 176, 557–558, 623–624 (D.D.C.2003) (opinion of Kollar–Kotelly, J.), and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.

65 Quite distinct from the interest in preventing improper influences on the electoral process, I have long believed that "a number of [other] purposes, both legitimate and substantial, may justify the imposition of reasonable limitations on the expenditures permitted during the course of any single campaign." *Davis v. FEC,* 554 U.S. 724, 751, 128 S.Ct. 2759, 2779, 171 L.Ed.2d 737 (2008) (opinion concurring in part and dissenting in part). In my judgment, such limitations may be justified to the extent they are tailored to "improving the quality of the exposition of ideas" that voters receive, *ibid.,* "free[ing] candidates and their staffs from the interminable burden of fundraising," *ibid.* (internal quotation marks omitted), and "protect[ing] equal access to the political arena," *Randall v. Sorrell,* 548 U.S. 230, 278, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting) (internal quotation marks omitted). I continue to adhere to these beliefs, but they have not been briefed by the parties or *amici* in this case, and their soundness is immaterial to its proper disposition.

66 In fact, the notion that the "electioneering communications" covered by § 203 can breed *quid pro quo* corruption or the appearance of such corruption has only become more plausible since we decided *McConnell*. Recall that THE CHIEF JUSTICE's controlling opinion in *WRTL* subsequently limited BCRA's definition of "electioneering communications" to those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S., at 470, 127 S.Ct. 2652. The upshot was that after *WRTL*, a corporate or union expenditure could be regulated under § 203 only if everyone would understand it as an endorsement of or attack on a particular candidate for office. It does not take much imagination to perceive why this type of advocacy might be especially apt to look like or amount to a deal or a threat.

67 "We must give weight" and "due deference" to Congress' efforts to dispel corruption, the Court states at one point. *Ante,* at 911. It is unclear to me what these maxims mean, but as applied by the Court they clearly do not entail "deference" in any normal sense of that term.

68 Justice BREYER has suggested that we strike the balance as follows: "We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution ... insulates legislators from effective electoral challenge." *Shrink Missouri,* 528 U.S., at 403–404, 120 S.Ct. 897 (concurring opinion).

69 THE CHIEF JUSTICE denies this, *ante,* at 921 – 923, citing scholarship that has interpreted *Austin* to endorse an equality rationale, along with an article by Justice Thurgood Marshall's former law clerk that states that Marshall, the author of *Austin,* accepted "equality of opportunity" and "equalizing access to the political process" as bases for campaign finance regulation, Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 How. L. J. 655, 667–668 (2009) (internal quotation marks omitted). It is fair to say that *Austin* can bear an egalitarian reading, and I have no reason to doubt this characterization of Justice Marshall's beliefs. But the fact that *Austin* can be read a certain way hardly proves THE CHIEF JUSTICE's charge that there is nothing more to it. Many of our precedents can bear multiple readings, and many of our doctrines have some "equalizing" implications but do not rest on an equalizing theory: for example, our takings jurisprudence and numerous rules of criminal procedure. More importantly, the *Austin* Court expressly declined to rely on a speech-equalization rationale, see 494 U.S., at 660, 110 S.Ct. 1391, and we have never understood *Austin* to stand for such a rationale. Whatever his personal views, Justice Marshall simply did not write the opinion that THE CHIEF JUSTICE suggests he did; indeed, he "would have viewed it as irresponsible to write an opinion that boldly staked out a rationale based on equality that no one other than perhaps Justice White would have even considered joining," Garrett, 52 How. L. J., at 674.

70 In state elections, even domestic corporations may be "foreign" controlled in the sense that they are incorporated in another jurisdiction and primarily owned and operated by out-of-state residents.

71 Regan, Corporate Speech and Civic Virtue, in Debating Democracy's Discontent 289, 302 (A. Allen & M. Regan eds.1998) (hereinafter Regan).

72 Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, see, *e.g.*, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819) (Marshall, C. J.), a nexus of explicit and implicit contracts, see, *e.g.*, F. Easterbrook & D. Fischel, The Economic Structure of Corporate Law 12 (1991), a mediated hierarchy of stakeholders, see, *e.g.*, Blair & Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999) (hereinafter Blair & Stout), or any other recognized model. *Austin* referred to the structure and the advantages of corporations as "state-conferred" in several places, 494 U.S., at 660, 665, 667, 110 S.Ct. 1391, but its antidistortion argument relied only on the basic descriptive features of corporations, as sketched above. It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern. Cf. Hansmann & Kraakman 441, n. 5.

73 Not all corporations support BCRA § 203, of course, and not all corporations are large business entities or their tax-exempt adjuncts. Some nonprofit corporations are created for an ideological purpose. Some closely held corporations are strongly identified with a particular owner or founder. The fact that § 203, like the statute at issue in *Austin*, regulates some of these corporations' expenditures does not disturb the analysis above. See 494 U.S., at 661–665, 110 S.Ct. 1391. Small-business owners may speak in their own names, rather than the business', if they wish to evade § 203 altogether. Nonprofit corporations that want to make unrestricted electioneering expenditures may do so if they refuse donations from businesses and unions and permit members to disassociate without economic penalty. See *MCFL*, 479 U.S. 238, 264, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Making it plain that their decision is not motivated by a concern about BCRA's coverage of nonprofits that have ideological missions but lack *MCFL* status, our colleagues refuse to apply the Snowe–Jeffords Amendment or the lower courts' *de minimis* exception to *MCFL*. See *ante*, at 891 – 892.

74 Of course, no presiding person in a courtroom, legislature, classroom, polling place, or family dinner would take this hyperbole literally.

75 Under the majority's view, the legislature is thus damned if it does and damned if it doesn't. If the legislature gives media corporations an exemption from electioneering regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.

76 I note that, among the many other regulatory possibilities it has left open, ranging from new versions of § 203 supported by additional evidence of *quid pro quo* corruption or its appearance to any number of tax incentive or public financing schemes, today's decision does not require that a legislature rely solely on these mechanisms to protect shareholders. Legislatures remain free in their incorporation and tax laws to condition the types of activity in which corporations may engage, including electioneering activity, on specific disclosure requirements or on prior express approval by shareholders or members.

1 BCRA imposes similar disclosure requirements. See, *e.g.*, 2 U.S.C. § 434(f)(2)(F) ("Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" must disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement").

2 But cf. *Hill v. Colorado*, 530 U.S. 703, 707–710, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (approving a statute restricting speech "within 100 feet" of abortion clinics because it protected women seeking an abortion from " 'sidewalk counseling,' " which "consists of efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech,' " and which "sometimes" involved "strong and abusive language in face-to-face encounters").

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16 N.Y.3d 173
Court of Appeals of New York.

MANDARIN TRADING LTD., Appellant,
v.
Guy WILDENSTEIN et al., Respondents.

Feb. 10, 2011.

Synopsis

Background: Buyer of painting brought action against provider of appraisal letter and others, asserting claims for fraudulent and negligent misrepresentation, breach of contract, breach of implied covenant of good faith and fair dealing, and unjust enrichment. The Supreme Court, New York County, Emily Jane Goodman, J., 17 Misc.3d 1118(A), 2007 WL 3101235, granted defendants' motion to dismiss, and buyer appealed. The Supreme Court, Appellate Division, 65 A.D.3d 448, 884 N.Y.S.2d 47, affirmed, and buyer appealed as of right.

Holdings: The Court of Appeals, Jones, J., held that:

appraiser's letter did not provide basis for cause of action for fraudulent misrepresentation;

buyer failed to state claim for fraudulent omission;

buyer failed to state claim for negligent misrepresentation;

buyer failed to state claim for breach of contract; and

connection between buyer and appraiser was too attenuated to support claim for unjust enrichment.

Affirmed.

Attorneys and Law Firms

*****467** Crowell & Moring LLP, New York City (Clifton S. Elgarten, Samaa Haridi, Birgit Kurtz and Daniel Ginzburg of counsel), for appellant.

Schindler Cohen & Hochman LLP, New York City (Steven R. Schindler and Daniel E. Shaw of counsel), for respondents.

***176 OPINION OF THE COURT**

JONES, J.

****1106** In a dispute arising from the purchase and sale of the painting *Paysage aux Trois Arbres* by Paul Gauguin, this Court is asked to determine whether claims sounding in fraud, negligent misrepresentation, breach of contract, and unjust enrichment were properly pleaded in the plaintiff's complaint.

In July 2000, J. Amir Cohen approached plaintiff Mandarin Trading Ltd.* to solicit interest in the purchase of the painting for investment purposes. Cohen explained that he could arrange a transaction for the sale and subsequent resale of the painting at an auction. Mandarin was interested in the opportunity, but sought (1) an appraisal of the painting, (2) a report of its condition, and (3) a report of its prior ownership. Cohen agreed to obtain the requested information and recommended defendant ***177** Guy Wildenstein, an allegedly renowned expert on Gauguin, for the appraisal.

On July 28, 2000, Wildenstein presented a written appraisal letter to Michel Reymondin, which stated that the painting was worth $15 million to $17 million. Neither Reymondin's role in the transactions, nor his relationship to the parties is pleaded. ****1107 ***468** Furthermore, the letter is addressed solely to Reymondin and neither indicates the purpose of the letter nor who requested the valuation of the painting. While the letter revealed that the painting was part of Mrs. Arthur Lehman's collection and was once sold by Wildenstein, it did not disclose any contemporaneous ownership interest. Mandarin received the letter, the complaint does not say from whom, on August 12, 2000.

On August 9, 2000, Cohen contacted and informed Mandarin that if the painting was purchased expeditiously, it could be sold at auction through Christie's at an optimum price. Christie's had outlined the logistics of the auction in a letter to Cohen in which Christie's proposed to hold an auction for the painting in New York with a reserve price of $12 million—a price below which the painting would not sell. Christie's estimated that the painting could sell for $12 million to $16 million.

Mandarin purchased the painting through a series of transactions that occurred during the period of August 16, 2000 to August 30, 2000. First, Peintures Hermes S.A., a company allegedly owned by Wildenstein, forwarded an invoice to Calypso Fine Art Ltd., an intermediary, for the sale transaction. Mandarin then wired $11.3 million for the purchase of the painting to Calypso's account. Finally,

Calypso paid $9.5 million to Peintures in exchange for the painting and then transferred the painting to Mandarin. It is further alleged that Peintures deposited $8.8 million into a bank account owned by Wildenstein.

On November 8, 2000, Christie's held an auction for the painting, but the highest bid failed to exceed the reserve price and the painting was not sold. Mandarin has since retained ownership of the painting.

Before discovery, Supreme Court granted Wildenstein's CPLR 3211(a)(1) and (7) motion to dismiss Mandarin's complaint (17 Misc.3d 1118[A], 2007 N.Y. Slip Op. 52059[U], 2007 WL 3101235). Supreme Court held that Mandarin's fraud claims failed because the complaint did not allege that Wildenstein intended to defraud Mandarin through a misstatement of fact upon which Mandarin could ***178** justifiably rely. The negligent misrepresentation claim was dismissed for lack of a special relationship, privity, or a privity-like relationship between the parties. In addition, the breach of contract claims were dismissed for failure to plead the existence of a contract. Finally, the unjust enrichment claim was dismissed because Supreme Court concluded that Mandarin unjustifiably relied upon the appraisal.

In a 3–2 decision, the Appellate Division affirmed dismissal of Mandarin's complaint by holding that the pleadings did not sufficiently allege claims for fraud, negligent misrepresentation, breach of contract, and unjust enrichment (65 A.D.3d 448, 884 N.Y.S.2d 47 [1st Dept.2009]). One dissenting Justice voted to affirm dismissal of the claims at law, but to reinstate the equity claim of unjust enrichment, while the other dissenting Justice sought to reinstate Mandarin's entire complaint. Mandarin appeals to this Court as of right, from the two-Justice dissent, pursuant to CPLR 5601(a).

In the context of a CPLR 3211 motion to dismiss, the pleadings are "to be afforded a liberal construction. [The Court must] accept the facts as alleged in the complaint as true, [and] accord plaintiffs the benefit of every possible favorable inference" (*Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994] [citation omitted]; *see also Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 [1980]). Even affording Mandarin all favorable inferences ****1108 ***469** the complaint fails to sufficiently plead its claims, and we now affirm.

Fraud

Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996]; *see also Channel Master Corp. v. Aluminium Ltd. Sales*, 4 N.Y.2d 403, 406–407, 176 N.Y.S.2d 259, 151 N.E.2d 833 [1958]). Furthermore, where a cause of action is based in fraud, "the circumstances constituting the wrong shall be stated in detail" (*see* CPLR 3016[b]; *see also Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 373 N.E.2d 278 [1977] ["(CPLR 3016[b]) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of"]).

Mandarin argues that the complaint properly pleads that Wildenstein's omission of his ownership interest in the painting ***179** when providing the appraisal was a fraudulent, material misrepresentation intended to induce Mandarin's reliance. Wildenstein asserts that the complaint fails to plead that Wildenstein specifically intended to defraud Mandarin, and also owed a fiduciary duty to disclose an alleged ownership interest.

Wildenstein's letter regarding the painting's value constituted nonactionable opinion that provided no basis for a fraud claim (*see Jacobs v. Lewis*, 261 A.D.2d 127, 127–128, 689 N.Y.S.2d 468 [1st Dept.1999] ["alleged misrepresentations amounted to no more than opinions and puffery or ultimately unfulfilled promises, and in either case were not actionable as fraud"]). The letter merely disclosed Wildenstein's familiarity with the painting, a belief that the painting was worth $15 million to $17 million, and an acknowledgement that the letter was addressed in response to Reymondin, with no mention of Mandarin.

Furthermore, with respect to a claim of fraudulent omission, the complaint fails to allege that Wildenstein owed a fiduciary duty to Mandarin (*see P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376, 754 N.Y.S.2d 245 [1st Dept.2003] ["A cause of action for fraudulent concealment requires, in addition to the four foregoing elements (of fraudulent misrepresentation), an allegation that the defendant had a duty to disclose material information and that it failed to do so"]).

The narrative within the complaint is devoid of facts

indicating any connection between Mandarin and Wildenstein that would give rise to a fiduciary duty. Highlighting this deficiency are pleadings that require leaps of fact and logic such as the unknown role played by Reymondin—the man who allegedly received the appraisal from Wildenstein. By failing to plead the role played by Reymondin or how he was related to the parties, no inference can be drawn, for example, that Wildenstein misrepresented his alleged ownership interest or the painting's value, knowing that Reymondin would transfer the information to Mandarin. Moreover, the letter offers no assistance to Mandarin's claim, in light of the fact that the letter was addressed solely to Reymondin, and in the absence of allegations creating a bridge between Mandarin and Wildenstein. Rather than alleging that Wildenstein misrepresented his ownership to Mandarin specifically, an insufficient, general allegation is proffered that Wildenstein was required to disclose ****1109 ***470** his interest because he should have known that a hypothetical purchaser would rely on the appraisal letter (*see Garelick v. Carmel*, 141 A.D.2d 501, 502, 529 N.Y.S.2d 126 [2d Dept.1988] ["Moreover, in order to plead a ***180** valid cause of action sounding in fraud, the complaint must set forth all of the elements of fraud including the making of material representations by the defendant to the plaintiff"]).

As such, Mandarin's fraud claims were properly dismissed.

Negligent Misrepresentation

It is well settled that "[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148, 831 N.Y.S.2d 364, 863 N.E.2d 585 [2007]; *see also Parrott v. Coopers & Lybrand*, 95 N.Y.2d 479, 483–484, 718 N.Y.S.2d 709, 741 N.E.2d 506 [2000]).

Mandarin argues that the Appellate Division majority erred in affirming dismissal of this claim because, here, a buyer-seller relationship established privity. Wildenstein responds that no relationship existed between the parties.

A special relationship may be established by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v. Schaefer*, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715, 675 N.E.2d 450 [1996]). Although Mandarin generally pleads that "a special relationship of trust or confidence" existed between the parties, the lack of allegations showing a relationship with Wildenstein mandates dismissal of this claim. The complaint does not allege whether Wildenstein had any contact with Mandarin, whether Mandarin solicited the appraisal directly from Wildenstein, whether Wildenstein knew the purpose of the appraisal letter, or whether Wildenstein was even aware of Mandarin's existence.

In *Kimmell*, the defendant sought to induce plaintiffs to invest in a business venture by directly sending them a memo regarding business projections, meeting with them personally, and sending out correspondence to assure the safety of the investment. We held that the record supported a finding that the defendant established a special relationship with the plaintiffs because of the financial skill and expertise of the defendant, and his continued attempts to communicate directly with the plaintiffs to induce their investment (*id.* at 264, 652 N.Y.S.2d 715, 675 N.E.2d 450).

Ravenna v. Christie's Inc., 289 A.D.2d 15, 734 N.Y.S.2d 21 (2001) involved a similar issue in the context of the sale of a painting where the ***181** plaintiff alleged negligent misrepresentation after meeting with a Christie's representative and receiving advice on the value of a painting. The Appellate Division held that gratuitous advice given in a single meeting, "which did not even create a business relationship, cannot be said to have created a relationship of trust and confidence" (*id.* at 16, 734 N.Y.S.2d 21).

Here, the pleadings fail to allege the existence of any relationship between Mandarin and Wildenstein that would support a negligent misrepresentation claim. Unlike the defendant in *Kimmell*, there are no allegations here that Wildenstein ever met with Mandarin, was retained by Mandarin for an appraisal, or knew that the appraisal would be used by Mandarin ****1110 ***471** for the purpose of purchasing the painting (*see Spitzer v. Christie's Appraisals*, 235 A.D.2d 266, 652 N.Y.S.2d 38 [1st Dept.1997]). And this case has an even more tenuous basis for finding privity, or a privity-like relationship, as it lacks even the bare, minimal contact of the parties in *Ravenna*. Wildenstein's art expertise alone cannot create a special relationship where otherwise the relationship between the parties is too attenuated.

Mandarin further argues that Wildenstein should have known or foreseen that the appraisal was requested by a purchaser for the purpose of buying the painting, but this Court has

"previously rejected a rule 'permitting recovery by any

> "foreseeable" plaintiff who relied on the negligently prepared report, and have rejected even a somewhat narrower rule that would permit recovery where the reliant party or class of parties was actually known or foreseen' but the individual defendant's conduct did not link it to that third party" (*Parrott*, 95 N.Y.2d at 485, 718 N.Y.S.2d 709, 741 N.E.2d 506).

Accordingly, without further allegations establishing a relationship between the parties, Mandarin's complaint fails and was properly dismissed.

Breach of Contract

Mandarin alleges that it has sufficiently pleaded a breach of contract claim because it was an intended third-party beneficiary to an appraisal contract between Wildenstein and Reymondin. However, the failure to allege a relationship between the parties again proves fatal to this claim as well.

Generally, a party alleging a breach of contract must "demonstrate the existence of a ... contract reflecting the terms and ***182** conditions of their ... purported agreement" (*American–European Art Assoc. v. Trend Galleries*, 227 A.D.2d 170, 171, 641 N.Y.S.2d 835 [1st Dept.1996]). In the context of a third-party beneficiary claim, the plaintiff must establish:

> "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate ... to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (*Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 [811 N.Y.S.2d 294, 844 N.E.2d 748] [2006]).

The complaint only offers conclusory allegations without pleading the pertinent terms of the purported agreement. We are left to speculate as to the parties involved and the conditions under which this alleged appraisal contract was formed. Consequently, by failing to plead the salient terms of a valid and binding contract, Mandarin cannot show that the contract was intended for its immediate benefit.

Unjust Enrichment

"The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 [1972]). A plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " (*Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48 [2d Dept.2004]; *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629–630, 840 N.Y.S.2d 445 [3d Dept.2007]).

Mandarin's unjust enrichment claim fails for the same deficiency as its ****1111 ***472** other claims—the lack of allegations that would indicate a relationship between the parties, or at least an awareness by Wildenstein of Mandarin's existence. Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated (*see Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012 [2007]).

Moreover, under the facts alleged, there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement. Without further allegations, the ***183** mere existence of a letter that happens to find a path to a prospective purchaser does not render this transaction one of equitable injustice requiring a remedy to balance a wrong. Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal (*see North Salem Psychiatric Servs., P.C. v. Medco Health Solutions, Inc.*, 50 A.D.3d 986, 854 N.Y.S.2d 905 [2d Dept.2008]; *Vassel v. Vassel*, 40 A.D.2d 713, 336 N.Y.S.2d 887 [2d Dept.1972], *aff'd* 33 N.Y.2d 533, 347 N.Y.S.2d 434, 301 N.E.2d 422 [1973]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Order affirmed, with costs.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ, SMITH and PIGOTT concur.

All Citations

16 N.Y.3d 173, 944 N.E.2d 1104, 919 N.Y.S.2d 465, 2011 N.Y. Slip Op. 00741

Footnotes

* Phoenix Capital Reserve Fund is the parent corporation of Mandarin. Phoenix Capital's director, Patrick Blum, was approached by Cohen to determine interest in purchase of the painting.

End of Document

64 Misc.3d 909
Supreme Court, Westchester County, New York.

MAPLE MEDICAL LLP, Plaintiff,
v.
Joseph SCOTT, D.O. and Medical Liability Mutual Insurance Company, Defendants.

51103/2019
|
Decided on July 7, 2019

Synopsis

Background: Employer partnership brought complaint against employee physician seeking declaratory judgment as to who was entitled to distribution payment made by medical malpractice mutual insurance company, which issued policy covering employee physician that was paid for by employer partnership, pursuant to demutualization plan approved following sale of company to a subsidiary, which formed a stock company. Employee physician moved for summary judgment, and employer partnership cross-moved for summary judgment.

The Supreme Court, Westchester County, Lawrence H. Ecker, J., held that awarding proceeds to employee physician would result in employee's unjust enrichment.

Motion denied and cross-motion granted.

Attorneys and Law Firms

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Rivkan Rakler LLP, Attorney for Defendants 926 Rxr Plaza Uniondale NY 1156

Opinion

Lawrence H. Ecker, J.

***910** Motion of defendant Joseph Scott, D.O.[1] (mot sequence No. 1), made pursuant to CPLR 3212, for an order granting summary judgment on the counterclaim for a declaratory judgment against plaintiff Maple Medical LLP, and cross motion of plaintiff (mot sequence No. 2), made pursuant to CPLR 3212, for an order granting summary judgment on the complaint as against Scott.

The court determines as follows:

This lawsuit is one of six litigations[2] before this court that involve plaintiff, as the employer partnership, and individual physicians, as plaintiff's employees. The parties in the separate actions are all represented by the same law firms.

At the heart of all of the actions is the same single legal issue: whether the physician employee or the employer partnership is entitled to a distribution payment made by Medical Liability Mutual Insurance Company ("MLMIC").[3] MLMIC is a medical ****825** malpractice insurance company that issued policies covering the employee physicians that were paid for by plaintiff as their employer. The parties in all six litigations seek, in essence, a declaratory judgment resolving this one central issue. As such, the court's finding herein will govern and resolve the pending motions in the other five actions.

Plaintiff is a limited liability partnership that operates a multispecialty medical practice in White Plains NY Pursuant to the employment agreement between Scott as employee and plaintiff as employer, Scott performed medical services for plaintiff. As part of Scott's employment compensation package, plaintiff paid the malpractice insurance premiums for coverage for Scott. Plaintiff was designated by Scott to serve as his agent for the purpose of administering the policy, the coverages, the reporting requirements, and the payment of the premium.

The policy insuring Scott was issued by MLMIC. At the time of that the insurance policy was issued, MLMIC was a mutual insurance ***911** company owned by its policyholders, one of whom was Scott.

Thereafter, MLMIC negotiated a sale of its business to a subsidiary of Berkshire-Hathaway, which formed a stock company, and paid MLMIC $2.5 Billion for the MLMIC assets. This demutualization plan ("the Plan") was approved by the New York State Department of Financial Services pursuant to Insurance Law § 7307. The Plan includes the methodology for the *pro rata* distribution of the proceeds of the sale to parties in interest. As for Scott's policy, the amount for the distribution allotted to the policy is $128,148 ("the Payment"). The question presented in this action is whether Scott or plaintiff is entitled to the Payment. Based upon the disagreement of the parties, the Payment is in escrow pending resolution of the dispute.

The complaint asserts four causes of action: declaratory judgment; breach of contract-covenant of good faith and fair dealing; Insurance Law § 7307; and unjust enrichment. The answer includes a counterclaim for declaratory

judgment.

Each of the parties now moves for summary judgment on its claims, in essence seeking a declaration of which party is entitled to the Payment. The court will accept all papers submitted in this action for its review, notwithstanding Scott's argument that plaintiff did not follow proper procedure. There is no prejudice demonstrated, and this court strongly believes in the resolution of disputes upon the merits.

The court finds that the recent decision of the Appellate Division, First Department in *Matter of Schaffer, Schonholz & Drossman, LLP v. Title,* 171 A.D.3d 465, 96 N.Y.S.3d 526 ("the *Matter of Schaffer*"), decided April 4, 2019, is dispositive of the issues raised in this matter. Applying the principles set forth in the *Matter of Scaffer* decision to the facts presented, the court holds that plaintiff is therefore entitled to the distribution of the sales proceeds of MLMIC.

In the *Matter of Schaffer*, the parties, pursuant to CPLR 3222(b)(2), filed directly with the Appellate Court a statement of stipulated facts, together with their briefs. The statement of facts includes a section entitled "Controversy Presented ... Issue a declaratory judgment determining whether SS & D or Dr. Title is entitled to the disputed amount..."

A review of the facts in the *Matter of Schaffer* reveals that the litigation, like this action, involved a physician named as insured on a MLMIC policy. The doctor's employer, similar to ***912** plaintiff, purchased the policy and paid all of the premiums and costs related to the policy. Like Scott, the doctor acknowledged that she did not bargain for the benefit of the demutualization proceeds. Under the facts, the court held that:

> "Awarding [the doctor] the cash proceeds of MLMIC's demutualization would result in her unjust enrichment (citations omitted)."

****826** Of note, Scott does not try to distinguish the facts in this case from the facts in the *Matter of Schaffer*. The parties here serve in the same roles as the parties in *Matter of Schaffer*, and, in fact, MLMIL is the relevant insurance company in both actions. Like in the *Matter of Schaffer*, the named employer here purchased and paid all of the premiums on the medical professional insurance policy covering the physician who now seeks the distribution payment based on the policy. In addition Scott, like the doctor in *Matter of Schaffer*, does not claim to have bargained for the benefit of the Payment. Hence, the issues before the Court in the *Matter of Schaffer* are identical to the issues before this court, namely whether the employee physician, whose MLMIC premiums were paid by the employer, is entitled to the *pro rata* distribution of the stock sale proceeds.

Acknowledging that the facts are identical in the two actions, Scott argues that the First Department's decision in the *Matter of Schaffer* is not binding on this court. Scott further contends that, in any event, the First Department's determination based on the principles of unjust enrichment was in error because the issue was not properly argued to the appellate court.

Where an issue has not been addressed within an Appellate Department, the Supreme Court is bound by the doctrine of *stare decisis* to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals. *Phelps v. Phelps,* 128 A.D.3d 1545, 9 N.Y.S.3d 519 [4th Dept. 2015]; *D'Alessandro v. Carro,* 123 A.D.3d 1, 992 N.Y.S.2d 520 [4th Dept. 2015]; *see Mountain View Coach Lines v. Storms,* 102 A.D.2d 663, 664–665, 476 N.Y.S.2d 918 [2d Dept. 1984]. As such, in light of the identical facts and legal question presented here and in the *Matter of Schaffer*, the decision in the *Matter of Schaffer* is binding on this court. *See Mountain View Coach Lines v. Storms, supra*. Applying the holding from the *Matter of Schaffer* to the facts presented here, the court determines that the Payment is appropriately awarded to plaintiff.

In any event, the court finds that the conclusions drawn in the First Department's decision are persuasive, and that a ***913** similar holding in this action based on the principles of unjust enrichment is warranted. Simply put, awarding Scott the cash proceeds of MLMIC's demutualization would result in his unjust enrichment. *See Matter of Schaffer, Schonholz & Drossman, LLP v. Title, supra; see Paramount Film Distrib. Corp. v. State,* 30 N.Y.2d 415, 334 N.Y.S.2d 388, 285 N.E.2d 695 [1972].

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant JOSEPH SCOTT, D.O. [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment on the counterclaim for a declaratory judgment against plaintiff MAPLE MEDICAL LLP is denied; and it is further

ORDERED that the cross-motion of plaintiff MAPLE MEDICAL LLP [Mot. Seq. 2], made pursuant to CPLR 3212, for an order granting summary judgment on the first cause of action in the complaint for a declaratory judgment

as against defendant JOSEPH SCOTT, D.O., is granted; and it is further

ORDERED that the second, third and fourth causes of action in the complaint are dismissed as moot; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff MAPLE MEDICAL LLP is entitled to the receipt from the escrow agent currently holding funds due it in the amount of $128,148. plus accrued interest, if any, as to said amount representing the *pro rata* amount assigned to the account of JOSEPH SCOTT, D.O., which said amount shall be paid to plaintiff MAPLE MEDICAL LLP within fifteen ****827** (15) days of the service of this Order, with Notice of Entry, upon the Escrow Agent; and it is further

ORDERED that upon compliance with this Order, namely payment of the amounts due plaintiff MAPLE MEDICAL LLP by defendant MEDICAL LIABILITY MUTUAL INSURANCE COMPANY, the action shall be dismissed with prejudice.

The foregoing constitutes the Decision/Order/Judgment of the court.

All Citations

64 Misc.3d 909, 105 N.Y.S.3d 823, 2019 N.Y. Slip Op. 29210

Footnotes

1 Defendant points out that he is a doctor of osteopathy and not a doctor of medicine.

2 The other actions are *Maple Medical, LLP v Goldenberg*, 51105/2019; *Maple Medical LLP v Arevalo*, 51106/2019; *Maple Medical, LLP v Sundaram*, 51107/2019; *Maple Medical LLP v Mutic*, 51108/2019; *Maple Medical, LLP v Youkeles*, 51109/2019.

3 Medical Liability Mutual Insurance Company (MLMIC) is the escrow agent holding the relevant funds in escrow. MLMIC does not submit any papers relative to these motions. In its answer (NY St Cts Elec Filing [NYSCEF] Doc No. 14), it generally denied the allegations in the complaint and asserts affirmative defenses.

418 F.3d 168
United States Court of Appeals,
Second Circuit.

MID–HUDSON CATSKILL RURAL MIGRANT MINISTRY, INC., Plaintiff–Appellant–Cross–Appellee,
v.
FINE HOST CORPORATION, Defendant–Appellee–Cross–Appellant.

Docket No. 04–0056–CV(L), 04–0181–CV(XAP), 04–0472–CV(CON), 04–0767–CV(XAP).
|
Argued: Feb. 9, 2005.
|
Decided: Aug. 8, 2005.

Synopsis

Background: Nonprofit ministry brought state law suit against food service vendor based on unjust enrichment, quantum meruit, and breach of contract, under which organization to receive percentage of gross sales from food booths at outdoor concert that were manned by its volunteers. The United States District Court for the Southern District of New York, Barrington D. Parker, Jr. and Samuel Conti, granted partial summary judgment in favor of vendor with respect certain damages on quantum meruit claims, dismissed quantum meruit claims at trial, entered judgment on jury verdict in favor of organization on contract claim, and awarded $1,000 in fees. Both sides appealed.

Holdings: The Court of Appeals, Sotomayor, Circuit Judge, held that:

ministry lacked associational standing to sue on behalf of its members;

ministry lacked third-party standing to sue on behalf of its non-member volunteers;

ministry had standing to bring claims for unjust enrichment/quantum meruit;

under New York law, contract claim encompassed unjust enrichment/quantum meruit claims;

indemnity provision applied to actions between parties themselves; and

indemnification for attorney fees was properly limited to one-third contingency fee provided for in ministry's retainer agreement.

Affirmed and remanded.

Attorneys and Law Firms

***170** Dan Getman, New Paltz, N.Y. (Carol A. Lafond, LeBoeuf, Lamb, Greene & MacRae, LLP, New York, NY, on the brief), for plaintiff-appellant-cross-appellee.

Patrick L. Seely, Jr., Hacker & Murphy, LLP, Latham, NY, for defendant-appellee-cross-appellant.

Before: McLAUGHLIN and SOTOMAYOR, Circuit Judges, and CEDARBAUM, District Judge.*

Opinion

***171** SOTOMAYOR, Circuit Judge.

Plaintiff-appellant/cross-appellee Mid–Hudson Catskill Rural Migrant Ministry, Inc. ("plaintiff" or "the Ministry") appeals from a judgment of the United States District Court for the Southern District of New York dismissing its quantum meruit claim under New York law against defendant-appellee/cross-appellant Fine Host Corp. ("defendant" or "Fine Host"). Because plaintiff has recovered damages from defendant under a valid contract governing the same subject matter as the quantum meruit claim, we affirm the district court's dismissal of that claim.

Plaintiff also appeals from a judgment setting awarded attorney's fees at $1,000, arguing that the district court rested its fee calculation on a mistaken analysis of the case law, a misreading of plaintiff's retainer agreement, and a misapplication of Federal Rule of Civil Procedure 68. Plaintiff also claims—and defendant does not dispute—that the district court erred in failing to award plaintiff prejudgment interest on its damages award. On cross-appeal, defendant claims that the underlying contract does not authorize the award of attorney's fees in a breach-of-contract action between the parties. We affirm the district court's judgment awarding plaintiff fees in the amount of $1,000, but we remand the case for consideration of plaintiff's application for prejudgment interest.

BACKGROUND

Plaintiff is a nondenominational multi-faith ministry providing religious services and other assistance to migrant

farm workers in eastern New York State. Defendant is a national food service provider headquartered in Connecticut that provides food and related services for, *inter alia*, outdoor public events such as the event at the heart of this appeal.

On April 26, 1994, defendant entered into a food, beverage, and merchandise concession agreement with the promoter of Woodstock 1994, a multi-day outdoor concert in Saugerties, New York. To staff its concession stands, defendant solicited local nonprofit organizations to provide volunteer labor in return for a share of the profits. Plaintiff accepted defendant's offer, and the two parties signed a contract in August 1994. Under the contract, plaintiff was to receive between seven and eight percent of the gross sales of the food booths its volunteers managed. On appeal, the parties dispute how many volunteers plaintiff was to provide under the contract. Plaintiff alleges that it was a maximum of twenty volunteers per booth *per day*, while defendant claims that it was a maximum of twenty volunteers per booth *per shift* (with several shifts each day). Regardless of what the contract provided, the parties agree that plaintiff supplied over 250 volunteers.

Woodstock 1994 did not go as planned. According to plaintiff, the individuals managing the festival were incapable of dealing with the severe weather and unruly crowds. Hundreds of people entered the concert without paying and widespread looting of concession stands occurred. Plaintiff alleges that defendant failed to provide adequate food, kitchen staff, and restroom facilities, failed to sell the "festival scrips" that concert attendees needed to buy concession stand food, failed to keep the booths open and accessible, and failed to provide adequate protection from looters. Plaintiff also alleges that it did not receive payment under the contract.

In July 1998, plaintiff filed a complaint in the United States District Court for the Southern District of New York, asserting state-law causes of action based on quantum meruit, unjust enrichment, and breach of contract. Jurisdiction was based on ***172** diversity of citizenship. The complaint sought a judgment "for the full value of the services [plaintiff] provided to defendant or alternatively for damages incurred by defendant's breach of contract in the approximate amount of $200,000 plus interest." The complaint further sought punitive damages, costs, and attorney's fees.

By order dated January 19, 2001, then District Court Judge Barrington D. Parker, Jr. granted defendant's motion for summary judgment on plaintiff's quantum meruit and unjust enrichment claims to the extent that plaintiff sought damages based on the number of hours worked by the volunteers. The court held that such "wage based" damages could be claimed—if at all—only by the volunteers themselves. The court left open for trial, however, whether plaintiff could recover quantum meruit damages based on another theory. The court denied plaintiff's cross-motion for summary judgment on the quantum meruit claim.

Visiting District Court Judge Samuel Conti of the Northern District of California took over the case in July 2003. Prior to trial, he ruled, based on Judge Parker's earlier order precluding a wage-based measure of damages, that plaintiff could not introduce evidence related to the hourly-rate value of the work of its volunteers. Judge Conti explained: "Any costs that [plaintiff] expended in getting the extra ... people would be quantum meruit costs, but any amount of money attributable to them, to their worth is their own private cause of action, as I read Judge Parker's order." After all evidence had been presented at trial, Judge Conti determined that any remaining quantum meruit claims were subsumed by the contract claim. The court dismissed the quantum meruit claim while allowing the contract claim to proceed.

The jury found defendant liable for breach of contract, but awarded damages of only $3,000. Pursuant to an indemnity clause in the parties' contract, plaintiff sought $155,179.13 in attorney's fees and $5,397.36 in costs. The district court agreed that the contract entitled plaintiff to recover reasonable attorney's fees, but the court set the awarded amount at $1,000, well below plaintiff's request. The court based its reduction of the award on defendant's earlier offer of judgment under Federal Rule of Civil Procedure 68, the small size of the damages award, and the contingent-fee arrangement between plaintiff and its attorney. Both parties appealed.

DISCUSSION

I. Quantum Meruit and Unjust Enrichment

Plaintiff claims that "[t]he District Court erred when it determined that [plaintiff] did not have standing to pursue quantum meruit and unjust enrichment claims." This is not, however, what the district court held. Rather, Judges Parker and Conti held that because plaintiff lacked standing to bring suit on behalf of its volunteers, plaintiff could not measure damages in the quantum meruit action by reference to a wage-based valuation of the volunteers' work. The court left open the possibility that Mid–Hudson could recover quantum meruit damages on a theory that

was not wage-based. When the district court ultimately dismissed the quantum meruit claim, it did so not for lack of standing but rather because the evidence adduced at trial had demonstrated that the quantum meruit claim was indistinguishable from the contract claim.

Plaintiff's brief does not make clear whether it seeks to sue in quantum meruit on its own behalf, on behalf of its volunteers, or both. Plaintiff's opening brief, ***173** for example, claims that the district court's holding on standing was erroneous because plaintiff had brought the quantum meruit claims "on its own behalf and not on behalf of its volunteers." Later in that same argument section, however, plaintiff explains that it has "standing to sue as a representative of the volunteers." In one particularly confusing sentence, plaintiff argues that it "has standing to bring such claims *on its own behalf* based on *Matter of Dental Society of the State of New York v. Carey,* 61 N.Y.2d 330, 474 N.Y.S.2d 262, 462 N.E.2d 362 (1984), in which a professional society was found to have standing to [sue] *on behalf of its members* " (emphasis added).

Despite these points of confusion, we will construe the briefs liberally as raising an objection to the district court's quantum meruit ruling in its entirety. *Cf. Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.,* 369 F.3d 645, 653 n. 4 (2d Cir.2004) (reaching a claim where "certain language" in the brief could be "liberally construed" as raising it). We will also assume that plaintiff intends to raise the quantum meruit claims both on its own behalf *and* on behalf of its volunteers. *See id.* Reviewing the issues *de novo,* we affirm the judgment of the district court. *See Shain v. Ellison,* 356 F.3d 211, 214 (2d Cir.2004) ("The existence of standing is a question of law that we review *de novo.*"); *Grochowski v. Phoenix Constr.,* 318 F.3d 80, 84–85 (2d Cir.2003) (noting that this Court reviews grants of summary judgment *de novo*).

A. Plaintiff has standing to sue on its own behalf but not on behalf of its volunteers.

Where, as here, jurisdiction is predicated on diversity of citizenship, a plaintiff must have standing under both Article III of the Constitution and applicable state law in order to maintain a cause of action. *See Bano v. Union Carbide Corp.,* 361 F.3d 696, 713–14 (2d Cir.2004) (applying federal law of standing in a diversity action and holding that plaintiff organizations lacked standing to bring damages claims belonging to their members); *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP,* 322 F.3d 147, 156–57 (2d Cir.2003) (applying state law of standing in a diversity action to determine if plaintiffs had standing to bring claims of breach of fiduciary duty and breach of contract); *see also Metro. Express Servs., Inc. v. City of Kansas City,* 23 F.3d 1367, 1369–70 (8th Cir.1994) (holding that a plaintiff in a diversity action must establish standing under applicable state law as well as under Article III). Applying New York and federal law, we hold that plaintiff has standing to bring suit on its own behalf for injuries it sustained as an organization but that it lacks standing to sue on behalf of its volunteers.

We address first plaintiff's standing to sue as a representative of the volunteers. To the extent that the volunteers in the instant dispute were members of the Ministry—and plaintiff claims that at least some of them were—the standing inquiry turns on whether plaintiff has "associational" or "organizational" standing to sue on behalf of its members. Under New York and federal law, an organization may sue as a representative of its members only if the members " 'have standing to sue in their own right.' " *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (quoting *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)); *see* ***174** *MFY Legal Servs., Inc. v. Dudley,* 67 N.Y.2d 706, 708, 499 N.Y.S.2d 930, 490 N.E.2d 849 (1986).[1] Injury-in-fact is an indispensable requirement for standing. *See Jenkins v. United States,* 386 F.3d 415, 417 (2d Cir.2004); *New York Propane Gas Ass'n v. New York State Dep't of State,* 17 A.D.3d 915, 793 N.Y.S.2d 601, 602 (3d Dep't 2005) (same). Plaintiff argues that its volunteers were "injured because they had donated valuable labor to the Ministry, and the Ministry had not been fully compensated for it." We need not reach the question of whether the member volunteers' (allegedly unfulfilled) interest in seeing that plaintiff received the compensation for which they had worked gave rise to an injury-in-fact, because even if we were to hold that they suffered a legally cognizable injury, the extent of the injury would vary among the member volunteers, who did not all invest the same amount of labor. The need for an individualized inquiry would defeat the association's standing, because a plaintiff normally lacks associational standing to sue on behalf of its members where "the fact and extent of injury would require individualized proof." *Bano,* 361 F.3d at 714 (citation and internal quotation marks omitted); *see also id.* ("We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members.").

To the extent that plaintiff seeks to sue on behalf of volunteers who are *not* members, it may pursue its claim only on a theory of third-party standing. In addition to meeting "the constitutional prerequisites of standing,"

namely "(1) injury-in-fact, (2) causation, and (3) redressability," a plaintiff seeking third-party standing in federal court must also satisfy the prudential prerequisites of standing by demonstrating a close relation to the injured third party and a hindrance to that party's ability to protect its own interests. *Lewis v. Thompson*, 252 F.3d 567, 584 (2d Cir.2001) (citations omitted). Plaintiff lacks third-party standing because it has not demonstrated a hindrance to the volunteers' ability to protect their own interests.

Whether plaintiff has standing to sue *on its own behalf* presents an entirely different question. *See Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir.1998); *Dudley*, 67 N.Y.2d at 708, 499 N.Y.S.2d 930, 490 N.E.2d 849. There is no doubt that an organization may sue on its own behalf for injuries it has sustained. *See Irish Lesbian & Gay Org.*, 143 F.3d at 649; *Mixon v. Grinker*, 157 A.D.2d 423, 556 N.Y.S.2d 855, 857 (1st Dep't 1990). In accordance with basic principles of standing under state and federal law, however, the plaintiff must allege "an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." *Jenkins v. United States*, 386 F.3d at 417 (emphasis omitted); *see Soc'y of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772–73, 570 N.Y.S.2d 778, 573 N.E.2d 1034 (1991). Here, plaintiff alleges that it expended resources *as an organization* to locate, recruit, manage, train, and supply volunteers to defendant beyond what was required by their contract, and that defendant's failure to compensate plaintiff for those extra services constitutes unjust enrichment. We agree with the district court that this claim ***175** satisfies standing requirements under New York and federal law.

B. The existence of a valid contract nevertheless bars plaintiff's claim for quantum meruit relief.

Applying New York law, we may analyze quantum meruit and unjust enrichment together as a single quasi contract claim. *See Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 663 (2d Cir.1996) (citing *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 768 F.Supp. 89, 96 (S.D.N.Y.1991) (explaining that "quantum meruit and unjust enrichment are not separate causes of action," and that "unjust enrichment is a required element for an implied-in-law, or quasi contract, and quantum meruit, meaning 'as much as he deserves,' is one measure of liability for the breach of such a contract"), *rev'd on other grounds*, 959 F.2d 425 (2d Cir.1992)). In order to recover in quantum meruit under New York law, a claimant must establish "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 69 (2d Cir.2000) (citation and internal quotation marks omitted). New York law does not permit recovery in quantum meruit, however, if the parties have a valid, enforceable contract that governs the same subject matter as the quantum meruit claim. *Clark–Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987); *Ellis v. Abbey & Ellis*, 294 A.D.2d 168, 742 N.Y.S.2d 225, 228 (1st Dep't 2002); *Mariacher Contracting Co., Inc. v. Kirst Constr., Inc.*, 187 A.D.2d 986, 590 N.Y.S.2d 613, 615 (4th Dep't 1992). This restriction on quantum meruit claims bars recovery by plaintiff here. Having successfully brought a breach-of-contract claim based on defendant's failure to compensate it for the services it provided, plaintiff may not recover a second time through quantum meruit. *See Clark–Fitzpatrick, Inc.*, 70 N.Y.2d at 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 ("It is impermissible ... to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.").

Plaintiff claims that this restriction on quantum meruit actions does not apply to the instant case because the contract at issue required plaintiff to provide only twenty volunteers per day. Compensation for providing additional volunteers, plaintiff contends, remains recoverable in a quantum meruit action. Plaintiff is certainly correct that a valid contract bars a quantum meruit action only where "the scope of [the contract] clearly covers the dispute between the parties." *Id.; see also Curtis Props. Corp. v. Greif Cos.*, 236 A.D.2d 237, 653 N.Y.S.2d 569, 571 (1st Dep't 1997) ("[A] party is not precluded from proceeding on both breach of contract and quasi-contract theories where ... the contract does not cover the dispute in issue."); *see also U.S. East Telecomms., Inc. v. U.S. West Communications Servs., Inc.*, 38 F.3d 1289, 1298 (2d Cir.1994) ("[R]ecovery in quasi-contract outside the existing contract may be had if a party has rendered additional services upon extra-contractual representations by the other party."). On the other hand, a plaintiff's entitlement to recover in quantum meruit outside of a valid contract may depend on a showing that the " 'additional services' are 'so distinct from the [contractual] duties ... that it would be unreasonable for the [defendant] to assume that they were rendered without expectation of further ***176** pay.' " *Id.* (quoting *O'Keeffe v. Bry*, 456 F.Supp. 822, 831 (S.D.N.Y.1978) (further citation omitted)). We doubt that plaintiff could make such a showing here.

The real flaw in plaintiff's argument, however, is simply that its breach-of-contract claim, as plaintiff presented it to

the jury, sought damages based on the provision of all 259 of the volunteers. The contract suit thus encompassed the work of providing all of the so-called "extra" volunteers for which plaintiff seeks compensation in quantum meruit.[2]

In his arguments to the jury, for example, plaintiff's attorney repeatedly emphasized that pursuant to defendant's request, plaintiff had recruited a large number of volunteers—259 in total—to work at the festival. Despite plaintiff's compliance with defendant's request, the attorney explained, defendant failed to live up to its promise *under the contract* to provide adequate food for those volunteers to sell. Plaintiff's consistent emphasis on the full complement of volunteers defeats its claim on appeal that the majority of the volunteers were "extra" volunteers not encompassed in the breach-of-contract action before the district court. It is worth noting that the Executive Director of the Ministry, who signed the contract with defendant on behalf of plaintiff, testified at trial that "according to [the contract]," plaintiff was to provide twenty people *per booth per shift*, not merely twenty people per day. Moreover, although defendant arguably had an interest in reducing the scope of the contract claim (in order to reduce its liability), the defense attorney, like plaintiff's attorney, represented to the trial judge and jury that the contract provided for the full number of volunteers who worked at the festival. The defendant's strategy was simply to claim that it was not responsible for the festival's troubles.

The district court's rulings further reflect the understanding of the parties at trial that the breach-of-contract claim encompassed the work of providing all 259 volunteers. Before closing, for example, the district court dismissed the quantum meruit action, finding that "the cause of action for quantum meruit is exactly the same cause of action as breach of contract." Given that the quantum meruit claim was based on plaintiff's provision of the so-called "extra" volunteers, the court's finding that the quantum meruit claim was identical to the contract claim indicates unambiguously that the court, like the parties, viewed the contract claim as covering all of the volunteers. Indeed, at the time the district court dismissed the quantum meruit claim, plaintiff gave no indication to the district court judge that its breach-of-contract claim was limited to twenty volunteers per day, or that it was willing to so limit its claim if the district court allowed the quantum meruit claim to survive.

Finally, the district court judge, as part of his instruction on the breach-of-contract claim, explained to the jury that if "the parties mutually agreed to perform specific duties outside the contract and [if] both parties were fully aware of the contents of such specific agreements, then the parties would be bound by those additional agreements." In light of the fact that both parties argued to the jury that plaintiff and defendant had mutually agreed to the provision of over 250 volunteers, the district court's instruction to the jury that such a mutual agreement would fall within the contract claim eliminates any doubt that the claim considered by the jury encompassed ***177** plaintiff's provision of all 259 volunteers.[3]

In sum, we cannot credit plaintiff's claim before this Court that the work of providing the "extra" volunteers was beyond the scope of its breach-of-contract action. Having recovered damages in that action, plaintiff is barred from seeking duplicative relief in quantum meruit. *See Clark–Fitzpatrick, Inc.* 70 N.Y.2d at 389, 521 N.Y.S.2d 653, 516 N.E.2d 190; *see also Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 263–64 (2d Cir.1999) (holding that once jury had found that plaintiff had an enforceable contract, plaintiff could not seek recovery in quantum meruit under New York law).

II. Attorney's Fees

We apply New York substantive law to resolve the dispute regarding plaintiff's entitlement to attorney's fees. *See Banker v. Nighswander, Martin & Mitchell*, 37 F.3d 866, 873 (2d Cir.1994) (holding in a diversity action that " '[s]tate law creates the substantive right to attorney's fees' " (quoting *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir.1992))). We review an award of attorney's fees for abuse of discretion if the district court has awarded the fees "under a valid contractual authorization." *U.S. Fidelity & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 74 (2d Cir.2004). We review *de novo*, however, the district court's interpretation of the contract. *Id.*

A. The contract's indemnity clause provides for attorney's fees in actions between the parties.

Because promises in a contract to indemnify the other party's attorney's fees "run against the grain of the accepted policy that parties are responsible for their own attorneys' fees," *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir.2003), courts applying New York law " 'should not infer a party's intention' to provide counsel fees as damages for a breach of contract 'unless the intention to do so is unmistakably clear' from the language of the contract." *Id.* (quoting *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492, 549 N.Y.S.2d 365, 548 N.E.2d 903 (1989)). Applying this rule in *Hooper*

Associates, the New York Court of Appeals refused to read an attorney's fees provision as including claims between the parties themselves, as opposed to third-party claims, where the provision did not "exclusively or unequivocally" refer to such claims or otherwise "support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract." 74 N.Y.2d at 492, 549 N.Y.S.2d 365, 548 N.E.2d 903. Reading the contract as a whole, the court also observed that its narrow interpretation of the indemnity clause was "supported by other provisions in the contract which unmistakably relate[d] to third-party claims." *Id.* To read the indemnity clause as covering suits between the parties, the court found, would render other provisions "meaningless." ***178** [4] *Id.* Applying a similar rationale in *Oscar Gruss & Son*, this Court refused to read an indemnity clause as providing for attorney's fees in breach-of-contract suits between the parties where the subsection of the contract providing for indemnification also contained language that "indisputably applie[d] solely to third-party claims."[5] 337 F.3d at 200; *see also Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20–21 (2d Cir.1996) (applying New York law and holding that a contractual indemnity provision did not apply to a suit between the parties where its language could "easily be read as limited to third party actions").

As originally written, the contract now before us included only one of the two indemnification provisions that appear in the contract's final form. This first provision requires indemnification of *defendant* by *plaintiff* in certain actions brought by third parties:

> [The Ministry] will indemnify and hold harmless [Fine Host, Woodstock Ventures, Inc., Polygram Diversified Ventures, the Town of Saugerties and other entities] from any and all liabilities (i.e. bodily injury), damage (i.e. property), expenses (including reasonable attorney fees, court costs, and other costs) or actions of any kind or nature, arising, growing out of, or otherwise connected with any activity under this Agreement *arising by the negligence of [Ministry] personnel.*

(Emphasis added).

Before signing the contract, the parties added an addendum to the agreement that includes a second indemnification provision requiring indemnification of *plaintiff* by *defendant*. That is the provision at issue here. Significantly, the parties did not simply copy the structure and wording of the first provision in drafting the second; instead, they wrote an indemnity clause that sweeps more broadly, providing for reimbursement of attorney's fees regardless of the nature of the underlying action:

> [The Ministry] shall be indemnified and held harmless from any actions resulting from the negligence of [defendant]; from any and all liabilities (i.e. bodily injury), damage (i.e. property), expenses (including reasonable attorney fees, court costs, and other costs) or actions of any kind or nature arising, growing out of, or otherwise connected with any activity under this Agreement.

We agree with plaintiff that the broad language of the second provision, when read in conjunction with the first provision, indicates "unmistakably," *Hooper Assocs.*, 74 N.Y.2d at 492, 549 N.Y.S.2d 365, 548 N.E.2d 903, that the parties intended for the second provision to apply to "actions of any kind or nature," including actions between ***179** the parties. *See also Sagittarius Broad. Corp. v. Evergreen Media Corp.*, 243 A.D.2d 325, 663 N.Y.S.2d 160, 161 (1st Dep't 1997) (holding, where language limiting indemnification to third-party actions appeared in only one of two key sentences in an indemnity clause, that the more expansive sentence encompassed attorney's fees in suits on the contract between the parties). Accordingly, we reject defendant's cross appeal and affirm the district court's decision to award fees.

B. Plaintiff is entitled to no more than $1,000 in fees.

The district court found that "[p]laintiff and its counsel agreed to a one-third contingency fee arrangement," and held that this amount—$1,000—represented a reasonable estimate of the awardable attorney's fees. We agree with plaintiff that the court misstated the relevant provision of the retainer agreement, which provides that plaintiff and its counsel agree to "the rate of either 1/3 of any gross settlement or judgment, or the amount of fees received from defendants, (e.g. pursuant to the contract with Fine Host Corporation), *whichever is greater* " (emphasis added). Despite this error, we affirm the district court's decision to cap awardable fees at $1,000. Construing the

parties' indemnity clause strictly, as we must under New York law, *see Hooper Assocs.*, 74 N.Y.2d at 491, 549 N.Y.S.2d 365, 548 N.E.2d 903, we agree with defendant that the clause does not permit plaintiff to demand from defendant greater expenses than plaintiff has itself incurred.[6] *See id.* ("When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.").

The contract provision requiring defendant to pay attorney's fees is by its plain terms an indemnity provision. It provides that plaintiff "shall be *indemnified* and *held harmless* from ... reasonable attorney fees" (emphasis added). Indemnity provisions by definition only require reimbursement for losses and liabilities that the indemnitee has actually incurred. *See Atlantic Richfield Co. v. Interstate Oil Transp. Co.*, 784 F.2d 106, 112 (2d Cir.1986) ("[A] claim for indemnity ... requires that an actual liability be sustained by the indemnitee....") (first ellipsis in original) (citation and internal quotation marks omitted); Black's Law Dictionary 783–84 (8th ed.2004) (defining "indemnify" as "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default"); *id.* at 749 (defining "hold-harmless agreement" as "[a] contract in which one party agrees to indemnify the other"). Plaintiff may ***180** not be indemnified for an amount it does not yet owe. *See Bay Ridge Air Rights, Inc. v. State of New York*, 44 N.Y.2d 49, 54, 404 N.Y.S.2d 73, 375 N.E.2d 29 (1978) (noting that a cause of action for indemnity generally does not accrue until the indemnitee makes a payment requiring indemnification). Though the record makes clear that plaintiff owes its attorney $1,000, there is no evidence of a liability exceeding that amount.[7]

Plaintiff suggests that it may owe more than $1,000 because its retainer agreement requires payment to counsel of attorney's fees "received from defendants" if those fees are greater than the one-third contingency fee. By making plaintiff's obligation to its attorney depend on what plaintiff "receive[s] from defendants," however, the retainer agreement places the cart before the horse and ignores the language of the parties' underlying indemnity agreement, which requires defendant to reimburse plaintiff only *after* plaintiff has demonstrated a loss or liability. In other words, plaintiff must demonstrate to the court that it owes a given amount to its counsel *before* seeking indemnification in that amount from defendant. The retainer agreement is unenforceable to the extent that it attempts to calculate plaintiff's liabilities to counsel based on what plaintiff can secure as reimbursement for those liabilities in an indemnity action.[8]

Footnotes

In arguing that the fee award owed to plaintiff by defendant may exceed the amount owed by plaintiff to its attorney, plaintiff relies only on *Venegas v. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). *Venegas*, however, involved the award of attorney's fees pursuant to a federal civil rights law, *see* 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of [certain federal civil rights statutes], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...."), and therefore has little, if any, relevance to a dispute concerning a contractual indemnity provision governed by state law.

Defendant argues that if we uphold the judgment entitling plaintiff to a fees award, which we have done, we should affirm the judgment setting that award at $1,000. Thus, neither party seeks a recalculation to reduce the award below $1,000. ***181** Accordingly, we may affirm the district court's ruling on attorney's fees without addressing the remaining arguments raised by the parties.[9]

Finally, we address plaintiff's argument that the district court erred in failing to consider the application for prejudgment interest. We agree—and defendant concedes—that the district court erred. On remand, the district court should consider the application in accordance with New York state law. *See* N.Y. C.P.L.R. § 5001; *see also Campbell ex rel. Campbell v. Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179, 186 (2d Cir.2001).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court judgment dismissing the quantum meruit claim. We also AFFIRM the court's judgment that plaintiff is entitled to recover $1,000 in attorney's fees under the indemnity provision of the parties' contract. We REMAND the case to the district court for consideration of plaintiff's motion for prejudgment interest.

All Citations

418 F.3d 168

* The Honorable Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

1 The district court discussed an additional requirement for representative standing under *Dudley*, namely, that a corporation may not "sue on its own behalf for a declaration of the rights of its members." *Dudley*, however, held that an organization could not "sue on its own behalf for a *declaration of its potential clients' rights.*" 67 N.Y.2d at 708, 499 N.Y.S.2d 930, 490 N.E.2d 849 (emphasis added). This aspect of *Dudley* does not apply here, for plaintiffs are not seeking declaratory relief and its volunteers were not "potential."

2 Moreover, plaintiff did not present evidence at trial of any damages—beyond the breach-of-contract damages—that it incurred *as an organization* in providing the so-called "extra" volunteers.

3 Furthermore, we disagree with plaintiff's suggestion that the written contract "undeniabl[y]" calls for only twenty volunteers per day. The relevant provision is open-ended: "Fine Host will determine the adequate staff size both collectively and for each individual stand assigned to the [Ministry] at all days. The [Ministry] will supply a maximum number of 20 members for each scheduled day *unless specified otherwise* " (emphasis added).
Evidence in the record suggests that from the start of its dealings with defendant, plaintiff understood that the agreement would encompass all of the volunteers that plaintiff could provide. In any event, any ambiguity was resolved at trial, where both parties represented to the jury that the contract covered all of the volunteers who worked at the festival.

4 The court focused specifically on a provision of the contract requiring plaintiff " 'promptly [to] notify' defendant of 'any claim or litigation to which the indemnity [clause] shall apply,' " as well as a provision allowing defendant to " 'assume the defense of any such claim or litigation with counsel satisfactory to [plaintiff].' " *Id.* (second alteration in original). To read the indemnity clause as including attorney's fees in a breach-of-contract action between the parties, the court found, "would render [those] provisions meaningless because the requirement of notice and assumption of the defense has no logical application to a suit between the parties." *Id.* at 492–93.

5 As in *Hooper Associates*, the clause at issue in *Oscar Gruss & Son* provided, *inter alia*, that defendant had "the right to notice of any indemnification claim and an opportunity to assume [the other party's] defense." 337 F.3d at 200; *see Hooper Assocs.*, 74 N.Y.2d at 492–93, 549 N.Y.S.2d 365, 548 N.E.2d 903. Such provisions have "no logical application to a suit between the parties." *Hooper Assocs.*, 74 N.Y.2d at 493, 549 N.Y.S.2d 365, 548 N.E.2d 903.

6 Though we agree with defendant's conclusion, we do not adopt its rationale. Defendant argues that the retainer agreement's "whichever is greater" language is unenforceable under the principles of *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 381 N.Y.S.2d 459, 344 N.E.2d 391 (1976). In *Equitable Lumber*, the New York Court of Appeals held that a "[p]laintiff may not manipulate the actual amount of damages by entering into any exorbitant fee arrangement with its attorney." *Id.* at 521. *Equitable Lumber*, however, involved a specific statutory scheme not at issue here. *See id.* at 519–24, 381 N.Y.S.2d 459, 344 N.E.2d 391. More fundamentally, even if the awardable fees in the instant case exceeded $1,000, there would be no risk of an "exorbitant fee," *id.* at 521, 381 N.Y.S.2d 459, 344 N.E.2d 391, because the contract's indemnity clause provides only for the award of "reasonable" fees. We have no doubt that district courts calculating awardable fees under New York law can distinguish "reasonable" from "exorbitant." Nevertheless, for the reasons explained *infra*, we agree with defendant that the parties' indemnity agreement limits plaintiff's recovery of attorney's fees to plaintiff's actual losses and liabilities.

7 New York law "permit[s] an indemnitee to obtain a conditional judgment fixing the potential liability without the need for payment until it is shown that the judgment in the principal action has been satisfied in whole or part." *McCabe v. Queensboro Farm Prods., Inc.*, 22 N.Y.2d 204, 208, 292 N.Y.S.2d 400, 239 N.E.2d 340 (1968). Even where this "procedural device" is permitted, however, it "does not vitiate the requirement of a showing of actual loss before there may be recovery." *Id.*

8 Nothing in this analysis would preclude a plaintiff from recovering fees calculated using a lodestar or similar method if the retainer agreement were drafted appropriately. For example, a retainer agreement could provide that in the event plaintiff prevails on any claim, plaintiff will pay counsel at a rate of either one-third of any judgment, or at a rate of X number of dollars per hour worked, whichever is greater. Under such an agreement, a prevailing plaintiff could seek indemnification for the greater of these amounts—subject to a court's adjustment for reasonableness—because plaintiff would already be liable to counsel for the higher rate; that is, its liability to its attorney would have accrued before it sought indemnification. Here, in contrast, the retainer agreement provides that plaintiff does not owe its counsel more than one third of the recovery until the amount is "received" from the defendant. This provision is unenforceable, because pursuant to the indemnity agreement, plaintiff will not receive any money from defendant until plaintiff first demonstrates a liability to counsel.

9 The parties raise a number of significant issues, including questions regarding the proper application of Federal Rule of Civil Procedure 68 in contract disputes; the permissibility of reducing attorney's fees incurred *before* an offer of judgment based on a party's rejection of the Rule 68 offer; and the extent to which a court may base its fees award on the small size of a damages award

under New York law. None of these issues is essential to the resolution of the questions in this case, however, and we do not discuss them further.

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102 A.D.2d 663
Supreme Court, Appellate Division, Second Department, New York.

MOUNTAIN VIEW COACH LINES, INC.,
Appellant,
v.
Betty STORMS, Respondent.

June 18, 1984.

Synopsis

Appeal was taken from a judgment of the Supreme Court, Dutchess County, Vincent Gurahian, J., dismissing claim for loss of use by owner of bus damaged in accident by negligence of defendant. The Supreme Court, Appellate Division, Titone, J., held that owner was entitled to loss of use damages notwithstanding that it did not hire a substitute bus but utilized one it had maintained in reserve.

Reversed and remitted.

Attorneys and Law Firms

****919 *663** George A. Roland, Albany, for appellant.

Owen & Grogan, Goshen (Thomas N. O'Hara, Goshen, of counsel), for respondent.

Before MOLLEN, P.J., and TITONE, WEINSTEIN and RUBIN, JJ.

Opinion

TITONE, Justice.

Plaintiff appeals from so much of a judgment of the Supreme Court, Dutchess County, as dismissed its claim for damages for loss of use of a bus placed out of service as a result of defendant's negligence. The core issue is whether damages for loss of use are interdicted because plaintiff did not hire a substitute bus, utilizing one it maintained in reserve instead. We hold that loss of use damages are recoverable in such circumstances and decline to follow two Third Department cases to the contrary (*Mountain View Coach Lines v. Gehr*, 80 A.D.2d 949, 439 N.Y.S.2d 632; *Mountain View* ***664** *Coach Lines v. Hartnett*, 99 Misc.2d 271, 415 N.Y.S.2d 918, affd. 69 A.D.2d 1020, 414 N.Y.S.2d 947, as amd. 70 A.D.2d 977, mot. for lv. to app. den. 47 N.Y.2d 710, 419 N.Y.S.2d 1026, 393 N.E.2d 1050).

On October 28, 1980, a collision occurred between a bus owned by the plaintiff and a motor vehicle owned by the defendant. The parties stipulated that the defendant was negligent, that the cost of repairs was $983.23, that the damages sustained for loss of use were $3,200, and that the facts supporting the claim for loss of use were the same as those in the two Third Department cases (*Mountain View Coach Lines v. Gehr, supra; Mountain View Coach Lines v. Hartnett, supra*), i.e., that no substitute was hired by the plaintiff during the period of repairs, plaintiff having substituted one of its own buses for the damaged bus. The loss of use claim was thus submitted to the Supreme Court as an issue of law, and was dismissed solely on constraint of the Third Department cases. We reverse the judgment insofar as appealed from and remit the case to the Supreme Court, Dutchess County, for entry of a judgment awarding plaintiff damages for loss of use.

At the outset, we note that if the Third Department cases were, in fact, the only New York authorities on point, the trial court followed the correct procedural course in holding those cases to be binding authority at the nisi prius level. The Appellate Division is a single statewide court divided into departments for administrative convenience (see *Waldo v. Schmidt*, 200 N.Y. 199, 202, 93 N.E. 477; Project, The ****920** Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court, 47 Ford L.Rev. 929, 941) and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (see, e.g., *Kirby v. Rouselle Corp.*, 108 Misc.2d 291, 296, 437 N.Y.S.2d 512; *Matter of Bonesteel*, 38 Misc.2d 219, 222, 238 N.Y.S.2d 164, affd. 16 A.D.2d 324, 228 N.Y.S.2d 301; 1 Carmody-Wait 2d, N.Y.Prac., § 2:63, p. 75). This is a general principle of appellate procedure (see, e.g., *Auto Equity Sales v. Superior Court of Santa Clara County*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; *Chapman v. Pinellas County*, 423 So.2d 578, 580 [Fla.App.]; *People v. Foote*, 104 Ill.App.3d 581, 60 Ill.Dec. 355, 432 N.E.2d 1254), necessary to maintain uniformity and consistency (see ***665** *Lee v. Consolidated Edison Co. of N.Y.*, 98 Misc.2d 304, 306, 413 N.Y.S.2d 826), and, consequently, any cases holding to the contrary (see, e.g., *People v. Waterman*, 122 Misc.2d 489, 495, n. 2, 471 N.Y.S.2d 968) are disapproved.

Such considerations do not, of course, pertain to this court. While we should accept the decisions of sister departments as persuasive (see, e.g., *Sheridan v. Tucker*, 145 App.Div. 145, 147, 129 N.Y.S. 18; 1 Carmody-Wait 2d, N.Y.Prac., § 2:62; cf. *Matter of Ruth H.*, 26 Cal.App.3d 77, 86, 102 Cal.Rptr. 534), we are free to reach a contrary result (see, e.g., *Matter of Johnson*, 93 A.D.2d 1, 16, 460 N.Y.S.2d 932, revd. on other grounds 59 N.Y.2d 461, 465 N.Y.S.2d 900, 452 N.E.2d 1228; *State v. Hayes*, 333 So.2d 51, 53 [Fla.App.]; *Glasco Elec. Co. v. Department of Revenue*, 87

Ill.App.3d 1070, 42 Ill.Dec. 896, 409 N.E.2d 511, affd. 86 Ill.2d 346, 56 Ill.Dec. 10, 427 N.E.2d 90). Denial of leave to appeal by the Court of Appeals is, of course, without precedential value (*Giblin v. Nassau County Med. Center*, 61 N.Y.2d 67, 76, n., 471 N.Y.S.2d 563, 459 N.E.2d 856). We find the Third Department decisions little more than a "conclusory assertion of result", in conflict with settled principles, and decline to follow them (*People v. Hobson*, 39 N.Y.2d 479, 490, 384 N.Y.S.2d 419, 348 N.E.2d 894).

It is beyond dispute that where a motor vehicle is harmed as a result of a tortious act, the plaintiff is entitled to damages for loss of use during the time reasonably required to make repairs (*Johnson v. Scholz*, 276 App.Div. 163, 93 N.Y.S.2d 334; Restatement, Torts 2d, § 928; 10 Fuchsberg, Encyclopedia N.Y.Law, Damages, § 875). While some early lower court cases held that recovery for loss of use was barred unless a substitute was actually hired (e.g., *Murphy v. New York City Ry. Co.*, 58 Misc. 237, 108 N.Y.S. 1021), the Appellate Term, Second Department, later noted that these holdings were at variance with the rule generally prevailing in this State and elsewhere (*Dettmar v. Burns Bros.*, 111 Misc. 189, 181 N.Y.S. 146; see, also, Recovery for Loss of Use of a Motor Vehicle Damaged or Destroyed, Ann., 18 A.L.R.3d 497, 528). *Dettmar* states the correct rule and is in accord with subsequent New York authority (*Nicholas v. Mellon Constr. Co.*, 241 App.Div. 771, 270 N.Y.S. 516; *Denehy v. Pasarella*, 230 App.Div. 707, 424 N.Y.S. 888; *Sellari v. Palermo*, 188 Misc. 1057, 70 N.Y.S.2d 554; *Pittari v. Madison Ave. Coach Co.*, 188 Misc. 614, 68 N.Y.S.2d 741; Fuchsberg, *op. cit.*, § 878).

There is no logical or practical reason why a distinction should be drawn between cases in which a substitute vehicle is actually hired and those in which the plaintiff utilizes a spare. The point is well illustrated by then ***666** Justice CARDOZO's opinion in *Brooklyn Eastern Dist. Term. v. United States*, 287 U.S. 170, 176–177, 53 S.Ct. 103, 105, 77 L.Ed. 240, explaining the so-called "spare boat" doctrine applied in admiralty:

> "Shipowners at times maintain an extra or spare boat which is kept in reserve for the purpose of being utilized as a substitute in the contingency of damage to other vessels of the fleet. There are decisions to the effect that in such conditions the value of the use of a boat thus ****921** specially reserved may be part of the demurrage * * * If no such boat had been maintained, another might have been hired, and the hire charged as an expense. The result is all one whether the substitute is acquired before the event or after".*

This reasoning is persuasive and is fully applicable to the case before us. The rule has the support of the Restatement of Torts Second (§ 931, comment c) and numerous commentators (11 Blashfield, Automobile Law and Practice [rev. 3d ed.], § 429.2; Dobbs, Remedies, § 5.11, pp. 387–389; 10 Fuchsberg, *op. cit.*, § 878; McCormick, Damages, § 124, pp. 470–476; 1 Sedgwick, Damages [9th ed.], §§ 195, 243b). Moreover, it has been consistently followed in this department (see *Nicholas v. Mellon Constr. Co.*, 241 App.Div. 771, 270 N.Y.S. 516, *supra; Denehy v. Pasarella*, 230 App.Div. 707, 424 N.Y.S. 888, *supra; Dettmar v. Burns Bros.*, 111 Misc. 189, 181 N.Y.S. 146, *supra*), in the United States Court of Appeals for the Second Circuit applying New York law (*Koninklijke Luchtvaart Maatschaapij, N.V. v. United Technologies Corp.*, 610 F.2d 1052), and is in accord with the overwhelming weight of authority elsewhere (*Malinson v. Black*, 83 Cal.App.2d 375, 188 P.2d 788; *Hillman v. Bray Lines*, 41 Colo.App. 493, 591 P.2d 1332, affd Colo., 625 P.2d 364; *Graf v. Don Rasmussen Co.*, 39 Or.App. 311, 592 P.2d 250; *Holmes v. Raffo*, 60 Wash.2d 421, 374 P.2d 536; ***667** Recovery for Loss of Use of a Motor Vehicle Damaged or Destroyed, Ann., 18 A.L.R.3d 497, § 13).

For these reasons, the judgment should be reversed insofar as appealed from, with costs, and the matter remitted to the Supreme Court, Dutchess County, for entry of an appropriate judgment awarding damages for loss of use in accordance with the stipulation.

Judgment of the Supreme Court, Dutchess County, entered July 12, 1983, reversed insofar as appealed from, on the law, with costs, and matter remitted to the Supreme Court, Dutchess County, for entry of an appropriate judgment in the principal sum of $3,200.

MOLLEN, P.J., and WEINSTEIN and RUBIN, JJ., concur in the opinion of TITONE, J.

All Citations

102 A.D.2d 663, 476 N.Y.S.2d 918

Footnotes

* It is true that the Supreme Court declined to extend the "spare boat" doctrine to a boat acquired and maintained for the general uses of the business, limiting recoverable damages to "the additional wear and tear on the over-worked vessels" (Dobbs, Remedies, § 5.11, p. 389). While that result has been criticized (Note, 39 Harv. L. Rev. 760), that portion of the holding is irrelevant to the case now before us as the business of the plaintiff is the operation of buses and the parties have stipulated the amount of damages incurred

as a result of the loss of use.

30 N.Y.2d 415
Court of Appeals of New York.

PARAMOUNT FILM DISTRIBUTING CORPORATION, Respondent,
v.
STATE of New York, Appellant.

Claim No. 45976.
|
June 8, 1972.

Synopsis
Appeal from order of the Supreme Court, Appellate Division, 37 A.D.2d 226, 324 N.Y.S.2d 363, which modified, and as modified, affirmed judgment in favor of claimant entered on decision of Court of Claims, Henry W. Lengyel, J. The Court of Appeals, Breitel, J., held that where motion picture distributor paid license fees for films without protest, regulatory services had been performed, fees had been upheld, and statute under which fees had been collected was declared unconstitutional on ground unrelated to fees, distributor was not entitled to recover fees paid.

Reversed and remanded.

Bergan, J., dissented and filed opinion in which Fuld, C.J., and Gibson, J., concurred.

Attorneys and Law Firms

*****389 **695 *416** Louis J. Lefkowitz, Atty. Gen. (Grace K. Banoff and Ruth Kessler Toch, Albany, of counsel), for appellant.

***417** John R. Davison, Albany and Walter J. Josiah, Jr., New York City, for respondent.

Opinion

BREITEL, Judge.

Claimant, a motion picture distributor, seeks recovery of $128,322.50 in motion picture license fees paid to the State from June 10, 1959 to June 10, 1965 when the applicable statutes were nullified (Education Law, Consol. Laws, c. 16, ss 120—132; Matter of Trans-Lux Distr. Corp. v. Board of Regents, 16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558, on remand from the United States Supreme Court, 380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959). The fee for original films was $3.50 for each 1,000 feet of film while the fee for copies was $3 plus an additional dollar ***418** for each 1,000 feet (Education Law, s 126). Although over a six-year period the fees aggregate an impressive sum, the fee per motion picture distributed in New York was only an inconsiderable expense compared to the cost of production, most often less than $10. Claimant had paid all but a trivial portion of the fees without protest and ****696** had not otherwise ever resisted the statutory procedure for licensing or the payment of fees.

*****390** On the prior appeal (14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d 242) in the Trans-Lux case (380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959; 16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558, Supra) this court, in upholding the denial of a motion picture license, passed only on the propriety of denying a license for the particular motion picture in suit. The validity of the licensing statute, extant in some form since 1927, its procedure, and the fees charged were not in issue. Motion picture licensing generally had been held valid by the Supreme Court, and indeed in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, the case upon which the Trans-Lux order was reversed, the Supreme Court went out of its way to observe that a requirement of prior submission of motion pictures to a licensing board need not be unconstitutional. The Freedman case nullified the Maryland statute only because its procedural 'apparatus' violated due process in not providing for prompt judicial review. Since the New York procedure was similar to Maryland's, this court on remand declared the New York statute null (16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558, Supra).

A majority at the Appellate Division sustained claimant's right to recover all fees paid since 1959. While $128,322.50 plus interest is now involved, other cases pending bring the claims to just under $2,000,000.

As posted by the parties, the issue is whether the payments of the license fees were voluntary, or involuntary under duress entitling the payor to recover, albeit the payments were made without protest or other action to resist the payments or to recover them.

Two leading New York cases mark clearly when there is a right to recover unprotested taxes or fees.

In Mercury Mach. Importing Corp. v. City of New York, 3 N.Y.2d 418, 165 N.Y.S.2d 517, 144 N.E.2d 400 this court, over vigorous dissent it is true, held that corporate taxpayers who voluntarily paid an illegally levied tax without protest were not entitled to refunds although the statute under which the taxes were paid was subsequently ***419** held unconstitutional. The fulcrum of the determination was the relatively new section of the Civil Practice Act which provided that a mistake being one of law for that reason alone did not forbid recovery for mistake (s 112—f). The taxpayers had made a mistake of

law, namely, as to the validity of the taxing statute, but it was held that the mistake did not render the payment involuntary. It was pointed out that in a sense no tax is paid willingly, free from the coercion of law. The precedents were collated and classified and it is unnecessary to repeat what was done there.

*****391** In Five Boro Elec. Contrs. Assn. v. City of New York, 12 N.Y.2d 146, 237 N.Y.S.2d 315, 187 N.E.2d 774 this court again in an opinion by Judge Van Voorhis, who had written for the court in the Mercury case (3 N.Y.2d 418, 165 N.Y.S.2d 517, 144 N.E.2d 400, Supra), but this time with unanimous concurrence of the court, permitted the recovery of license fees paid under a city local law without protest by licensed electricians. The distinction was made that the payments then in question were involuntary and under duress, because the electricians would otherwise have been barred from engaging in their occupations. The court held that protest was not required 'under the circumstances of this case * * * in view of the compulsory nature of the payment of these exorbitant license fees' (Id., at p. 149, 237 N.Y.S.2d at p. 317, 187 N.E.2d at p. 775). Most important, the fees themselves had been the subject of a previous successful attack and the exaction declared unconstitutional because the amounts bore no reasonable relation to the licensing and regulation of electricians ****697** under a nonrevenue statute (Adlerstein v. City of New York, 6 N.Y.2d 740, 185 N.Y.S.2d 821, 158 N.E.2d 512).* Again the same authorities cited in the Mercury case were reviewed and the distinctions there made repeated to explain the difference in result between the two cases.

The Mercury and Five Boro cases are not aberrational. They conform generally with distinctions made throughout the country between voluntary and involuntary payments of taxes or fees later declared void, and the necessity for protest in the case of voluntary payments (see, generally, Restatement, Restitution, s 75, including Comments and Illustrations; Ann., ***420** Taxes—Involuntary Payment—Recovery, 80 A.L.R.2d 1040; 53 C.J.S. Licenses s 57).

Applying the distinctions to this case, the payments by claimant were voluntary, and in the absence of protest at the time, claimant is not entitled to recover the fees it paid just because in a collateral matter on grounds not applicable to it or ever raised by it, the statute has been declared null.

The test of voluntariness in cases involving taxes and fees is sometimes elusive and difficult of application. As noted earlier by Judge Van Voorhis, all taxes and fees in a sense are paid 'involuntarily'. The difference is often, if not always, one of degree and turns on many factors, including the right of taxing authorities to rely on objection if there be resistance to payment, the likelihood that authentic resistance will be asserted, the unavoidable drastic impact of the taxes or fees on the claimant, and the impact on the public fisc, if *****392** revenues raised long ago and expended are subject to reimbursement. Surely one would expect motion picture distributors, and especially a corporation as large as claimant with its staff of lawyers, to protest if the fees were thought illegal. Indeed, the failure to protest indicates that there was no authentic resistance to making the minimal payments for the extensive procedures in licensing motion pictures whose gross yield would be massive compared to the trivial fees imposed.

Moreover, the fees as such have never been held illegal or excessive but on the contrary sustained, and the regulatory services which the fees financed have long ago been rendered and the cost undoubtedly passed on to the patrons of the films. The Trans-Lux case (14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d 242; 380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959; 16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558, Supra) and the Freedman case (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, Supra) each involved a license requirement to exhibit a motion picture, and the requirements were overturned because of the invalid procedure under the statute. On the other hand, the fees sought to be recovered in this case were reasonable tariffs for motion picture licensing and the films were actually licensed (Matter of Connection Co. v. Regents, 17 A.D.2d 671, 230 N.Y.S.2d 103, affd. 12 N.Y.2d 779, 234 N.Y.S.2d 722, 186 N.E.2d 569). Notably, in the Freedman case (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, Supra) the Supreme Court reiterated its prior holdings that motion pictures were properly subject to licensing and the payment of license fees. Indeed, Mr. Justice Brennan, on behalf of the court, suggested illustrative ***421** procedural means to implement a valid licensing statute (380 U.S., at pp. 60—61, 85 S.Ct. 734). In a similar context, and in the only reported case found deciding the issue of the recovery of license fees paid without protest under a motion picture licensing statute, the Pennsylvania Supreme Court denied recovery for reasons analogous to those mentioned above (Universal Film Exch. v. Board of Finance & Revenue, 409 Pa. 180, 185 A.2d 542, cert. den. 372 U.S. 958, 83 S.Ct. 1015, 10 L.Ed.2d 12). Of particular significance ****698** to the Pennsylvania court were the long years of acquiescence with adequate opportunity to take legal action, the rendering of inspection services as a Quid pro quo, the benefit to the industry, and the passing on of the costs of the license fees to the theatre-going public. (See, also, Box Office Pictures v. Board of Finance & Revenue, 402 Pa. 511, 515—519, 166 A.2d 656; Paramount Film Distr. Corp. v. Tracy, Ohio Com.Pl., 176 N.E.2d 610, 618—621, affd. 118 Ohio App. 29, 193 N.E.2d 283, affd. 175 Ohio St. 55, 191 N.E.2d 839.)

What has been said so far assumes, as the parties have assumed, that restitution is appropriate unless it can be

shown that claimant paid its license fees voluntarily. But, if general principles of restitution ***393** were to be reached, even if one assumes involuntary or coerced payment, those general principles do not support restitution.

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (Grombach Prods. v. Waring, 293 N.Y. 609, 615, 59 N.E.2d 425, 428; American Sur. Co. v. Conner, 251 N.Y. 1, 8—11, 166 N.E. 783, 785—787; Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337, 339; Schank v. Schuchman, 212 N.Y. 352, 106 N.E. 127; Restatement, Restitution, s 1; 50 N.Y.Jur., Restitution, ss 1, 3). Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (50 N.Y.Jur., Restitutions, s 7). Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (Restatement, Restitution, ss 1, 142, esp. Comment B; id., s 155, including Comment B).

It is difficult to say that the State has received any benefit, let alone unjust enrichment. The fees defrayed the cost of the *422 licensing program, a program which, at least, was intended to further the interests of both the industry and the public. The statute was not a revenue measure, and, Inter alia, it exacted a regulatory fee to support the program. The difference between regulatory fees and revenue imposts, the latter including unauthorized excessive regulatory fees paid involuntarily, also distinguishes this case from the Five Boro case (12 N.Y.2d 146, 237 N.Y.S.2d 315, 187 N.E.2d 774, Supra).

Moreover, the funds have been disbursed long ago. Nor has the State acted tortiously or fraudulently in exacting the fees. The implications of this court's holding in Trans-Lux invalidating the statute for reasons distinct from the power to collect fees has already been noted. That the exactions were themselves proper and not tortious, fraudulent, or illegal, and that they have been consumed is significant. Generally, if a plaintiff's recovery will lead to an undue net loss to a defendant by reason of a changed position, as will often be the case when the funds have been disbursed, then the parties being equally innocent, recovery may be denied (Ball v. Shepard, 202 N.Y. 247, 253—254, 95 N.E. 719, 721; Matter of Harned, 149 Misc. 476, 478—479, 267 N.Y.S. 769, 771—772 (Wingate, S.); 44 N.Y.Jur., Payment, ss 105—106; see, generally, Ann., Restitution—Payee's Change of Position, 40 A.L.R.2d 997).

In summary, the payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes; hence, no recovery for the fees collected without protest or other ***394** resistance may be allowed. Since a small percentage of fees were paid under protest between March and June, 1965, the matter should be remanded so that such fees may be computed, and recovery allowed.

Accordingly, the order of the Appellate Division should be reversed, with one bill of costs, and the action remanded for further **699** proceedings in accordance with this opinion.

BERGAN, Judge (dissenting).

On March 15, 1965 the Supreme Court in Matter of Trans-Lux Distr. Corp. v. Board of Regents, 380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959 summarily, and on the authority of Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 decided two weeks earlier, reversed the decision of this court in Matter of Trans-Lux Distr. Corp. v. Board of Regents, 14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d 242 which had sustained refusal *423 by the Board of Regents to license a motion picture, and had again upheld the validity of the New York licensing statute (Education Law, tit. I, art. 3, part II).

Trans-Lux applied to this court in June, 1965 to amend the remittitur entered under the decision at 14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d 242 to conform the judgment to the Supreme Court mandate and this motion was granted June 10 (16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558). Specifically, the court directed that 'the matter be remitted to the Supreme Court, Albany County, with directions to vacate its judgment entered April 24, 1964, and to enter a new judgment declaring and determining that Title I, Article 3, Part II of the Education Law violates the Fourteenth Amendment of the Constitution of the United States and is null and void' (16 N.Y.2d, at p. 711, 261 N.Y.S.2d, at p. 903, 209 N.E.2d, at p. 558).

In opposition to that motion the Board of Regents argued the general provisions of the statute survived the Supreme Court's decision and that the court did not 'hold that the statute of the State of New York is unconstitutional'. This was an argument that the licensing and collection of the licensing fees could continue although the Regents must change its procedures.

This court's answer, as it has been observed, was a determination that the entire statute 'is null and void', a decision embracing the fee provisions. This much must be

said about the belief of the majority that the fees as such have never been held illegal.

It is not disputed claimant paid the State $128,322.50 in fees during the six-year period before June 10, 1965, either for licenses issued to it or to its parent corporation Paramount Pictures Corporation. The Court of Claims found claimant was entitled to $29,279 which was the *****395** amount claimant had paid in fees for licenses issued directly to it, but that it was not entitled to $99,025 which claimant itself had also paid as fees for licenses issued to its parent Paramount Pictures. The Appellate Division, by a divided court, modified this judgment to allow claimant the full amount of its claim, $128,322.50.

On the State's argument that a large part of the fees paid by claimant were not under protest, and, therefore, not recoverable because voluntarily paid, it is necessary to examine the two leading cases in this court in their impact on this problem and on each other.

***424** In 1957 the court decided Mercury Mach. Importing Corp. v. City of New York, 3 N.Y.2d 418, 165 N.Y.S.2d 517, 144 N.E.2d 400. This case involved actions to recover payments made by taxpayers on interstate business levied under the New York City General Business and Financial Tax Law. The tax in its effect on interstate commerce had been previously held invalid.

Since there had been no protest made, and the conditions of duress did not exist under which protest was deemed unnecessary, i.e., 'duress, where present liberty of person or immediate possession of needful goods is threatened by nonpayment' of the tax or where there was a resulting lien, the tax was held not under duress, and since not protested, could not be recovered (3 N.Y.2d, at p. 425, 165 N.Y.S.2d, at p. 520, 144 N.E.2d, at p. 402).

****700** Five years later in 1962 the court decided Five Boro Elec. Contrs. Assn. v. City of New York, 12 N.Y.2d 146, 237 N.Y.S.2d 315, 187 N.E.2d 774. It held that license fees paid by a number of electricians over a five-year period under a statute which had been held by this court invalid because excessive in amount and bearing no relation to the cost of licensing, could be recovered although paid by plaintiffs without protest.

To reach this result it became necessary for the court to distinguish Mercury (3 N.Y.2d 418, 165 N.Y.S.2d 517, 144 N.E.2d 400, Supra) which it undertook to do. The ground of distinction was precisely laid down. No protest was needed, and there was, in effect, a resulting duress because 'these electricians were placed in a situation where their only alternative was to submit to an illegal exaction or discontinue their businesses (Swift & Courtney & Beecher Co. v. United States, 111 U.S. 22, 28, 4 S.Ct. 244, 28 L.Ed. 341). They were not allowed to operate without licenses, nor could their licenses be renewed except by payment of excessive fees' (12 N.Y.2d, at p. 149, 237 N.Y.S.2d, at p. 317, 187 N.E.2d, at p. 776).

The court excused failure to protest the payment of fees even as to those made after there had been a judicial determination that the statute as applied was invalid. That decision, *****396** Adlerstein v. City of New York, 11 Misc.2d 754, 174 N.Y.S.2d 610, affd. 7 A.D.2d 717, 181 N.Y.S.2d 165, affd. 6 N.Y.2d 740, 185 N.Y.S.2d 821, 158 N.E.2d 512, was rendered at Special Term in April, 1958, and the fees allowed to be recovered were paid from 1954 through 1959 (12 N.Y.2d, p. 147, 237 N.Y.S.2d 315, 187 N.E.2d 774).

The ground for this was that even after Adlerstein (supra) was decided 'unless they (licensees) had paid the excessive fees required for their licenses to do business they would have ***425** been prevented from earning a livelihood while that litigation was pending. The right to earn one's living and to engage in business is fundamental and its protection is necessary to the interests of Society' (12 N.Y.2d, at pp. 149—150, 237 N.Y.S.2d, at p. 317, 187 N.E.2d, at p. 776).

Therefore, the rule of Mercury (3 N.Y.2d 418, 165 N.Y.S.2d 517, 144 N.E.2d 400, Supra) was held not to apply to an invalid license requirement which, if not obeyed, would result in the loss of a right to engage in business. That exception to Mercury is exactly the case of the present claimant. There is at least as much 'authentic resistance' to the payment of the claimant's license fees as there was in Five Boro (12 N.Y.2d 146, 237 N.Y.S.2d 315, 187 N.E.2d 774, Supra) and the actual protest came earlier in relation to judicial declarations of invalidity addressed to the respective statutes.

What seems decisive in the majority's summation of the grounds for decision here is that claimant's 'payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes'. On this aspect of the case, at least, Five Boro (12 N.Y.2d 146, 237 N.Y.S.2d 315, 187 N.E.2d 774, Supra) appears to be indistinguishable and it should be overruled or followed. The need for protest, and not the uses to which the fees were put, was decisive in Five Boro. The rule for licensed electricians and licensed motion picture exhibitors should be pretty much the same.

Thus the difference between regulatory fees and revenue imposts played no part in the announced reasons for decision in Five Boro and is not a ground to distinguish the present case. This court did not in Adlerstein (6 N.Y.2d 740, 185 N.Y.S.2d 821, 158 N.E.2d 512, Supra) hold the electricians' license fees so high as to become a revenue impost; and Five Boro did not consider this ground, but

treated the actions as brought to 'recover excess money' (12 N.Y.2d, at pp. 147—148, 237 N.Y.S.2d, at p. 316, 187 N.E.2d, at p. 775) under the Adlerstein ****701** holding that the fees were unconstitutionally excessive.

That the State used the proceeds of the license fees collected under the statute in the licensing operation itself does not for the purposes of this case distinguish it from one where the fee or tax is used for general State purposes. Here the program of inspection and licensing *****397** expressed in the statute was responsive to the State's belief in the value of censorship to protect public morals and elevate public taste, and so in furtherance of a general public policy. No benefit to the business of motion ***426** picture exhibitors was intended or demonstrated in the experience with censorship.

Hence the impact of the fee on the licensee's business was not for the protection or assistance of the licensee or even to improve its service to the public, but rather to effectuate the purpose of public authority to censor.

Long experience with this type of censorship left its benefit to the public doubtful, and where approval of films was not granted routinely, the censor tended to act repressively against creative innovation. Ultimately censorship ran afoul of constitutional freedom of expression.

It is true, as the majority has observed, that an action for recovery for unjust enrichment or restitution should appeal to equity and good conscience and this principle ought to apply to an action such as the present one.

Here the good conscience in issue is that of the sovereign which collected the fees under the compulsion of a statute which the sovereign State itself, by its highest court, advisedly held to be 'null and void'. It seems the part of fair dealing to turn the money back.

The sum is large for the taxpayers as well as the State. As Judge Fuld noted in dissent in Mercury (3 N.Y.2d 418, 165 N.Y.S.2d 517, 144 N.E.2d 400, Supra): 'Modern and enlightened tax administration frowns upon the imposition of technical obstacles to the refunding of illegally collected taxes' (p. 433, 165 N.Y.S.2d p. 527, 144 N.E.2d p. 408).

The order should be affirmed.

BURKE, SCILEPPI and JASEN, JJ., concur with BREITEL, J.

BERGAN, J., dissents and votes to affirm in a separate opinion in which FULD, C.J., and GIBSON, J., concur.

Order reversed, with costs, and case remitted to the Court of Claims for further proceedings in accordance with the opinion herein.

All Citations

30 N.Y.2d 415, 285 N.E.2d 695, 334 N.Y.S.2d 388

Footnotes

[*] Plaintiffs in the Five Boro case were among those who brought the class action in the Adlerstein case to nullify the local law. The fees sought to be recovered in the Five Boro case were paid while the Adlerstein action was pending.

111 S.Ct. 2597
Supreme Court of the United States

Pervis Tyrone PAYNE, Petitioner
v.
TENNESSEE.

No. 90–5721.
|
Argued April 24, 1991.
|
Decided June 27, 1991.
|
Rehearing Denied Sept. 13, 1991.
|
See 501 U.S. 1277, 112 S.Ct. 28.

Synopsis
Defendant was convicted in the Shelby Criminal Court, Bernier Weinman, J., of first-degree murder of a mother and her two-year-old daughter and first-degree assault with intent to murder a three-year-old boy. The defendant was sentenced to death, and he appealed. The Supreme Court of Tennessee, 791 S.W.2d 10, affirmed. The defendant petitioned for certiorari. The Supreme Court granted review, and held in an opinion by Chief Justice Rehnquist that: (1) the Eighth Amendment did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence, and (2) doctrine of stare decisis did not require court to follow prior precedent.

Affirmed.

Justice O'Connor filed a concurring opinion in which Justices White and Kennedy joined.

Justice Scalia filed a concurring opinion in Part II which Justices O'Connor and Kennedy joined.

Justice Souter filed a concurring opinion in which Justice Kennedy joined.

Justice Marshall filed a dissenting opinion in which Justice Blackmun joined.

Justice Stevens filed a dissenting opinion in which Justice Blackmun joined.

****2599 *808** *Syllabus*[*]

Petitioner Payne was convicted by a Tennessee jury of the first-degree murders of Charisse Christopher and her 2–year–old daughter, and of first-degree assault upon, with intent to murder, Charisse's 3–year–old son Nicholas. The brutal crimes were committed in the victims' apartment after Charisse resisted Payne's sexual advances. During the sentencing phase of the trial, Payne called his parents, his girlfriend, and a clinical psychologist, each of whom testified as to various mitigating aspects of his background and character. The State called Nicholas' grandmother, who testified that the child missed his mother and baby sister. In arguing for the death penalty, the prosecutor commented on the continuing effects on Nicholas of his experience and on the effects of the crimes upon the victims' family. The jury sentenced Payne to death on each of the murder counts. The State Supreme Court affirmed, rejecting his contention that the admission of the grandmother's testimony and the State's closing argument violated his Eighth Amendment rights under *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876, which held that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are *per se* inadmissible at a capital sentencing hearing.

Held: The Eighth Amendment erects no *per se* bar prohibiting a capital sentencing jury from considering "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such evidence at a ****2600** capital sentencing hearing. To the extent that this Court held to the contrary in *Booth* and *Gathers* those cases are overruled. Pp. 2604–2611.

(a) There are numerous infirmities in the rule created by *Booth* and *Gathers.* Those cases were based on two premises: that evidence relating to a particular victim or to the harm caused a victim's family does not in general reflect on the defendant's "blameworthiness," and that only evidence of "blameworthiness" is relevant to the capital sentencing decision. See *Booth, supra,* at 504–505, 107 S.Ct., at 2533–2534. However, assessment of the harm caused by the defendant has long been an important factor in determining the appropriate punishment, and victim impact evidence is simply another method of informing the sentencing authority about such harm. In excluding such evidence, the Court in *Booth, supra,* at 504, 107 S.Ct., at 2533–2534, misread ***809** the statement in *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, that the capital defendant must be treated as a "uniquely individual human bein[g]." As *Gregg v. Georgia*, 428 U.S. 153, 203–204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 demonstrates, the *Woodson* language was not intended to describe a class of evidence that *could not* be received, but a class of evidence that *must* be received, *i.e.*, any relevant, nonprejudicial material, see *Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S.Ct. 3383, 3397, 77

L.Ed.2d 1090. The *Booth* Court's misreading of precedent has unfairly weighted the scales in a capital trial. Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances. See, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1. The State has a legitimate interest in counteracting such evidence, but the *Booth* rule prevents it from doing so. Similarly, fairness to the prosecution requires rejection of *Gathers'* extension of the *Booth* rule to the prosecutor's argument, since, under the Eighth Amendment, this Court has given the capital defendant's attorney broad latitude to argue relevant mitigating evidence reflecting on his client's individual personality. The Court in *Booth, supra*, 482 U.S., at 506–507, 107 S.Ct., at 2534–2535, also erred in reasoning that it would be difficult, if not impossible, for a capital defendant to rebut victim impact evidence without shifting the focus of the sentencing hearing away from the defendant to the victim. The mere fact that for tactical reasons it might not be prudent for the defense to rebut such evidence makes the case no different from others in which a party is faced with this sort of dilemma. Nor is there merit to the concern voiced in *Booth, supra*, at 506, 107 S.Ct., at 2534–2535, that admission of such evidence permits a jury to find that defendants whose victims were assets to their communities are more deserving of punishment than those whose victims are perceived to be less worthy. Such evidence is not generally offered to encourage comparative judgments of this kind, but is designed to show instead *each* victim's uniqueness as an individual human being. In the event that victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief. See *Darden v. Wainwright*, 477 U.S. 168, 179–183, 106 S.Ct. 2464, 2470–2472, 91 L.Ed.2d 144. Thus, a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase victim impact evidence. Pp. 2604–2609.

(b) Although adherence to the doctrine of *stare decisis* is usually the best policy, the doctrine is not an inexorable command. This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned, *Smith v. Allwright*, 321 U.S. 649, 655, 64 S.Ct. 757, 760–761, 88 L.Ed. 987 particularly in constitutional cases, where correction through legislative action is practically impossible, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407, 52 S.Ct. 443, 447, 76 L.Ed. 815 (Brandeis, J., ****2601** dissenting), and in cases involving procedural ***810** and evidentiary rules. *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging their basic underpinnings; have been questioned by Members of this Court in later decisions; have defied consistent application by the lower courts, see, *e.g.*, *State v. Huertas*, 51 Ohio St.3d 22, 33, 553 N.E.2d 1058, 1070; and, for the reasons heretofore stated, were wrongly decided. Pp. 2609–2611.

791 S.W.2d 10 (Tenn.1990), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE and KENNEDY, JJ., joined, *post*, p. 2611. SCALIA, J., filed a concurring opinion, in Part II of which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 2613. SOUTER, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 2614. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 2619. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 2625.

Attorneys and Law Firms

J. Brooke Lathram argued the cause and filed briefs for petitioner.

Charles W. Burson, Attorney General of Tennessee, argued the cause for respondent. With him on the brief was *Kathy M. Principe*, Assistant Attorney General.

Attorney General Thornburgh argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Stephen L. Nightingale*.*

**Stephen B. Bright* and *J.L. Chestnut* filed a brief for the Southern Christian Leadership Conference as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the Washington Legal Foundation et al. by *Richard K. Willard*, *Daniel J. Popeo*, *Paul D. Kamenar*, and *Richard Samp;* and for Congressman Thomas J. Bliley, Jr., et al. by *Michael J. Lockerby* and *Frank G. Carrington.*

Briefs of *amici curiae* were filed for the State of Alabama et al. by *Daniel E. Lungren*, Attorney General, of California, *George Williamson*, Chief Assistant Attorney General, *Harley D. Mayfield*, Senior Assistant Attorney General, *Frederick R. Millar, Jr.*, Supervising Deputy Attorney General, and *Louis R. Hanoian*, Deputy Attorney General, *James H. Evans*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona, *Gale A. Norton*, Attorney General of Colorado, *John J. Kelly*, Chief State's Attorney of connecticut, *Robert A. Butterworth*,

Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Frederic J. Cowan*, Attorney General of Kentucky, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Lee Fisher*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *Mark W. Barnett*, Attorney General of South Dakota, and *Kenneth O. Eikenberry*, Attorney General of Washington; for the Appellate Committee of the California District Attorneys Association by *Ira Reiner*, *Harry B. Sondheim*, and *Martha E. Bellinger;* for the Justice for All Political Committee et al. by *Mario Thomas Gaboury* and *Sally S. King;* and for the National Organization for Victim Assistance et al. by *Judith Rowland*.

Opinion

***811** Chief Justice REHNQUIST delivered the opinion of the Court.

In this case we reconsider our holdings in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

Petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders and to 30 years in prison for the assault.

The victims of Payne's offenses were 28–year–old Charisse Christopher, her 2–year–old daughter Lacie, and her 3–year–old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from Payne's girlfriend, Bobbie Thomas. On Saturday, June 27, 1987, Payne visited Thomas' apartment several times in expectation of her return from her mother's house in Arkansas, but found no one at home. On one visit, he left his overnight bag, containing ***812** clothes and other items for his weekend stay, in the hallway outside Thomas' apartment. With the bag were three cans of malt liquor.

Payne passed the morning and early afternoon injecting cocaine and drinking beer. Later, he drove around the town with a friend in the friend's car, each of them taking turns reading a pornographic magazine. Sometime around 3 p.m., Payne returned to the apartment complex, entered the Christophers' apartment, and began making sexual advances towards Charisse. Charisse resisted and Payne became violent. A neighbor who resided in the apartment directly beneath the Christophers heard Charisse screaming, " 'Get out, get out,' as if she were telling the children to leave." Brief for Respondent 3. The noise briefly subsided and then began, " 'horribly loud.' " *Ibid.* The neighbor called the police after she heard a "blood curdling scream" from the Christopher's apartment. *Ibid.*

When the first police officer arrived at the scene, he immediately encountered Payne, who was leaving the apartment building, so covered with blood that he appeared to be " 'sweating blood.' " The officer confronted Payne, who responded, " 'I'm the complainant.' " *Id.*, at 3–4. When the officer asked, " 'What's going on up there?' " Payne struck the officer with the overnight bag, dropped ****2602** his tennis shoes, and fled. 791 S.W.2d 10, 12 (Tenn.1990).

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

***813** Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne's baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne's fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment door.

Payne was apprehended later that day hiding in the attic of the home of a former girlfriend. As he descended the stairs of the attic, he stated to the arresting officers, " 'Man, I ain't

killed no woman.' " *Id.*, at 13. According to one of the officers, Payne had " 'a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid.' " *Ibid.* He had blood on his body and clothes and several scratches across his chest. It was later determined that the blood stains matched the victims' blood types. A search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, and a cap from a hypodermic syringe. His overnight bag, containing a bloody white shirt, was found in a nearby dumpster.

At trial, Payne took the stand and, despite the overwhelming and relatively uncontroverted evidence against him, testified that he had not harmed any of the Christophers. Rather, he asserted that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived. He stated that he had gotten blood on himself when, after hearing moans from the Christophers' apartment, he ***814** had tried to help the victims. According to his testimony, he panicked and fled when he heard police sirens and noticed the blood on his clothes. The jury returned guilty verdicts against Payne on all counts.

During the sentencing phase of the trial, Payne presented the testimony of four witnesses: his mother and father, Bobbie Thomas, and Dr. John T. Hutson, a clinical psychologist specializing in criminal court evaluation work. Bobbie Thomas testified that she met Payne at church, during a time when she was being abused by her husband. She stated that Payne was a very caring person, and that he devoted much time and attention to her three children, who were being affected by her marital difficulties. She said that the children had come to love him very much and would miss him, and that he "behaved just like a father that loved his kids." She asserted that he did not drink, nor did he use drugs, and that it was generally inconsistent with Payne's character to have committed these crimes.

Dr. Hutson testified that based on Payne's low score on an IQ test, Payne was "mentally handicapped." Hutson also said that Payne was neither psychotic nor schizophrenic, and that Payne was the most polite prisoner he had ever met. Payne's parents testified that their son had no prior criminal record and ****2603** had never been arrested. They also stated that Payne had no history of alcohol or drug abuse, he worked with his father as a painter, he was good with children, and he was a good son.

The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she responded:

> "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I ***815** tell him yes. He says, I'm worried about my Lacie." App. 3.

In arguing for the death penalty during closing argument, the prosecutor commented on the continuing effects of Nicholas' experience, stating:

> "But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister." *Id.*, at 9.
>
> "There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> "Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer." *Id.*, at 12.

In the rebuttal to Payne's closing argument, the prosecutor stated:

> "You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will ***816** always come into your mind, probably throughout the rest of your lives....
>
> . . . . .
>
> "... No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him

> at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.
>
> . . . . .
>
> "[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever." *Id.*, at 13–15.

The jury sentenced Payne to death on each of the murder counts.

The Supreme Court of Tennessee affirmed the conviction and sentence. ****2604** 791 S.W.2d 10 (1990). The court rejected Payne's contention that the admission of the grandmother's testimony and the State's closing argument constituted prejudicial violations of his rights under the Eighth Amendment as applied in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). The court characterized the grandmother's testimony as "technically irrelevant," ***817** but concluded that it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." 791 S.W.2d, at 18.

The court determined that the prosecutor's comments during closing argument were "relevant to [Payne's] personal responsibility and moral guilt." *Id.*, at 19. The court explained that "[w]hen a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his 'blameworthiness.' " The court concluded that any violation of Payne's rights under *Booth* and *Gathers* "was harmless beyond a reasonable doubt." *Ibid.*

We granted certiorari, 498 U.S. 1080, 111 S.Ct. 1031, 112 L.Ed.2d 1032 (1991), to reconsider our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family.

In *Booth*, the defendant robbed and murdered an elderly couple. As required by a state statute, a victim impact statement was prepared based on interviews with the victims' son, daughter, son-in-law, and granddaughter. The statement, which described the personal characteristics of the victims, the emotional impact of the crimes on the family, and set forth the family members' opinions and characterizations of the crimes and the defendant, was submitted to the jury at sentencing. The jury imposed the death penalty. The conviction and sentence were affirmed on appeal by the State's highest court.

This Court held by a 5–to–4 vote that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial. The Court ***818** made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was *per se* inadmissible in the sentencing phase of a capital case except to the extent that it "relate[d] directly to the circumstances of the crime." 482 U.S., at 507, n. 10, 107 S.Ct., at 2535, n. 10. In *Gathers*, decided two years later, the Court extended the rule announced in *Booth* to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

The *Booth* Court began its analysis with the observation that the capital defendant must be treated as a " 'uniquely individual human bein[g],' " 482 U.S., at 504, 107 S.Ct., at 2534 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)), and therefore the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the " 'character of the individual and the circumstances of the crime.' " 482 U.S., at 502, 107 S.Ct. at 2532 (quoting *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983)). The Court concluded that while no prior decision of this Court had mandated that only the defendant's character and immediate characteristics of the crime may constitutionally be considered, other factors are irrelevant to the capital sentencing decision unless they have "some bearing on the defendant's 'personal responsibility and moral guilt.' " 482 U.S., at 502, 107 S.Ct. at 2533 (quoting *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 (1982)). To the extent that victim impact ****2605** evidence presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," the Court concluded, it has nothing to do with the "blameworthiness of a particular defendant." 482 U.S., at 504, 505, 107 S.Ct., at 2534. Evidence of the victim's character, the Court observed, "could well distract the sentencing jury from its constitutionally required task

[of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." The Court concluded that, except to the extent that victim impact evidence relates "directly ***819** to the circumstances of the crime," *id.*, at 507, and n. 10, 107 S.Ct., at 2535, and n. 10, the prosecution may not introduce such evidence at a capital sentencing hearing because "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner," *id.*, at 505, 107 S.Ct., at 2534.

Booth and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's "blameworthiness," and that only evidence relating to "blameworthiness" is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth*, 482 U.S., at 519, 107 S.Ct., at 2541 (SCALIA, J., dissenting). The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed. *Tison v. Arizona*, 481 U.S. 137, 148, 107 S.Ct. 1676, 1683, 95 L.Ed.2d 127 (1987).

The principles which have guided criminal sentencing—as opposed to criminal liability—have varied with the times. The book of Exodus prescribes the *Lex talionis*, "An eye for an eye, a tooth for a tooth." Exodus 21:22–23. In England and on the continent of Europe, as recently as the 18th century, crimes which would be regarded as quite minor today ***820** were capital offenses. Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that "the punishment should fit the crime." He said that "[w]e have seen that the true measure of crimes is the injury done to society." J. Farrer, Crimes and Punishments 199 (1880).

Gradually the list of crimes punishable by death diminished, and legislatures began grading the severity of crimes in accordance with the harm done by the criminal. The sentence for a given offense, rather than being precisely fixed by the legislature, was prescribed in terms of a minimum and a maximum, with the actual sentence to be decided by the judge. With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the "indeterminate sentence," where the time of incarceration was left almost entirely to the penological authorities rather than to the courts. But more recently the pendulum has swung back. The Federal Sentencing Guidelines, which went into effect in 1987, provided for very precise calibration of sentences, depending upon a number of factors. These factors relate both to the ****2606** subjective guilt of the defendant and to the harm caused by his acts.

Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion:

> "The first significance of harm in Anglo–American jurisprudence is, then, as a prerequisite to the criminal sanction. The second significance of harm—one no less important to judges—is as a measure of the seriousness of the offense and therefore as a standard for determining the severity of the sentence that will be meted out." S. Wheeler, K. Mann, & A. Sarat, Sitting in Judgment: The Sentencing of White–Collar Criminals 56 (1988).

Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of ***821** relevant material. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). In the federal system, we observed that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). Even in the context of capital sentencing, prior to *Booth* the joint opinion of Justices Stewart, Powell, and STEVENS in *Gregg v. Georgia*, 428 U.S. 153, 203–204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976), had rejected petitioner's attack on the Georgia statute because of the "wide scope of evidence and argument allowed at presentence hearings." The joint opinion stated:

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such

> a hearing and to approve open and far-ranging argument.... So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

The Maryland statute involved in *Booth* required that the presentence report in all felony cases include a "victim impact statement" which would describe the effect of the crime on the victim and his family. *Booth, supra*, 482 U.S., at 498, 107 S.Ct., at 2531. Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. The evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect were much the same as if it had been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) (upholding the constitutionality of a ***822** notice-of-alibi statute, of a kind enacted by at least 15 States dating from 1927); *United States v. DiFrancesco*, 449 U.S. 117, 142, 101 S.Ct. 426, 440, 66 L.Ed.2d 328 (1980) (upholding against a double jeopardy challenge an Act of Congress representing "a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges 'to mete out light sentences in cases involving organized crime management personnel' ").

We have held that a State cannot preclude the sentencer from considering "any relevant mitigating evidence" that the defendant proffers in support of a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). See also *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Thus we have, as the Court observed in *Booth*, required that the capital defendant be treated as a " 'uniquely individual human ****2607** bein[g],' " 482 U.S., at 504, 107 S.Ct., at 2534 (quoting *Woodson v. North Carolina*, 428 U.S., at 304, 96 S.Ct., at 2991). But it was never held or even suggested in any of our cases preceding *Booth* that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received. Any doubt on the matter is dispelled by comparing the language in *Woodson* with the language from *Gregg v. Georgia*, quoted above, which was handed down the same day as *Woodson*. This misreading of precedent in *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," *Mills v. Maryland*, 486 U.S., 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, C.J., dissenting), or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

***823** The *Booth* Court reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a " 'mini-trial' on the victim's character." *Booth, supra*, 482 U.S., at 506–507, 107 S.Ct. at 2534–2535. In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of a dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S.Ct. 3383, 3397, 77 L.Ed.2d 1090 (1983).

Payne echoes the concern voiced in *Booth* 's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth, supra*, 482 U.S., at 506, n. 8, 107 S.Ct., at 2534 n. 8. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being,"

whatever the jury might think the loss to the community resulting from his death might be. The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps ***824** not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments, and criminal procedure are, of course, subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the ****2608** Eighth Amendment imposes special limitations upon that process.

> "First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey v. Kemp*, 481 U.S. 279, 305–306, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987).

But, as we noted in *California v. Ramos*, 463 U.S. 992, 1001, 103 S.Ct. 3446, 3453, 77 L.Ed.2d 1171 (1983), "[b]eyond these limitations ... the Court has deferred to the State's choice of substantive factors relevant to the penalty determination."

"Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990). The States remain free, in capital cases, as well as others, to ***825** devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See *Darden v. Wainwright*, 477 U.S. 168, 179–183, 106 S.Ct. 2464, 2470–2472, 91 L.Ed.2d 144 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S., at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S., at 821, 109 S.Ct. at 2216 (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

The present case is an example of the potential for such unfairness. The capital sentencing jury heard testimony from ***826** Payne's girlfriend that they met at church; that he was affectionate, caring, and kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne's parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None ****2609** of this testimony was related to the circumstances of Payne's brutal crimes. In contrast, the only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas' grandmother's description—in response to a single question—that the child misses his mother and baby sister. Payne argues that the Eighth Amendment commands that the jury's death sentence must be set aside because the jury heard this testimony. But the testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant. The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by

Booth when it said: "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." 791 S.W.2d, at 19.

In *Gathers*, as indicated above, we extended the holding of *Booth* barring victim impact evidence to the prosecutor's argument to the jury. Human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury's verdict. Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting ***827** on his individual personality, and the defendant's attorney may argue that evidence to the jury. Petitioner's attorney in this case did just that. For the reasons discussed above, we now reject the view—expressed in *Gathers*—that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We reaffirm the view expressed by Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934): "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne and his *amicus* argue that despite these numerous infirmities in the rule created by *Booth* and *Gathers*, we should adhere to the doctrine of *stare decisis* and stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265–266, 106 S.Ct. 617, 624–625, 88 L.Ed.2d 598 (1986). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). ***828** *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." ****2610** *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co., supra*, 285 U.S., at 407, 52 S.Ct., at 447 (Brandeis, J., dissenting). Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, see *Swift & Co. v. Wickham*, 382 U.S. 111, 116, 86 S.Ct. 258, 261–262, 15 L.Ed.2d 194 (1965); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977); *Burnet v. Coronado Oil & Gas Co., supra*, 285 U.S., at 405–411, 52 S.Ct., at 446–449 (Brandeis, J., dissenting); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924); *The Genesee Chief v. Fitzhugh*, 12 How. 443, 458, 13 L.Ed. 1058 (1852); the opposite is true in cases such as the present one involving procedural and evidentiary rules.

Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions.[1] *Booth* and *Gathers* ****2611** were decided ***829** by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later ***830** decisions, and have defied consistent application by the lower courts. See *Gathers*, 490 U.S., at 813, 109 S.Ct., at 2212 (O'CONNOR, J., dissenting); *Mills v. Maryland*, 486 U.S. 367, 395–396, 108 S.Ct. 1860, 1875–1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, C.J., dissenting). See also *State v. Huertas*, 51 Ohio St. 3d 22, 33, 553 N.E.2d 1058, 1070 (1990) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area") (Moyer, C.J., concurring). Reconsidering these decisions now, we conclude, for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled.[2] We accordingly affirm the judgment of the Supreme Court of Tennessee.

It is so ordered.

Justice O'CONNOR, with whom Justice WHITE and

Justice KENNEDY join, concurring.

In my view, a State may legitimately determine that victim impact evidence is relevant to a capital sentencing proceeding. A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community. A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, ***831** C.J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

Given that victim impact evidence is potentially relevant, nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence. "The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so ****2612** offend the moral consensus of this society as to be deemed 'cruel and unusual.' " *South Carolina v. Gathers*, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216, 104 L.Ed.2d 876 (1989) (O'CONNOR, J., dissenting). Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most States have enacted legislation enabling judges and juries to consider victim impact evidence. *Ante*, at 2606. The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." *Ante*, at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they ***832** did not come home. I do not doubt that the jurors were moved by this testimony—who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2–year–old daughter Lacie was killed by repeated thrusts of that same knife; and 3–year–old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived—only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.

Nor did the prosecutor's comments about Charisse and Lacie in the closing argument violate the Constitution. The jury had earlier seen a videotape of the murder scene that included the slashed and bloody corpses of Charisse and Lacie. In arguing that Payne deserved the death penalty, the prosecutor sought to remind the jury that Charisse and Lacie were more than just lifeless bodies on a videotape, that they were unique human beings. The prosecutor remarked that Charisse would never again sing a lullaby to her son and that Lacie would never attend a high school prom. In my view, these statements were permissible. "Murder is the ultimate act of depersonalization." Brief for Justice For All Political Committee et al. as *Amici Curiae* 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

I agree with the Court that *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *Gathers*, *supra*, were wrongly decided. The Eighth Amendment does not prohibit a State from choosing to admit evidence concerning a murder victim's personal characteristics or the impact of the crime on the victim's family ***833** and community. *Booth* also addressed another kind of victim impact evidence—opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial. ****2613** *Ante*, at 2611, n. 2. Nor do we express an opinion as to other aspects of the prosecutor's conduct. As to the victim impact evidence that was introduced, its admission did not violate the Constitution. Accordingly, I join the Court's opinion.

Justice SCALIA, with whom Justice O'CONNOR and Justice KENNEDY join as to Part II, concurring.

I

The Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence, see, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). I have previously expressed my belief that the latter requirement is both wrong and, when combined with the remainder of our capital sentencing jurisprudence, unworkable. See *Walton v. Arizona*, 497 U.S. 639, 671–673, 110 S.Ct. 3047, 3066–3068, 111 L.Ed.2d 511 (1990) (opinion concurring in part and concurring in judgment). Even if it were abandoned, however, I would still affirm the judgment here. True enough, the Eighth Amendment permits parity between mitigating and aggravating factors. But more broadly and fundamentally still, it permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime.

II

The response to Justice MARSHALL's strenuous defense of the virtues of *stare decisis* can be found in the writings of Justice MARSHALL himself. That doctrine, he has reminded ***834** us, "is not 'an imprisonment of reason.' " *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 618, 103 S.Ct. 3221, 3241, 77 L.Ed.2d 866 (1983) (dissenting opinion) (quoting *United States v. International Boxing Club of N.Y., Inc.*, 348 U.S. 236, 249, 75 S.Ct. 259, 266, 99 L.Ed. 290 (1955) (Frankfurter, J., dissenting)). If there was ever a case that defied reason, it was *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic. Justice MARSHALL has also explained that " '[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.' " *Flood v. Kuhn*, 407 U.S. 258, 293, n. 4, 92 S.Ct. 2099, 2117, n. 4, 32 L.Ed.2d 728 (1972) (dissenting opinion) (quoting Szanton, Stare Decisis; A Dissenting View, 10 Hastings L.J. 394, 397 (1959)) (internal quotation marks omitted). *Booth's* stunning *ipse dixit*, that a crime's unanticipated consequences must be deemed "irrelevant" to the sentence, 482 U.S., at 503, 107 S.Ct., at 2533, conflicts with a public sense of justice keen enough that it has found voice in a nationwide "victims' rights" movement.

Today, however, Justice MARSHALL demands of us some "special justification"—*beyond* the mere conviction that the rule of *Booth* significantly harms our criminal justice system and is egregiously wrong—before we can be absolved of exercising "[p]ower, not reason." *Post*, at 2619. I do not think that is fair. In fact, quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes.

It seems to me difficult for those who were in the majority in *Booth* to hold themselves forth as ardent apostles of *stare decisis.* That doctrine, to the extent it rests upon anything more than administrative convenience, is merely the application ***835** to judicial ****2614** precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, *Booth*, and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis.*

Justice SOUTER, with whom Justice KENNEDY joins, concurring.

I join the Court's opinion addressing two categories of facts excluded from consideration at capital sentencing proceedings by *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989): information revealing the individuality of the victim and the impact of the crime on the victim's survivors.[1] As to these two categories, I believe *Booth* and

Gathers were wrongly decided.

To my knowledge, our legal tradition has never included a general rule that evidence of a crime's effects on the victim and others is, standing alone, irrelevant to a sentencing determination of the defendant's culpability. Indeed, as the Court's opinion today, see *ante*, at 2605–2606, and dissents in *Booth, supra*, 482 U.S., at 519–520, 107 S.Ct., at 2541–2542 (opinion of SCALIA, J.) and *Gathers, supra*, 490 U.S., at 817–820, 109 S.Ct., at 2214–2216 (opinion of O'CONNOR, J.), make clear, criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically ***836** intended, but determined in part by conditions unknown to a defendant when he acted. The majority opinion in *Booth, supra*, 482 U.S., at 502–503, 107 S.Ct., at 2532–2533, nonetheless characterized the consideration in a capital sentencing proceeding of a victim's individuality and the consequences of his death on his survivors as "irrelevant" and productive of "arbitrary and capricious" results, insofar as that would allow the sentencing authority to take account of information not specifically contemplated by the defendant prior to his ultimate criminal decision. This condemnation comprehends two quite separate elements. As to one such element, the condemnation is merited but insufficient to justify the rule in *Booth*, and as to the other it is mistaken.

Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh*, 492 U.S. 302, 319–328, 109 S.Ct. 2934, 2947–2952, 106 L.Ed.2d 256 (1989) (capital sentence should be imposed as a " 'reasoned *moral* response' ") (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring)); *Gholson v. Estelle*, 675 F.2d 734, 738 (CA5 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). But this is just as true when the defendant knew of the specific facts as when he was ignorant of their details, and in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. See *Darden v. Wainwright*, 477 U.S. 168, 178–183, 106 S.Ct. 2464, 2470–2472, 91 L.Ed.2d 144 (1986) (due process standard of fundamental fairness governs argument of ****2615** prosecutor at sentencing); *United States v. Serhant*, 740 F.2d 548, 551–552 (CA7 1984) (applying due process to purportedly "inflammatory" victim impact statements); see also *Lesko v. Lehman*, 925 F.2d 1527, 1545–1547 (CA3 1991); *Coleman v. Saffle*, 869 F.2d 1377, 1394–1396 (CA10 1989), cert. denied, ***837** 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 964 1990); *Rushing v. Butler*, 868 F.2d 800, 806–807 (CA5 1989). With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

Booth, supra,[2] nonetheless goes further and imposes a blanket prohibition on consideration of evidence of the victim's individuality and the consequential harm to survivors as irrelevant to the choice between imprisonment and execution, except when such evidence goes to the "circumstances of the crime," *id.*, 482 U.S., at 502, 107 S.Ct., at 2533, and probably then only when the facts in question were known to the defendant and relevant to his decision to kill, *id.*, at 505, 107 S.Ct., at 2534. This prohibition rests on the belief that consideration of such details about the victim and survivors as may have been outside the defendant's knowledge is inconsistent with the sentencing jury's Eighth Amendment duty "in the unique circumstance of a capital sentencing hearing ... to focus on the defendant as a 'uniquely individual human bein[g].' " *Id.*, at 504, 107 S.Ct., at 2534 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.)). The assumption made is that the obligation to consider the defendant's uniqueness limits the data about a crime's impact, on which a defendant's moral guilt may be calculated, to the facts he specifically knew and presumably considered. His uniqueness, in other words, is defined by the specifics of his knowledge and the reasoning that is thought to follow from it.

To hold, however, that in setting the appropriate sentence a defendant must be considered in his uniqueness is not to require that only unique qualities be considered. While a defendant's anticipation of specific consequences to the victims of his intended act is relevant to sentencing, such detailed ***838** foreknowledge does not exhaust the category of morally relevant fact. One such fact that is known to all murderers and relevant to the blameworthiness of each one was identified by the *Booth* majority itself when it barred the sentencing authority in capital cases from considering "the full range of foreseeable consequences of a defendant's actions." 482 U.S., at 504, 107 S.Ct., at 2533. Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just

as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the ****2616** defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

That foreseeability of the killing's consequences imbues them with direct moral relevance, cf. *Penry v. Lynaugh, supra*, 492 U.S., at 328, 109 S.Ct., at 2951 (death penalty should be " 'reasoned moral response' "), and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the ***839** kinds of consequences that were obviously foreseeable. It is morally both defensible and appropriate to consider such evidence when penalizing a murderer, like other criminals, in light of common knowledge and the moral responsibility that such knowledge entails. Any failure to take account of a victim's individuality and the effects of his death upon close survivors would thus more appropriately be called an act of lenity than their consideration an invitation to arbitrary sentencing. Indeed, given a defendant's option to introduce relevant evidence in mitigation, see, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 113–114, 102 S.Ct. 869, 876–877, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964–2965, 57 L.Ed.2d 973 (1978), sentencing without such evidence of victim impact may be seen as a significantly imbalanced process. See *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, C.J., dissenting).

I so view the relevance of the two categories of victim impact evidence at issue here, and I fully agree with the majority's conclusion, and the opinions expressed by the dissenters in *Booth* and *Gathers*, that nothing in the Eighth Amendment's condemnation of cruel and unusual punishment would require that evidence to be excluded. See *ante*, at 2609 ("[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar"); *Booth, supra*, 482 U.S., at 515–516, 107 S.Ct., at 2539 (WHITE, J., dissenting) (nothing " 'cruel or unusual' or otherwise unconstitutional about the legislature's decision to use victim impact statements in capital sentencing hearings"); *Gathers*, 490 U.S., at 816–821, 109 S.Ct., at 2213–2216 (O'CONNOR, J., dissenting); *id.*, at 823–825, 109 S.Ct., at 2217–2218 (SCALIA, J., dissenting).

I do not, however, rest my decision to overrule wholly on the constitutional error that I see in the cases in question. I must rely as well on my further view that *Booth* sets an unworkable standard of constitutional relevance that threatens, on its own terms, to produce such arbitrary consequences and uncertainty of application as virtually to guarantee a result far diminished from the case's promise of appropriately ***840** individualized sentencing for capital defendants. 482 U.S., at 502, 107 S.Ct., at 2532–2533. These conclusions will be seen to result from the interaction of three facts. First, although *Booth* was prompted by the introduction of a systematically prepared "victim impact statement" at the sentencing phase of the trial, *Booth's* restriction of relevant facts to what the defendant knew and considered in deciding to kill applies to any evidence, however derived or presented. Second, details of which the defendant was unaware, about the victim and survivors, will customarily be disclosed by the evidence introduced at the guilt phase of the trial. Third, the jury that determines guilt will usually determine, or make recommendations about, the imposition of capital punishment.

A hypothetical case will illustrate these facts and raise what I view as the serious practical problems with application of the *Booth* standard. Assume that a minister, unidentified as such and wearing no clerical ****2617** collar, walks down a street to his church office on a brief errand, while his wife and adolescent daughter wait for him in a parked car. He is robbed and killed by a stranger, and his survivors witness his death. What are the circumstances of the crime that can be considered at the sentencing phase under *Booth?* The defendant did not know his victim was a minister, or that he had a wife and child, let alone that they were watching. Under *Booth*, these facts were irrelevant to his decision to kill, and they should be barred from consideration at sentencing. Yet evidence of them will surely be admitted at the guilt phase of the trial. The widow will testify to what she saw, and, in so doing, she will not be asked to pretend that she was a mere bystander. She could not succeed at that if she tried. The daughter may well testify too. The jury will not be kept from knowing that the victim was a minister, with a wife and child, on an errand to his church. This is so not only because the widow will not try to deceive the jury about her relationship, but also because the usual standards of trial relevance afford factfinders enough information about ***841** surrounding circumstances to let them make sense of the narrowly material facts of the crime

itself. No one claims that jurors in a capital case should be deprived of such common contextual evidence, even though the defendant knew nothing about the errand, the victim's occupation, or his family. And yet, if these facts are not kept from the jury at the guilt stage, they will be in the jurors' minds at the sentencing stage.

Booth thus raises a dilemma with very practical consequences. If we were to require the rules of guilt-phase evidence to be changed to guarantee the full effect of *Booth's* promise to exclude consideration of specific facts unknown to the defendant and thus supposedly without significance in morally evaluating his decision to kill, we would seriously reduce the comprehensibility of most trials by depriving jurors of those details of context that allow them to understand what is being described. If, on the other hand, we are to leave the rules of trial evidence alone, *Booth's* objective will not be attained without requiring a separate sentencing jury to be empaneled. This would be a major imposition on the States, however, and I suppose that no one would seriously consider adding such a further requirement.

But, even if *Booth* were extended one way or the other to exclude completely from the sentencing proceeding all facts about the crime's victims not known by the defendant, the case would be vulnerable to the further charge that it would lead to arbitrary sentencing results. In the preceding hypothetical, *Booth* would require that all evidence about the victim's family, including its very existence, be excluded from sentencing consideration because the defendant did not know of it when he killed the victim. Yet, if the victim's daughter had screamed "Daddy, look out," as the defendant approached the victim with drawn gun, then the evidence of at least the daughter's survivorship would be admissible even under a strict reading of *Booth*, because the defendant, prior to killing, had been made aware of the daughter's existence, ***842** which therefore became relevant in evaluating the defendant's decision to kill. Resting a decision about the admission of impact evidence on such a fortuity is arbitrary.

Thus, the status quo is unsatisfactory, and the question is whether the case that has produced it should be overruled. In this instance, as in any other, overruling a precedent of this Court is a matter of no small import, for "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494, 107 S.Ct. 2941, 2957, 97 L.Ed.2d 389 (1987). To be sure, *stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 446–447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting); and our "considered practice [has] not [been] to apply *stare decisis* as rigidly in constitutional [cases] as in nonconstitutional cases," ****2618** *Glidden Co. v. Zdanok*, 370 U.S. 530, 543, 82 S.Ct. 1459, 1469, 8 L.Ed.2d 671 (1962). See *Burnet, supra*, 285 U.S., at 405–407, 52 S.Ct., at 446–447; *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173, 109 S.Ct. 2363, 2370–2371, 105 L.Ed.2d 132 (1989). But, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2310–2311, 81 L.Ed.2d 164 (1984).

The Court has a special justification in this case. *Booth* promises more than it can deliver, given the unresolved tension between common evidentiary standards at the guilt phase and *Booth's* promise of a sentencing determination free from the consideration of facts unknown to the defendant and irrelevant to his decision to kill. An extension of the case to guarantee a sentencing authority free from the influence of information extraneous under *Booth* would be either an unworkable or a costly extension of an erroneous principle and would itself create a risk of arbitrary results. There is only one other course open to us. We can recede from the erroneous holding that created the tension and extended the false promise, and there is precedent in our *stare decisis* jurisprudence for doing just this. In prior cases, when this Court has confronted a wrongly decided, unworkable ***843** precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent. See *Swift & Co. v. Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965);[3] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977);[4] see also ****2619** *Patterson v. McLean Credit* ***844** *Union, supra*, 491 U.S., at 173, 109 S.Ct., at 2370–2371. Following this course here has itself the support not only of precedent but of practical sense as well. Therefore, I join the Court in its partial overruling of *Booth* and *Gathers.*

Justice MARSHALL, with whom Justice BLACKMUN joins, dissenting.

Power, not reason, is the new currency of this Court's decisionmaking. Four Terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). By another 5–4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). Nevertheless, having expressly

invited respondent to renew the attack, 498 U.S. 1076, 111 S.Ct. 1031, 112 L.Ed.2d 1032 (1991), today's majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.

In dispatching *Booth* and *Gathers* to their graves, today's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store. Renouncing this Court's historical commitment to a conception of "the judiciary as a source of impersonal and reasoned judgments," *Moragne v. States Marine Lines*, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339 (1970), ***845** the majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case. Because I believe that this Court owes more to its constitutional precedents in general and to *Booth* and *Gathers* in particular, I dissent.

I

Speaking for the Court as then constituted, Justice Powell and Justice Brennan set out the rationale for excluding victim-impact evidence from the sentencing proceedings in a capital case. See *Booth v. Maryland*, *supra*, 482 U.S., at 504–509, 107 S.Ct., at 2533–2536; *South Carolina v. Gathers*, *supra*, 490 U.S., at 810–811, 109 S.Ct., at 2210–2211. As the majorities in *Booth* and *Gathers* recognized, the core principle of this Court's capital jurisprudence is that the sentence of death must reflect an " '*individualized* determination' " of the defendant's " 'personal responsibility and moral guilt' " and must be based upon factors that channel the jury's discretion " 'so as to minimize the risk of wholly arbitrary and capricious action.' " *Booth v. Maryland*, *supra*, 482 U.S., at 502, 107 S.Ct., at 2532, quoting *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983); *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932–2933, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); accord, *South Carolina v. Gathers*, *supra*, 490 U.S., at 810, 109 S.Ct., at 2210. The State's introduction of victim-impact evidence, Justice Powell and Justice Brennan explained, violates this fundamental principle. Where, as is ordinarily the case, the defendant was unaware of the personal circumstances of his victim, admitting evidence ****2620** of the victim's character and the impact of the murder upon the victim's family predicates the sentencing determination on "factors ... wholly unrelated to the ***846** blameworthiness of [the] particular defendant." *Booth v. Maryland*, *supra*, 482 U.S., at 504, 107 S.Ct., at 2534; *South Carolina v. Gathers*, *supra*, 490 U.S., 810, 109 S.Ct., at 2210. And even where the defendant *was* in a position to foresee the likely impact of his conduct, admission of victim-impact evidence creates an unacceptable risk of sentencing arbitrariness. As Justice Powell explained in *Booth*, the probative value of such evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community. See *Booth v. Maryland*, *supra*, 482 U.S., at 505–507, and n. 8, 107 S.Ct., at 2534–2535, and n. 8; *South Carolina v. Gathers*, *supra*, 490 U.S., at 810–811, 109 S.Ct., at 2210–2211. I continue to find these considerations wholly persuasive, and I see no purpose in trying to improve upon Justice Powell's and Justice Brennan's exposition of them.

There is nothing new in the majority's discussion of the supposed deficiencies in *Booth* and *Gathers*. Every one of the arguments made by the majority can be found in the dissenting opinions filed in those two cases, and, as I show in the margin, each argument was convincingly answered by Justice Powell and Justice Brennan.[1]

****2621 *847** But contrary to the impression that one might receive from reading the majority's lengthy rehearsing of the issues addressed in *Booth* and *Gathers*, the outcome of this case does ***848** not turn simply on who—the *Booth* and *Gathers* majorities or the *Booth* and *Gathers* dissenters—had the better of the argument. Justice Powell and Justice Brennan's position carried the day in those cases and became the law of the land. The real question, then, is whether today's majority has come forward with the type of extraordinary showing that this Court has historically demanded before overruling one of its precedents. In my view, the majority clearly has not made any such showing. Indeed, the striking feature of the majority's opinion is its radical assertion that it need not even try.

II

The overruling of one of this Court's precedents ought to be a matter of great moment and consequence. Although the doctrine of *stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 446–447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), this Court has repeatedly stressed that fidelity to precedent is fundamental to "a society governed by the rule of law," *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983). See generally *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) ("[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ***849** 'an arbitrary discretion.' The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)"); *Appeal of Concerned Corporators of Portsmouth Savings Bank*, 129 N.H. 183, 227, 525 A.2d 671, 701 (1987) (Souter, J., dissenting) ("*[S]tare decisis* ... 'is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results,' " quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786–787, 106 S.Ct. 2169, 2192–2193, 90 L.Ed.2d 779 (1986) (WHITE, J., dissenting)).

Consequently, this Court has never departed from precedent without "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2310–2311, 81 L.Ed.2d 164 (1984). Such justifications include the advent of "subsequent changes or development in the law" that undermine a decision's rationale, *Patterson v. McLean Credit Union, supra*, 491 U.S., at 173, 109 S.Ct., at 2370–2371; the need "to bring [a decision] into agreement with experience and with facts ****2622** newly ascertained," *Burnet v. Coronado Oil & Gas Co., supra*, 285 U.S., at 412, 52 S.Ct., at 450 (Brandeis, J., dissenting); and a showing that a particular precedent has become a "detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union, supra*, 491 U.S., at 173, 109 S.Ct., at 2371.

The majority cannot seriously claim that *any* of these traditional bases for overruling a precedent applies to *Booth* or *Gathers*. The majority does not suggest that the legal rationale of these decisions has been undercut by changes or developments in doctrine during the last two years. Nor does the majority claim that experience over that period of time has discredited the principle that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (plurality opinion), the larger postulate of political morality on which *Booth* and *Gathers* rest.

The majority does assert that *Booth* and *Gathers* "have defied consistent application by the lower courts," *ante*, at 2611, ***850** but the evidence that the majority proffers is so feeble that the majority cannot sincerely expect anyone to believe this claim. To support its contention, the majority points to Justice O'CONNOR's dissent in *Gathers*, which noted a division among lower courts over whether *Booth* prohibited prosecutorial arguments relating to the victim's personal characteristics. See 490 U.S., at 813, 109 S.Ct., at 2212. That, of course, was the issue expressly considered and resolved in *Gathers*. The majority also cites THE CHIEF JUSTICE's dissent in *Mills v. Maryland*, 486 U.S. 367, 395–398, 108 S.Ct. 1860, 1875–1877, 100 L.Ed.2d 384 (1988). That opinion does not contain a *single word* about any supposed "[in]consistent application" of *Booth* in the lower courts. Finally, the majority refers to a divided Ohio Supreme Court decision disposing of an issue concerning victim-impact evidence. See *State v. Huertas*, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990), cert. dism'd as improvidently granted, 498 U.S. 336, 111 S.Ct. 805, 112 L.Ed.2d 837 (1991). Obviously, if a division among the members of a single lower court in a single case were sufficient to demonstrate that a particular precedent was a "detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union, supra*, 491 U.S., at 173, 109 S.Ct., at 2371, there would hardly be a decision in United States Reports that we would not be obliged to reconsider.

It takes little real detective work to discern just what *has* changed since this Court decided *Booth* and *Gathers:* this Court's own personnel. Indeed, the majority candidly explains why this particular contingency, which until now has been almost universally understood *not* to be sufficient to warrant overruling a precedent, see, *e.g.*, *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 153, 101 S.Ct. 1032, 1036, 67 L.Ed.2d 132 (1981) (STEVENS, J., concurring); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636, 94 S.Ct. 1895, 1914, 40 L.Ed.2d 406 (1974) (Stewart, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 677, 81 S.Ct. 1684, 1703–1704, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting); but see *South Carolina v. Gathers, supra*, 490 U.S., at 824, 109 S.Ct., at 2217–2218 (SCALIA, J., dissenting), *is* sufficient to justify overruling *Booth* and *Gathers*. "Considerations in favor of *stare decisis* are at their acme," the majority explains, "in ***851** cases involving property and contract rights, where reliance interests are involved[;] the opposite is true in

cases such as the present one involving procedural and evidentiary rules." *Ante,* at 2610 (citations omitted). In addition, the majority points out, "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents" and thereafter were "questioned by Members of the Court." *Ante,* at 2611. Taken together, these considerations make it legitimate, in the majority's view, to elevate the position of the *Booth* and *Gathers* dissenters into the law of the land.

****2623** This truncation of the Court's duty to stand by its own precedents is astonishing. By limiting full protection of the doctrine of *stare decisis* to "cases involving property and contract rights," *ante,* at 2610, the majority sends a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination. Taking into account the majority's additional criterion for overruling—that a case either was decided or reaffirmed by a 5–4 margin "over spirited dissen[t]," *ante,* at 2611—the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court. See, *e.g., Metro Broadcasting v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (authority of Federal government to set aside broadcast licenses for minority applicants); *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) (right under Double Jeopardy Clause not to be subjected twice to prosecution for same criminal conduct); *Mills v. Maryland, supra* (Eighth Amendment right to jury instructions that do not preclude consideration of nonunanimous mitigating factors in capital sentencing); *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (right to promotions as remedy for racial discrimination in government hiring); *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (Eighth Amendment right not to be executed if insane); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (reaffirming ***852** right to abortion recognized in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)); *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (Establishment Clause bar on governmental financial assistance to parochial schools).[2]

In my view, this impoverished conception of *stare decisis* cannot possibly be reconciled with the values that inform the proper judicial function. Contrary to what the majority suggests, *stare decisis* is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of "the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines,* 398 U.S., at 403, 90 S.Ct., at 1789. Indeed, this function of *stare decisis* is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving commercial ***853** entitlements. Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this ****2624** Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing "principles ... founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986).[3] Thus, as Justice STEVENS has explained, the "stron[g] presumption of validity" to which "recently decided cases" are entitled "is an essential thread in the mantle of protection that the law affords the individual.... It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law." *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn.,* 450 U.S., at 153–154, 101 S.Ct., at 1036–1037 (concurring opinion).

Carried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. See ***854** *Mitchell v. W.T. Grant Co.,* 416 U.S., at 634, 94 S.Ct., at 1913 (Stewart, J., dissenting). By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5–4 vote "over spirited dissen[t]," *ante,* at 2611, the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question.

Indeed, the majority's disposition of this case nicely illustrates the rewards of such a strategy of defiance. The Tennessee Supreme Court did nothing in this case to disguise its contempt for this Court's decisions in *Booth* and *Gathers.* Summing up its reaction to those cases, it concluded:

> "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or harm imposed, upon the victims." 791 S.W.2d 10, 19 (1990).

Offering no explanation for how this case could possibly be distinguished from *Booth* and *Gathers*—for obviously,

there is none to offer—the court perfunctorily declared that the victim-impact evidence and the prosecutor's argument based on this evidence "did not violate either [of those decisions]." *Ibid.* It cannot be clearer that the court simply declined to be bound by this Court's precedents.[4]

****2625 *855** Far from condemning this blatant disregard for the rule of law, the majority applauds it. In the Tennessee Supreme Court's denigration of *Booth* and *Gathers* as " 'an affront to the civilized members of the human race,' " the majority finds only confirmation of "the unfairness of the rule pronounced by" the majorities in those cases. *Ante,* at 2609. It is hard to imagine a more complete abdication of this Court's historic commitment to defending the supremacy of its own pronouncements on issues of constitutional liberty. See *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); see also *Hutto v. Davis,* 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). In light of the cost that such abdication exacts on the authoritativeness of *all* of this Court's pronouncements, it is also hard to imagine a more short-sighted strategy for effecting change in our constitutional order.

***856** III

Today's decision charts an unmistakable course. If the majority's radical reconstruction of the rules for overturning this Court's decisions is to be taken at face value—and the majority offers us no reason why it should not—then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far-reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's "spirited dissents" will squander the authority and the legitimacy of this Court as a protector of the powerless.

I dissent.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

The novel rule that the Court announces today represents a dramatic departure from the principles that have governed our capital sentencing jurisprudence for decades. Justice MARSHALL is properly concerned about the majority's trivialization of the doctrine of *stare decisis.* But even if *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), had not been decided, today's decision would represent a sharp break with past decisions. Our cases provide no support whatsoever for the majority's conclusion that the prosecutor may introduce evidence that sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.

Until today our capital punishment jurisprudence has required that any decision to impose the death penalty be based solely on ****2626** evidence that tends to inform the jury about the character of the offense and the character of the defendant. Evidence that serves no purpose other than to appeal to the ***857** sympathies or emotions of the jurors has never been considered admissible. Thus, if a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible. Evenhanded justice requires that the same constraint be imposed on the advocate of the death penalty.

I

In *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), this Court considered the scope of the inquiry that should precede the imposition of a death sentence. Relying on practices that had developed "both before and since the American colonies became a nation," *id.,* at 246, Justice Black described the wide latitude that had been accorded judges in considering the source and type of evidence that is relevant to the sentencing determination. Notably, that opinion refers not only to the relevance of evidence establishing the defendant's guilt, but also to the relevance of "the fullest information possible concerning the defendant's life and characteristics." *Id.,* at 247, 69 S.Ct., at 1083. "Victim impact" evidence, however, was unheard of when *Williams* was decided. The relevant evidence of harm to society consisted of proof that the defendant was guilty of the

offense charged in the indictment.

Almost 30 years after our decision in *Williams*, the Court reviewed the scope of evidence relevant in capital sentencing. See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In his plurality opinion, Chief Justice Burger concluded that in a capital case, the sentencer must not be prevented "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604, 98 S.Ct., at 2965 (emphasis deleted). As in *Williams*, the character of the offense and the character of the offender constituted ***858** the entire category of relevant evidence. "Victim impact" evidence was still unheard of when *Lockett* was decided.

As the Court acknowledges today, the use of victim impact evidence "is of recent origin," *ante*, at 2606. Insofar as the Court's jurisprudence is concerned, this type of evidence made its first appearance in 1987 in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529. In his opinion for the Court, Justice Powell noted that our prior cases had stated that the question whether an individual defendant should be executed is to be determined on the basis of " 'the character of the individual and the circumstances of the crime,' " *id.*, at 502, 107 S.Ct., at 2532 (quoting *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983)). See also *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875–876, 71 L.Ed.2d 1 (1982). Relying on those cases and on *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378–3379, 73 L.Ed.2d 1140 (1982), the Court concluded that unless evidence has some bearing on the defendant's personal responsibility and moral guilt, its admission would create a risk that a death sentence might be based on considerations that are constitutionally impermissible or totally irrelevant to the sentencing process. 482 U.S., at 502, 107 S.Ct., at 2532–2533. Evidence that served no purpose except to describe the personal characteristics of the victim and the emotional impact of the crime on the victim's family was therefore constitutionally irrelevant.

Our decision in *Booth* was entirely consistent with the practices that had been followed "both before and since the American colonies became a nation," *Williams*, 337 U.S., at 246, 69 S.Ct., at 1082. Our holding was mandated by our capital punishment jurisprudence, ****2627** which requires any decision to impose the death penalty to be based on reason rather than caprice or emotion. See *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1206–1207, 51 L.Ed.2d 393 (1977) (opinion of STEVENS, J.). The dissenting opinions in *Booth* and in *Gathers* can be searched in vain for any judicial precedent sanctioning the use of evidence unrelated to the character of the offense or the character of the offender in the sentencing process. Today, however, relying on nothing more than those dissenting opinions, the Court abandons ***859** rules of relevance that are older than the Nation itself and ventures into uncharted seas of irrelevance.

II

Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion. Because our decision in *Lockett*, 438 U.S., at 604, 98 S.Ct., at 2964–2965 (opinion of Burger, C.J.), recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the *victim.* See *ante*, at 2608–2609.[1] This argument is a classic *non sequitur*: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.

***860** Even if introduction of evidence about the victim could be equated with introduction of evidence about the defendant, the argument would remain flawed in both its premise and its conclusion. The conclusion that exclusion of victim impact evidence results in a significantly imbalanced sentencing procedure is simply inaccurate. Just as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence and may designate any relevant conduct to be an aggravating factor provided that the factor is sufficiently well defined and consistently applied to cabin the sentencer's discretion.

The premise that a criminal prosecution requires an even-handed balance between the State and the defendant is also incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State. Thus, the State must prove a defendant's guilt beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Rules of evidence are also weighted in the defendant's favor. For example, the prosecution generally cannot introduce evidence of the defendant's character to prove his propensity to commit a crime, but the defendant can introduce such reputation evidence to show his law-abiding nature. See, *e.g.*, ****2628** Fed.Rule Evid. 404(a). Even if balance were required or desirable, today's

decision, by permitting both the defendant and the State to introduce irrelevant evidence for the sentencer's consideration without any guidance, surely does nothing to enhance parity in the sentencing process.

III

Victim impact evidence, as used in this case, has two flaws, both related to the Eighth Amendment's command that the punishment of death may not be meted out arbitrarily or capriciously. First, aspects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant ***861** the defendant's "personal responsibility and moral guilt" and therefore cannot justify a death sentence. See *Enmund v. Florida*, 458 U.S., at 801, 102 S.Ct., at 3378–3379; see also *id.*, at 825, 102 S.Ct., at 3391 (O'CONNOR, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"); *Tison v. Arizona*, 481 U.S. 137, 149, 107 S.Ct. 1676, 1683, 95 L.Ed.2d 127 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"); *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring).

Second, the quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases. The sentencer's unguided consideration of victim impact evidence thus conflicts with the principle central to our capital punishment jurisprudence that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Open-ended reliance by a capital sentencer on victim impact evidence simply does not provide a "principled way to distinguish [cases], in which the death penalty [i]s imposed, from the many cases in which it [i]s not." *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980) (opinion of Stewart, J.).

The majority attempts to justify the admission of victim impact evidence by arguing that "consideration of the harm caused by the crime has been an important factor in the exercise of [sentencing] discretion." *Ante*, at 2606. This statement is misleading and inaccurate. It is misleading because it is not limited to harm that is foreseeable. It is inaccurate because it fails to differentiate between legislative determinations and judicial sentencing. It is true that an evaluation of ***862** the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines. There is a rational correlation between moral culpability and the foreseeable harm caused by criminal conduct. Moreover, in the capital sentencing area, legislative identification of the special aggravating factors that may justify the imposition of the death penalty is entirely appropriate.[2] But the majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family ****2629** are properly considered as aggravating evidence on a case-by-case basis.

The dissents in *Booth* and *Gathers* and the majority today offer only the recent decision in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and two legislative examples to support their contention that harm to the victim has traditionally influenced sentencing discretion. *Tison* held that the death penalty may be imposed on a felon who acts with reckless disregard for human life if a death occurs in the course of the felony, even though capital punishment cannot be imposed if no one dies as a result of the crime. The first legislative example is that attempted murder and murder are classified as two different offenses subject to different punishments. *Ante*, at 2605. The second legislative example is that a person who drives while intoxicated is guilty of vehicular homicide if his actions result in a death but is not guilty of this offense if he has the good fortune to make it home without killing anyone. See *Booth*, 482 U.S., at 516, 107 S.Ct., at 2539–2540 (WHITE, J., dissenting).

***863** These three scenarios, however, are fully consistent with the Eighth Amendment jurisprudence reflected in *Booth* and *Gathers* and do not demonstrate that harm to the victim may be considered by a capital sentencer in the ad hoc and post hoc manner authorized by today's majority. The majority's examples demonstrate only that harm to the victim may justify enhanced punishment if the harm is both foreseeable to the defendant and clearly identified in advance of the crime by the legislature as a class of harm that should in every case result in more severe punishment.

In each scenario, the defendants could reasonably foresee that their acts might result in loss of human life. In addition, in each, the decision that the defendants should be treated differently was made prior to the crime by the legislature, the decision of which is subject to scrutiny for basic rationality. Finally, in each scenario, every defendant who

causes the well-defined harm of destroying a human life will be subject to the determination that his conduct should be punished more severely. The majority's scenarios therefore provide no support for its holding, which permits a jury to sentence a defendant to death because of harm to the victim and his family that the defendant could not foresee, which was not even identified until after the crime had been committed, and which may be deemed by the jury, without any rational explanation, to justify a death sentence in one case but not in another. Unlike the rule elucidated by the scenarios on which the majority relies, the majority's holding offends the Eighth Amendment because it permits the sentencer to rely on irrelevant evidence in an arbitrary and capricious manner.

The majority's argument that "the sentencing authority has always been free to consider a wide range of *relevant* material," *ante,* at 2606 (emphasis added), thus cannot justify consideration of victim impact evidence that is *irrelevant* because it details harms that the defendant could not have foreseen. Nor does the majority's citation of Gregg v. Georgia ***864** concerning the "wide scope of evidence and argument allowed at presentence hearings," 428 U.S., at 203, 96 S.Ct., at 2939 (joint opinion of Stewart, Powell, and STEVENS, JJ.), support today's holding. See *ante,* at 2606. The *Gregg* joint opinion endorsed the sentencer's consideration of a wide range of evidence "[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant." 428 U.S., at 203–204, 96 S.Ct., at 2939–2940. Irrelevant victim impact evidence that distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors necessarily prejudices the defendant.

The majority's apparent inability to understand this fact is highlighted by its misunderstanding of Justice Powell's argument in *Booth* that admission of victim impact evidence is undesirable because it risks shifting the focus of the sentencing hearing away ****2630** from the defendant and the circumstances of the crime and creating a " 'mini-trial' on the victim's character." 482 U.S., at 507, 107 S.Ct., at 2535. *Booth* found this risk insupportable not, as today's majority suggests, because it creates a "tactical" "dilemma" for the defendant, see *ante,* at 2607, but because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice. See 482 U.S., at 506–507, 107 S.Ct., at 2534–2535.

IV

The majority thus does far more than validate a State's judgment that "the jury should see 'a quick glimpse of the life petitioner chose to extinguish,' *Mills v. Maryland,* 486 U.S. 367, 397 [108 S.Ct. 1860, 1876, 100 L.Ed.2d 384] (1988) (REHNQUIST, C.J., dissenting)." *Ante,* at 2611 (O'CONNOR, J., concurring). Instead, it allows a jury to hold a defendant responsible for a whole array of harms that he could not foresee and for which he is therefore not blameworthy. Justice SOUTER argues that these harms are sufficiently foreseeable to hold the defendant accountable because "[e]very defendant knows, if endowed with the mental competence for criminal responsibility, that ***865** the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death." *Ante,* at 2615 (SOUTER, J., concurring). But every juror and trial judge knows this much as well. Evidence about who those survivors are and what harms and deprivations they have suffered is therefore not necessary to apprise the sentencer of any information that was actually foreseeable to the defendant. Its only function can be to "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." See *Booth,* 482 U.S., at 505, 107 S.Ct., at 2534.

Arguing in the alternative, Justice SOUTER correctly points out that victim impact evidence will sometimes come to the attention of the jury during the guilt phase of the trial. *Ante,* at 2616. He reasons that the ideal of basing sentencing determinations entirely on the moral culpability of the defendant is therefore unattainable unless a different jury is empaneled for the sentencing hearing. *Ante,* at 2617. Thus, to justify overruling *Booth,* he assumes that the decision must otherwise be extended far beyond its actual holding.

Justice SOUTER's assumption is entirely unwarranted. For as long as the contours of relevance at sentencing hearings have been limited to evidence concerning the character of the offense and the character of the offender, the law has also recognized that evidence that is admissible for a proper purpose may not be excluded because it is inadmissible for other purposes and may indirectly prejudice the jury. See 1 J. Wigmore, Evidence § 13 (P. Tillers rev. 1983). In the case before us today, much of what might be characterized as victim impact evidence was properly admitted during the guilt phase of the trial and, given the horrible character of this crime, may have been sufficient to justify the Tennessee Supreme Court's conclusion that the error was harmless because the jury would necessarily have imposed the death sentence even

absent the error. The fact that a good deal of ***866** such evidence is routinely and properly brought to the attention of the jury merely indicates that the rule of *Booth* may not affect the outcome of many cases.

In reaching our decision today, however, we should not be concerned with the cases in which victim impact evidence will not make a difference. We should be concerned instead with the cases in which it will make a difference. In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants' moral culpability. The Constitution's proscription against the arbitrary imposition ****2631** of the death penalty must necessarily proscribe the admission of evidence that serves no purpose other than to result in such arbitrary sentences.

V

The notion that the inability to produce an ideal system of justice in which every punishment is precisely married to the defendant's blameworthiness somehow justifies a rule that completely divorces some capital sentencing determinations from moral culpability is incomprehensible to me. Also incomprehensible is the argument that such a rule is required for the jury to take into account that each murder victim is a "unique" human being. See *ante,* at 2607; *ante,* at 2611 (O'CONNOR, J., concurring); *ante,* at 2615 (SOUTER, J., concurring). The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black. See *McCleskey v. Kemp,* 481 U.S. 279, 366, 107 S.Ct. 1756, 1805–1806, 95 L.Ed.2d 262 (1987) (STEVENS, J., dissenting).

***867** Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described[3]—and that properly influences the deliberations of democratic legislatures—has played a role not only in the Court's decision to hear this case,[4] and in its decision to reach the constitutional question without pausing to consider affirming on the basis of the Tennessee Supreme Court's rationale,[5] but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution.

All Citations

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Footnotes

* 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 Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 *Perez v. Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Department of Public Safety of Utah,* 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962)); *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams,* 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928)); *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966)); *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Louis K. Liggett Co. v. Baldridge,* 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928)); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling in part *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *State Dept. of Health & Rehabilitative Services of Florida v. Zarate,* 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization,* 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972)); *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (overruling in effect *Hoyt v. Florida,* 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961)); *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin,* 13 Wall. 29, 20 L.Ed. 517 (1872)); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (overruling *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942)); *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245

(1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)); *New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957)); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948)); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951)); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)); *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937)); *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975)); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896)); *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922)); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling in part *Rolston v. Missouri Fund Comm'rs*, 120 U.S. 390, 7 S.Ct. 599, 30 L.Ed. 721 (1887)); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886)); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (overruling *National League of Cities v. Usery*, *supra*); *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling in part *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (overruling in part *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)); *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)); *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling in part *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)); *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)); *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling in part *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974)); *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) (overruling *Simpson v. Rice* (decided with *North Carolina v. Pearce*), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)); *Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (overruling *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966)); *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (overruling *Kring v. Missouri*, 107 U.S. 221, 27 L.Ed. 506 (1883)); *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898)); *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (overruling *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)).

2 Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

1 This case presents no challenge to the Court's holding in *Booth v. Maryland* that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence. See *ante*, at 2611, n. 2.

2 Because this discussion goes only to the underlying substantive rule in question, for brevity I will confine most references to *Booth* alone.

3 In *Swift & Co. v. Wickham*, the Court overruled *Kesler v. Department of Public Safety of Utah*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962). The issue presented in both *Swift* and *Kesler* concerned the application of the three-judge district court statute, 28 U.S.C. § 2281 (1970 ed.), in cases of alleged state statutory pre-emption by federal law. The Court had held in *Kesler* that "§ 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated." 382 U.S., at 115, 86 S.Ct., at 261.
Three years later in *Swift & Co. v. Wickham*, a majority of the Court disagreed with the *Kesler* analysis of the question, finding it inconsistent with the statute and earlier precedents of this Court. 382 U.S., at 122, 86 S.Ct., at 264–265 ("The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281"). The Court concluded that there were
"[t]wo possible interpretations of § 2281 [that] would provide a more practical rule for three-judge court jurisdiction. The first is that *Kesler* might be extended to hold, as some of its language might be thought to indicate, that *all* suits to enjoin the enforcement of a state statute, whatever the federal ground, must be channeled through three-judge courts. The second is that *no* such suits resting

solely on 'supremacy' grounds fall within the statute." *Id.*, at 125, 86 S.Ct., at 266 (footnote omitted).
Rather than extend the incorrectly decided opinion in *Kesler*, the Court decided to overrule it. 382 U.S., at 126–127, 86 S.Ct., at 266–267.

4 In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), which had held that "[u]nder the Sherman Act, it is [*per se*] unreasonable ... for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *Id.*, at 379, 87 S.Ct., at 1865. The decision distinguished between restrictions on retailers based on whether the underlying transaction was a sale, in which case the Court applied a *per se* ban, or not a sale, in which case the arrangement would be subject to a "rule of reason" analysis. In *Continental T.V., Inc.*, the Court reconsidered this *per se* rule in light of our traditional reliance on a "rule of reason" analysis for § 1 claims under the Sherman Act and the "continuing controversy and confusion, both in the scholarly journals and in the federal courts" caused by the sale/nonsale distinction drawn by the Court in *Schwinn*. 433 U.S., at 47–56, 97 S.Ct., at 2556–2561. The Court proceeded to reexamination and concluded "that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason." *Id.*, at 57, 97 S.Ct., at 2561. The Court found "no persuasive support for expanding the *per se* rule," and *Schwinn* was overruled. 433 U.S., at 57, 97 S.Ct., at 2561.

1 The majority's primary argument is that punishment in criminal law is frequently based on an "assessment of [the] harm caused by the defendant as a result of the crime charged." *Ante*, at 2605. See also *Booth v. Maryland*, 482 U.S. 496, 516, 107 S.Ct. 2529, 2539–2540, 96 L.Ed.2d 440 (1987) (WHITE, J., dissenting); *id.*, at 519–520, 107 S.Ct., at 2541–2542 (SCALIA, J., dissenting); *South Carolina v. Gathers*, 490 U.S. 805, 818–819, 109 S.Ct. 2207, 2214–2215, 104 L.Ed.2d 876 (1989) (O'CONNOR, J., dissenting). Nothing in *Booth* or *Gathers*, however, conflicts with this unremarkable observation. These cases stand merely for the proposition that the State may not put on evidence of *one* particular species of harm—namely, that associated with the victim's personal characteristics independent of the circumstances of the offense—in the course of *a capital murder proceeding*. See *Booth v. Maryland, supra*, 482 U.S., at 507, n. 10, 107 S.Ct., at 2535, n. 10 (emphasizing that decision does not bar reliance on victim-impact evidence in capital sentencing so long as such evidence "relate[s] directly to the circumstances of the crime"); *id.*, at 509, n. 12, 107 S.Ct., at 2536, n. 12 (emphasizing that decision does not bar reliance on victim-impact evidence in sentencing for noncapital crimes).
It may be the case that such a rule departs from the latitude of sentencers in criminal law generally to "tak[e] into consideration the harm done by the defendant." *Ante*, at 2608. But as the *Booth* Court pointed out, because this Court's capital-sentencing jurisprudence is founded on the premise that "death is a 'punishment different from all other sanctions,' " it is completely unavailing to attempt to infer from sentencing considerations in noncapital settings the proper treatment of any particular sentencing issue in a capital case. 482 U.S., at 509, n. 12, 107 S.Ct., at 2536, n. 12, quoting *Woodson v. North Carolina*, 428 U.S. 280, 303–304, 305, 96 S.Ct. 2978, 2990–2991, 2991–2992, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).
The majority also discounts Justice Powell's concern with the inherently prejudicial quality of victim-impact evidence. "[T]he mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence," the majority protests, "makes the case no different than others in which a party is faced with this sort of a dilemma." *Ante*, at 2607. See also *Booth v. Maryland, supra*, 482 U.S., at 518, 107 S.Ct., at 2540–2541 (WHITE, J., dissenting). Unsurprisingly, this tautology is completely unresponsive to Justice Powell's argument. The *Booth* Court established a rule excluding introduction of victim-impact evidence not merely because it is difficult to rebut—a feature of victim-impact evidence that may be "no different" from that of many varieties of relevant, legitimate evidence—but because the effect of this evidence in the sentencing proceeding is *unfairly prejudicial:* "The prospect of a 'mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." 482 U.S., at 507, 107 S.Ct., at 2535. The law is replete with *per se* prohibitions of types of evidence the probative effect of which is generally outweighed by its unfair prejudice. See, *e.g.*, Fed. Rules Evid. 404, 407–412. There is nothing anomalous in the notion that the Eighth Amendment would similarly exclude evidence that has an undue capacity to undermine the regime of individualized sentencing that our capital jurisprudence demands.
Finally, the majority contends that the exclusion of victim-impact evidence "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Ante*, at 2608. The majority's recycled contention, see *Booth, supra*, at 517, 107 S.Ct, at 2540 (WHITE, J., dissenting); *id.*, at 520, 107 S.Ct., at 2542 (SCALIA, J., dissenting); *Gathers, supra*, 490 U.S., at 817–818, 109 S.Ct., at 2214–2215 (O'CONNOR, J., dissenting), begs the question. Before it is possible to conclude that the exclusion of victim-impact evidence prevents the State from making its case or the jury from considering relevant evidence, it is necessary to determine whether victim-impact evidence is consistent with the substantive standards that define the scope of permissible sentencing determinations under the Eighth Amendment. The majority offers no persuasive answer to Justice Powell and Justice Brennan's conclusion that victim-impact evidence is frequently *irrelevant* to any permissible sentencing consideration and that such evidence risks exerting *illegitimate* "moral force" by directing the jury's attention on illicit considerations such as the victim's standing in the community.

2 Based on the majority's new criteria for overruling, these decisions, too, must be included on the "endangered precedents" list: *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (First Amendment right not to be denied public employment on the basis of party affiliation); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 S.Ct.

2281, 110 L.Ed.2d 83 (1990) (First Amendment right to advertise legal specialization); *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (due process right to procedural safeguards aimed at assuring voluntariness of decision to commit oneself to mental hospital); *James v. Illinois*, 493 U.S. 307, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990) (Fourth Amendment right to exclusion of illegally obtained evidence introduced for impeachment of defense witness); *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (First Amendment right of public employee to express views on matter of public importance); *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (Fifth Amendment and Sixth Amendment right of criminal defendant to provide hypnotically refreshed testimony on his own behalf); *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (rejecting applicability of harmless error analysis to Eighth Amendment right not to be sentenced to death by "death qualified" jury); *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) (Sixth Amendment right to counsel violated by introduction of statements made to government informant-codefendant in course of preparing defense strategy); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (rejecting theory that Tenth Amendment provides immunity to States from federal regulation); *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) (right to obtain injunctive relief from constitutional violations committed by judicial officials).

3 It does not answer this concern to suggest that Justices owe fidelity to the text of the Constitution rather than to the case law of this Court interpreting the Constitution. See, *e.g.*, *South Carolina v. Gathers*, 490 U.S., at 825, 109 S.Ct., at 2218 (SCALIA, J., dissenting). The text of the Constitution is rarely so plain as to be self-executing; invariably, this Court must develop mediating principles and doctrines in order to bring the text of constitutional provisions to bear on particular facts. Thus, to rebut the charge of personal lawmaking, Justices who would discard the mediating principles embodied in precedent must do more than state that they are following the "text" of the Constitution; they must explain why they are entitled to substitute *their* mediating principles for those that are already settled in the law. And such an explanation will be sufficient to legitimize the departure from precedent only if it measures up to the extraordinary standard necessary to justify overruling one of this Court's precedents. See generally Note, 103 Harv.L.Rev. 1344, 1351–1354 (1990).

4 Equally unsatisfactory is the Tennessee Supreme Court's purported finding that any error associated with the victim-impact evidence in this case was harmless. See 791 S.W.2d, at 19. This finding was based on the court's conclusion that "the death penalty was the only rational punishment available" in light of the "inhuman brutality" evident in the circumstances of the murder. *Ibid.* It is well established that a State cannot make the death penalty mandatory for any class of aggravated murder; no matter how "brutal" the circumstances of the offense, the State must permit the sentencer discretion to impose a sentence of less than death. See *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). It follows that an appellate court cannot deem error to be automatically *harmless* based solely on the aggravated character of a murder without assessing the impact of the error on the sentencer's discretion. Cf. *Clemons v. Mississippi*, 494 U.S. 738, 751–752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990).

To sentence petitioner to death, the jury was required to find that the mitigating circumstances shown by petitioner did not outweigh the aggravating circumstances. See App. 21–22. In what it tried to pass off as harmless error analysis, the Tennessee Supreme Court failed to address how the victim-impact evidence introduced during the sentencing proceedings in this case likely affected the jury's determination that the balance of aggravating and mitigating circumstances dictated a death sentence. Outside of a videotape of the crime scene, the State introduced *no* additional substantive evidence in the penalty phase *other than* the testimony of Mary Zvolanek, mother and grandmother of the murder victims. See 791 S.W.2d, at 17. Under these circumstances, it is simply impossible to conclude that this victim-impact testimony, combined with the prosecutor's extrapolation from it in his closing argument, was harmless beyond a reasonable doubt.

1 Justice SCALIA accurately described the argument in his dissent in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987):

"Recent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights'—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty." *Id.*, at 520, 107 S.Ct., at 2542.

In his concurring opinion today, Justice SCALIA again relies on the popular opinion that has "found voice in a nationwide 'victims' rights' movement." *Ante*, at 2613. His view that the exclusion of evidence about "a crime's unanticipated consequences" "significantly harms our criminal justice system," *ibid.*, rests on the untenable premise that the strength of that system is to be measured by the number of death sentences that may be returned on the basis of such evidence. Because the word "arbitrary" is not to be found in the constitutional text, he apparently can find no reason to object to the arbitrary imposition of capital punishment.

2 Thus, it is entirely consistent with the Eighth Amendment principles underlying *Booth* and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), to authorize the death sentence for the assassination of the President or Vice President, see 18 U.S.C. §§ 1751, 1111, a Congressman, Cabinet official, Supreme Court Justice, or the head of an executive department, § 351, or the murder of a policeman on active duty, see Md.Ann.Code, Art. 27, § 413(d)(1) (1987). Such statutory provisions give the potential

offender notice of the special consequences of his crime and ensure that the legislatively determined punishment will be applied consistently to all defendants.

3 *Northern Securities Co. v. United States*, 193 U.S. 197, 400–401, 24 S.Ct. 436, 486–487, 48 L.Ed. 679 (1904) (Holmes, J., dissenting).

4 See *Payne v. Tennessee*, 498 U.S. 1076, 111 S.Ct. 1031, 112 L.Ed.2d 1032 (1991) (STEVENS, J., dissenting).

5 *Rust v. Sullivan*, 500 U.S. 173, 223, 111 S.Ct. 1759, 1788, 114 L.Ed.2d 233 (1991) (O'CONNOR, J., dissenting).

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22 N.Y.3d 168
Court of Appeals of New York.

The PEOPLE of the State of New York,
Respondent,
v.
Juan Jose PEQUE, Also Known as Juan Jose Peque Sicajan, Appellant.
The People of the State of New York, Respondent,
v.
Richard Diaz, Appellant.
The People of the State of New York, Respondent,
v.
Michael Thomas, Also Known as Neil Adams, Appellant.

Nov. 19, 2013.

Synopsis

Background: First defendant, a native of Guatemala, pled guilty in the County Court, Chemung County, James T. Hayden, J., to rape, and the Supreme Court, Appellate Division, 88 A.D.3d 1024, 930 N.Y.S.2d 492, affirmed. Second defendant, a legal permanent resident of the United States originally from the Dominican Republic, pled guilty in the Supreme Court, New York County, Bonnie G. Wittner, J., to drug possession, and the Supreme Court, Appellate Division, 92 A.D.3d 413, 937 N.Y.S.2d 225, affirmed. Third defendant, a legal permanent resident of the United States originally from Jamaica, pled guilty in the Supreme Court, Queens County, Richard L. Buchter, J., to attempted criminal sale of a controlled substance, and had his plea withdrawal motion denied, and the Supreme Court, Appellate Division, 89 A.D.3d 964, 932 N.Y.S.2d 703, affirmed. All three defendants were granted leave to appeal.

Holdings: The Court of Appeals, Abdus–Salaam, J., held that:

second defendant was not required to preserve his involuntary plea claim based on lack of notice regarding potential deportation;

first defendant was required to preserve his involuntary plea claim based on lack of notice regarding potential deportation;

defendants were entitled to notice that deportation may ensue from a guilty plea, overruling *People v. Ford*, 86 N.Y.2d 397, 633 N.Y.S.2d 270, 657 N.E.2d 265;

failure to apprise defendants of deportation only affected the voluntariness of the pleas if defendants would have made different decisions had the consequence been disclosed;

second defendant's case required remittal to the trial court to allow second defendant to file a motion to vacate the plea; but

third defendant was not entitled to vacatur of his guilty plea.

Affirmed in part, and affirmed as modified in part.

Pigott, J., filed opinion concurring in result in part and dissenting in part in which Smith, J., concurred in part.

Lippman, C.J., filed dissenting opinion.

Rivera, J., filed an opinion concurring in part and dissenting in part.

Attorneys and Law Firms

*****284** Melissa A. Latino, Albany, for appellant in the first above-entitled action.

Weeden A. Wetmore, District Attorney, Elmira (Susan Rider–Ulacco of counsel), for respondent in the first above-entitled action.

Richard M. Greenberg, Office of the Appellate Defender, New York City (Rosemary Herbert of counsel), for appellant in the second above-entitled action.

Cyrus R. Vance, Jr., District Attorney, New York City (Vincent Rivellese and Hilary Hassler of counsel), for respondent in the second above-entitled action.

Lynn W.L. Fahey, Appellate Advocates, New York City, for appellant in the third above-entitled action.

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Kramer Levin Naftalis & Frankel LLP, New York City (Craig L. Siegel, Carl D. Duffield, Ashley S. Miller and Anna K. Ostrom of counsel), and Dawn Seibert for Immigrant Defense Project, amicus curiae in the first, second and third above-entitled actions.

OPINION OF THE COURT

ABDUS–SALAAM, J.

***175 **621** In these criminal appeals, we are called upon to decide whether, prior to permitting a defendant to plead guilty to a felony, a trial court must inform the defendant that, if the defendant is not a citizen of this country, he or she may be deported as a result of the plea. Our resolution of this issue is grounded in the right to due process of law, the bedrock of our constitutional order. That guarantee, most plain in its defense of liberty yet complex in application, requires us to strike a careful balance between the freedom of the individual and the orderly administration of government.

Upon review of the characteristics of modern immigration law and its entanglement with the criminal justice system, a ***176** majority of this Court, consisting of Chief Judge Lippman, Judges Graffeo, Read, Rivera and me, finds that deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea. We therefore hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony.[1] In reaching this conclusion, ****622 ***285** we overrule the limited portion of our decision in *People v. Ford*, 86 N.Y.2d 397, 633 N.Y.S.2d 270, 657 N.E.2d 265 (1995) which held that a court's failure to advise a defendant of potential deportation never affects the validity of the defendant's plea. However, a separate majority, consisting of Judges Graffeo, Read, Smith and me, reaffirms the central holding of *Ford* regarding the duties of a trial court and the distinction between direct and collateral consequences of a guilty plea, and we make clear that our precedent in this area is not otherwise affected by today's decision. Judges Graffeo, Read, Smith and I further hold that, in light of the Court's conclusion that a trial court must notify a pleading noncitizen defendant of the possibility of deportation, the trial court's failure to provide such advice does not entitle the defendant to automatic withdrawal or vacatur of the plea. Rather, to overturn his or her conviction, the defendant must establish the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial (*see* n. 1, *supra*).[2]

***177** I

Because the disposition of these appeals varies with the facts of each one, I begin by reviewing the factual background and procedural history of each case.

People v. Peque

Shortly after midnight on June 20, 2009, defendant Peque, a native of Guatemala, was arrested for allegedly raping a bartender in a bathroom stall at an inn. Defendant was later indicted on one count of rape in the first degree (*see* Penal Law § 130.35[1]). At arraignment, defendant told the court that he was from Guatemala City and lacked a Social Security number, and during their bail application, the People informed the court that, in prison, defendant had made statements indicating he was in the United States unlawfully.

After a series of later court appearances and plea negotiations, defendant pleaded guilty to first-degree rape in exchange for a promised sentence of a 17 ½—year determinate prison term to be followed by five years of postrelease supervision. Defendant indicated that he had discussed his plea with his attorney, and when the court asked defendant, "Is there anything at this point in the process that you do not understand ****623 ***286** he replied, via an interpreter, " No, everything is clear." The court accepted defendant's guilty plea without advising him that his first-degree rape conviction might result in his deportation because it qualified as a conviction for an "aggravated felony" under federal immigration statutes (*see* 8 U.S.C. §§ 1101[a][43][A]; 1227 [a][2]).

At sentencing, the court asked defense counsel whether there was "any legal reason sentence should not be pronounced," and counsel responded, "Not that I'm aware, Judge." Counsel then stated for the record that defendant was "subject to deportation following the completion of his sentence" and that counsel nonetheless wished for the court "to ratify the sentence as agreed upon." Counsel also mentioned that he had informed defendant of his "right of access to the Guatemalan consulate," which defendant had declined to exercise. Defendant, in turn, said, "I ***178** will ask your Honor to have mercy and allow me to be deported to my country within five years." Noting that it had no control over the immigration process, the court sentenced defendant as promised.

Defendant appealed, asserting that his guilty plea was not knowing, intelligent and voluntary because the trial court had not mentioned the possibility of deportation at the time of the plea. Defendant also claimed that his lawyer had been ineffective for not apprising him that he could be

deported if he pleaded guilty. The Appellate Division affirmed defendant's conviction (88 A.D.3d 1024, 1024–1025, 930 N.Y.S.2d 492 [3d Dept.2011]). Relying on *Ford*, the Appellate Division found that "[i]nasmuch as a defendant's potential for deportation is considered a collateral consequence of a criminal conviction, County Court's failure to advise defendant of such consequence does not render the plea invalid" (88 A.D.3d at 1025, 930 N.Y.S.2d 492). The Court rejected defendant's ineffective assistance of counsel claim as unreviewable because it "involves matters largely outside of the record and is more appropriately addressed by a CPL article 440 motion" (*id.*). A Judge of this Court granted defendant leave to appeal (19 N.Y.3d 977, 950 N.Y.S.2d 360, 973 N.E.2d 770 [2012]), and we now affirm.

People v. Diaz

On the night of October 11, 2006, defendant Diaz, who was a legal permanent resident of the United States originally from the Dominican Republic, was allegedly riding in the back of a taxicab with codefendant Castillo Morales. Police officers stopped the cab and, after searching the back seat, recovered a bag containing a two-pound brick of cocaine. The officers arrested defendant and Morales, and thereafter, both men were indicted on one count of criminal possession of a controlled substance in the first degree (*see* Penal Law § 220.21[1]) and one count of criminal possession of a controlled substance in the third degree (*see* Penal Law § 220.16[1]).

At a court appearance held for consideration of the People's bail application, defense counsel opposed setting bail, noting that defendant was not a flight risk because he had a green card. Later, immediately prior to the scheduled start of a suppression hearing, defendant agreed to accept the People's plea offer of a 2 ½-year determinate prison term plus two years of postrelease supervision in exchange for his plea of guilty to third-degree drug possession. After conducting a standard plea allocution, the court said, "And if you're not here legally or if you have any immigration issues these felony pleas could ***179** adversely affect you," adding, "Do you each understand that?" Defendant replied, "Yes." At sentencing, the court imposed the negotiated sentence. At no ****624 ***287** point did the court state that defendant could be deported based on his conviction of a removable controlled substances offense (*see* 8 U.S.C. § 1227[a][2][B][i]).

Defendant completed his prison term, and upon his release to postrelease supervision, United States Immigration and Customs Enforcement (ICE) initiated proceedings to remove him from the country based on his drug conviction. ICE initially detained defendant pending the outcome of those proceedings. However, defendant appealed his conviction and challenged the validity of his guilty plea, alleging that the court's failure to warn him of the possibility of deportation rendered his plea involuntary. As a result, ICE conditionally released defendant pending the resolution of his appeal, and he completed his term of postrelease supervision. While his appeal was pending, defendant also moved, pursuant to CPL 440.10, to vacate his conviction on the ground that his attorney had been ineffective for failing to advise him of the immigration consequences of his guilty plea. After a hearing, Supreme Court denied that motion, and the Appellate Division subsequently denied defendant permission to appeal from the hearing court's decision.

On defendant's direct appeal, the Appellate Division affirmed his conviction (92 A.D.3d 413, 413–414, 937 N.Y.S.2d 225 [1st Dept.2012]). The Court found that defendant had failed to preserve his challenge to the validity of his guilty plea (*id.* at 413, 937 N.Y.S.2d 225). As an alternative holding, the Court rejected defendant's claim on the merits (*id.*). The Court determined that, "[w]hile the duty to advise a defendant of the possibility of deportation before accepting a plea of guilty is imposed on the trial courts by statute (CPL 220.50[7]), the court's 'failure to do so does not affect the voluntariness of a guilty plea' " (*id.* at 413–414, 937 N.Y.S.2d 225, quoting *Ford*, 86 N.Y.2d at 404, 633 N.Y.S.2d 270, 657 N.E.2d 265 n). The Court further held that "the duties of a trial court upon accepting a guilty plea are not expanded by *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), which deals exclusively with the duty of defense counsel to advise a defendant of the consequences of pleading guilty when it is clear that deportation is mandated" (*id.* at 414, 937 N.Y.S.2d 225). Finally, in the Court's estimation, the trial court's warning about immigration matters "sufficed to apprise defendant that the consequences of his guilty plea extended to his immigration status" (*id.*). A Judge of this Court granted defendant leave to appeal (19 N.Y.3d 972, 950 N.Y.S.2d 355, 973 N.E.2d 765 [2012]), ***180** and we now conditionally modify the Appellate Division's decision and remit the matter to Supreme Court to afford defendant the opportunity to move to vacate his plea.

People v. Thomas

On February 15, 1992, defendant Thomas, a legal permanent resident of the United States originally from Jamaica, was arrested for selling cocaine to two

individuals. He was later charged in a superior court information with two counts of criminal sale of a controlled substance in the third degree (*see* Penal Law § 220.39[11]).

On February 20, 1992, defendant appeared with counsel in Supreme Court, waived indictment and pleaded guilty to one count of attempted criminal sale of a controlled substance in the third degree. In exchange for defendant's plea, the court promised to sentence him to 30 days in jail plus five years of probation. However, the court conditioned defendant's receipt of that sentence upon his return to court for sentencing, abstinence from committing further crimes and cooperation with the Department of Probation. At the plea ****625 ***288** proceeding, the court asked defendant whether he was a citizen of the United States. Defendant answered that he was not a United States citizen and was from Jamaica.

While defendant was at liberty pending sentencing, he failed to show up for a scheduled court appearance, and the court issued a bench warrant for his arrest. On April 28, 1992, defendant's attorney appeared in court and gave the trial judge a copy of defendant's death certificate, which indicated that defendant had committed suicide. The court vacated the bench warrant as abated by death.

About 16 years later, on February 28, 2008, defendant arrived at JFK International Airport and, using an alias, asked customs officials for admission to the United States as a returning lawful permanent resident. A few days later, the United States Department of Homeland Security ran defendant's fingerprints and discovered his true identity. The Department of Homeland Security notified the People of defendant's return to the country, and the People then informed the court of this turn of events. The court restored the case to its calendar and issued a bench warrant for defendant's arrest.

Two days after the issuance of a public notice of the murder of the lawyer who had represented defendant at the time of his plea, defendant moved to withdraw his guilty plea with the assistance ***181** of a new attorney. Defendant asserted that the court's failure to warn him that he might be deported as a result of his plea rendered his plea involuntary. Defendant also contended that his previous lawyer had been ineffective for failing to provide advice on the immigration consequences of his plea. In support of the motion, defense counsel submitted an affirmation stating that defendant's previous attorney had not advised defendant at all concerning the possibility of deportation. By contrast, defendant himself averred that his attorney had specifically promised him he would not be subject to deportation if he pleaded guilty.

The trial court denied defendant's plea withdrawal motion. The court found that defendant's allegations regarding his attorney's advice were contradictory and incredible, and that defendant generally lacked credibility because he had absconded and faked his own death. Thus, the court opined, defendant had not credibly established that his attorney's advice had been deficient at the time of his plea or that he had been prejudiced by his attorney's allegedly poor performance. Citing *Ford*, the court concluded that defendant was not entitled to withdraw his plea based on the court's or counsel's failure to apprise him of potential deportation. The court then sentenced defendant to an indeterminate prison term of from 2 to 6 years.

Defendant appealed, renewing his complaints about counsel's advice and the voluntariness of his guilty plea. While defendant's appeal was pending, the Department of Homeland Security charged him with being subject to removal from the United States based on his conviction in this case. Upon learning of defendant's appeal, the federal agency amended the charges to seek defendant's removal based on his failure to disclose his conviction when he applied for an immigrant visa. Defendant was paroled to ICE custody, and an immigration judge later ordered his removal from the country.

Thereafter, the Appellate Division affirmed defendant's conviction (89 A.D.3d 964, 964–965, 932 N.Y.S.2d 703 [2d Dept.2011]). The Court concluded that defendant's ineffective assistance claim was un-preserved and premised on incredible allegations regarding matters outside the record ****626 ***289** (*see id.* at 964–965, 932 N.Y.S.2d 703). Finding *Ford* to be controlling, the Court also held that defendant was not entitled to withdraw his guilty plea due to the trial court's failure to mention potential deportation at the plea proceeding (*see* 89 A.D.3d at 965, 932 N.Y.S.2d 703). A Judge of this Court granted defendant leave to appeal (19 N.Y.3d 1002, 951 N.Y.S.2d 478, 975 N.E.2d 924 [2012]), and we now affirm.

***182** II

A

Each defendant maintains that his guilty plea must be vacated because the trial court did not inform him that his plea would subject him to deportation, thereby failing to

provide constitutionally mandated notice of a critically important consequence of the plea. However, before we may reach defendants' claims, we must determine whether those claims have been preserved as a matter of law for our review (*see* N.Y. Const. art. VI, § 3[a]; CPL 470.05[2]; *People v. Hawkins*, 11 N.Y.3d 484, 491–492, 872 N.Y.S.2d 395, 900 N.E.2d 946 [2008]).

Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10 (*see* CPL 220.60[3]; 440.10; *People v. Clarke*, 93 N.Y.2d 904, 906, 690 N.Y.S.2d 501, 712 N.E.2d 668 [1999]; *People v. Toxey*, 86 N.Y.2d 725, 726, 631 N.Y.S.2d 119, 655 N.E.2d 160 [1995]; *People v. Lopez*, 71 N.Y.2d 662, 665, 529 N.Y.S.2d 465, 525 N.E.2d 5 [1988]). Under certain circumstances, this preservation requirement extends to challenges to the voluntariness of a guilty plea (*see People v. Murray*, 15 N.Y.3d 725, 726, 906 N.Y.S.2d 521, 932 N.E.2d 877 [2010]; *Toxey*, 86 N.Y.2d at 726, 631 N.Y.S.2d 119, 655 N.E.2d 160).

However, under *People v. Lopez*, where a deficiency in the plea allocution is so clear from the record that the court's attention should have been instantly drawn to the problem, the defendant does not have to preserve a claim that the plea was involuntary because "the salutary purpose of the preservation rule is arguably not jeopardized" (71 N.Y.2d at 665–666, 529 N.Y.S.2d 465, 525 N.E.2d 5). And, in *People v. Louree*, 8 N.Y.3d 541, 838 N.Y.S.2d 18, 869 N.E.2d 18 (2007) we concluded that a defendant need not move to withdraw a guilty plea in order to obtain appellate review of a claim that the trial court's failure to inform the defendant of the postrelease supervision component of the defendant's sentence rendered the plea involuntary (*see id.* at 545–547, 838 N.Y.S.2d 18, 869 N.E.2d 18). We carved out that exception to the preservation doctrine because of the "actual or practical unavailability of either a motion to withdraw the plea" or a "motion to vacate the judgment of conviction," reasoning that "a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge" (*id.* at 546, 838 N.Y.S.2d 18, 869 N.E.2d 18). Taken together, *Lopez* and *Louree* establish that where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation is not required. At the same time, there are significant constraints on this exception to the ***183** preservation doctrine. Recognizing as much, in *People v. Murray*, we held that the defendant had to preserve his claim that the trial court's imposition of a nonconforming term of postrelease supervision rendered his guilty plea involuntary because the court had mentioned the nonconforming postrelease supervision term at sentencing, thereby providing the defendant ****627 ***290** with an opportunity to challenge the voluntariness of his plea (*see Murray*, 15 N.Y.3d at 726–727, 906 N.Y.S.2d 521, 932 N.E.2d 877).

Here, in *Diaz*, the trial court never alerted defendant that he could be deported as a result of his guilty plea. In fact, the court provided defendant with inaccurate advice, as the court implied that defendant's plea would entail adverse immigration consequences only for someone who was in the country illegally or had existing immigration issues—circumstances which did not apply to defendant. Since defendant did not know about the possibility of deportation during the plea and sentencing proceedings, he had no opportunity to withdraw his plea based on the court's failure to apprise him of potential deportation. Thus, defendant's claim falls within *Lopez*'s and *Louree*'s narrow exception to the preservation doctrine.

By contrast, in *Peque*, because defendant knew of his potential deportation, and thus had the ability to tell the court, if he chose, that he would not have pleaded guilty if he had known about deportation, he was required to preserve his claim regarding the involuntariness of his plea.[3] At sentencing, defendant plainly knew that he might be deported as a result of his guilty plea, and he even implored the court "to have mercy and allow [him] to be deported to [his] country within five years." Given his awareness of the deportation issue at that point, defendant could have sought to withdraw his plea on that ground. The salutary purpose of the preservation doctrine, including the development of a full record and the efficient resolution of claims at the earliest opportunity, is served by requiring preservation in his case. In light of defendant's failure to raise the deportation issue below or move to withdraw his plea, we cannot entertain his newly minted challenge to its validity.

In *Thomas*, defendant fully preserved his claim that the trial court should have informed him that he could be deported as a ***184** result of his guilty plea, and therefore defendant's challenge to his plea is properly before us.

B

The State and Federal Constitutions guarantee that the State shall not deprive any person of his or her liberty without due process of law (*see* U.S. Const. 14th Amend.; N.Y. Const., art. I, § 6). To ensure that a criminal defendant receives due process before pleading guilty and surrendering his or her most fundamental liberties to the State, a trial court bears the responsibility to confirm that

the defendant's plea is knowing, intelligent and voluntary (*see United States v. Ruiz,* 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 [2002]; *Boykin v. Alabama,* 395 U.S. 238, 243–244, 89 S.Ct. 1709, 23 L.Ed.2d 274 [1969]; *Louree,* 8 N.Y.3d at 544–545, 838 N.Y.S.2d 18, 869 N.E.2d 18; *Ford,* 86 N.Y.2d at 402–403, 633 N.Y.S.2d 270, 657 N.E.2d 265). In particular, it "must be clear that 'the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant' " (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265, quoting *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 [1970]; *see People v. Gravino,* 14 N.Y.3d 546, 553, 902 N.Y.S.2d 851, 928 N.E.2d 1048 [2010]). ****628 ***291** To that end, while the court need not inform the defendant of every possible repercussion of a guilty plea prior to its entry (*see Ruiz,* 536 U.S. at 629–630, 122 S.Ct. 2450; *Gravino,* 14 N.Y.3d at 553, 902 N.Y.S.2d 851, 928 N.E.2d 1048), the court must advise the defendant of the direct consequences of the plea (*see People v. Catu,* 4 N.Y.3d 242, 244, 792 N.Y.S.2d 887, 825 N.E.2d 1081 [2005]; *Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265; *see also Brady v. United States,* 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 [1970]). On the other hand, the court generally has no obligation to apprise the defendant of the collateral consequences of the plea (*see Gravino,* 14 N.Y.3d at 553, 902 N.Y.S.2d 851, 928 N.E.2d 1048; *Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265).

A direct consequence of a guilty plea is one "which has a definite, immediate and largely automatic effect on [the] defendant's punishment" (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265; *see People v. Monk,* 21 N.Y.3d 27, 32, 966 N.Y.S.2d 739, 989 N.E.2d 1 [2013]; *see also United States v. Youngs,* 687 F.3d 56, 60 [2d Cir.2012]; *United States v. Delgado–Ramos,* 635 F.3d 1237, 1239–1240 [9th Cir.2011]), whereas a collateral consequence is one "peculiar to the individual's personal circumstances and one not within the control of the court system" (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265; *see People v. Belliard,* 20 N.Y.3d 381, 385, 961 N.Y.S.2d 820, 985 N.E.2d 415 [2013]). Examples of direct consequences include the forfeiture of trial rights (*see Boykin,* 395 U.S. at 243–244, 89 S.Ct. 1709), the imposition of a mandatory term of imprisonment that results from an unconditional guilty plea (*see id.* at 244 n. 7, 89 S.Ct. 1709; *Jamison v. Klem,* 544 F.3d 266, 277 [3d Cir.2008]; *People v. Harnett,* 16 N.Y.3d 200, 205, 920 N.Y.S.2d 246, 945 N.E.2d 439 [2011]), and the imposition of mandatory postrelease ***185** supervision (*see Catu,* 4 N.Y.3d at 244–245, 792 N.Y.S.2d 887, 825 N.E.2d 1081). By contrast, "[i]llustrations of collateral consequences are loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms[,] ... an undesirable discharge from the Armed Services" (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265 [citations omitted]), the imposition of a prison term upon revocation of postrelease supervision (*see Monk,* 21 N.Y.3d at 33, 966 N.Y.S.2d 739, 989 N.E.2d 1), sex offender registration under the Sex Offender Registration Act (SORA) (*see Gravino,* 14 N.Y.3d at 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048), and civil confinement under the Sex Offender Management and Treatment Act (SOMTA) (*see Harnett,* 16 N.Y.3d at 206, 920 N.Y.S.2d 246, 945 N.E.2d 439).

Furthermore, in *Ford,* this Court held that "[d]eportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system" (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265). Likewise, certain federal circuit courts have held that a court need not advise a pleading defendant of the possibility of deportation because deportation is a collateral consequence of a guilty plea (*see e.g. Delgado–Ramos,* 635 F.3d at 1241; *Santos–Sanchez v. United States,* 548 F.3d 327, 336–337 [5th Cir.2008]; *El–Nobani v. United States,* 287 F.3d 417, 421 [6th Cir.2002]; *United States v. Gonzalez,* 202 F.3d 20, 27 [1st Cir.2000]). Additionally, shortly before this Court's decision in *Ford* and after the defendant's guilty plea in that case, the Legislature passed CPL 220.50(7). That statute requires a court to inform a noncitizen defendant that a guilty plea may subject the defendant to deportation ****629 ***292** but it also states that "[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction" (*id.).*

Here, defendants' convictions upon their guilty pleas rendered them subject to deportation, and in each case, the trial court did not alert the defendant to that circumstance. Defendants claim that recent changes in federal immigration law have transformed deportation into a direct consequence of a noncitizen defendant's guilty plea, and that therefore the courts' failure here to mention the possibility of deportation rendered their pleas involuntary. Defendants thus urge us to overrule so much of *Ford* as holds otherwise. In opposition, the People maintain that, because federal authorities retain a significant degree of discretion in determining whether to deport a convicted felon, deportation remains a strictly collateral consequence of a guilty ***186** plea which does not have to be set forth during the plea allocution. The parties' arguments necessitate an examination of the evolving relationship between the immigration system and a New York criminal conviction before and after *Ford.*

C

As early as the mid-seventeenth century, the Dutch colony that would become New York experienced widespread immigration. By the late 1650s, non-Dutch European immigrants comprised about half the colony's population, and it appears that there were few, if any, legal restrictions on immigration at that time (*see* Milton M. Klein et al., The Empire State: A History of New York 45, 49–51 [2001] [hereinafter "Klein"]). This situation essentially continued through British rule of the colony and New York's early days as a state in post-revolutionary America (*see* Klein 153–154, 157–159, 308–311). During that span of history, immigrants contributed significantly to the constitutional tradition underlying today's decision. In the seventeenth century, the original foreign-born colonists brought with them the common-law tradition of individual rights, and in 1821, naturalized immigrants in certain progressive counties of the State provided the population, clout and votes needed to call for a constitutional convention, resulting in New York's becoming the first state to add a due process clause to its constitution (*see* J. Hampden Dougherty Constitutional History of the State of New York 29, 42–43, 97–99 [1915]; Peter J. Galie & Christopher Bopst, The New York State Constitution 68–69 [2d ed. 2012]).

Immigration laws began to change in the mid-nineteenth century. Prior to that time, New York City modestly regulated immigration, imposing various capitations on merchant shipmasters who transported impoverished immigrants to this country by sea and requiring those shipmasters to report certain identification information about their immigrant passengers to the Mayor (*see* Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. Am. Hist. 1092, 1095 [2013] [hereinafter "Hirota"]; *see also Henderson v. Mayor of New York*, 92 U.S. 259, 265–275, 23 L.Ed. 543 [1875] [describing New York City's immigration laws and striking down some of them as violative of the federal government's exclusive power to regulate commerce with foreign nations under the Federal Constitution]). In 1847, however, New York State passed laws which excluded from entry to the State any foreigner "likely to become ***187** permanently a public charge" as a penalty for a shipmaster's nonpayment of a bond for such a person (Hirota, 99 J. Am. Hist. at 1095). Furthermore, in 1882, the State successfully lobbied Congress to pass the Immigration Act, which prohibited ****630 ***293** entry into the United States of "convict [s]" (22 U.S. Stat 214 [1882]; *see* Hirota, 99 J. Am. Hist. at 1097–1098).

Even after the onset of federal regulation of immigration, removal from the country was largely discretionary and relatively uncommon. When Congress passed the Immigration Act of 1917, it authorized for the first time the deportation of noncitizens who had been convicted of crimes of "moral turpitude" and had served a sentence of a year or more in prison (39 U.S. Stat. 874, 889–890 [1917]). Under the 1917 Act, a state sentencing court had discretion to grant a noncitizen defendant a judicial recommendation against deportation, or JRAD, which prevented the federal government from deporting the defendant (*see* 39 U.S. Stat. at 889–890). New York officials also saw fit to extend discretionary relief to alien convicts to prevent their deportation. As noted in the Poletti Committee's report in preparation for the State's constitutional convention of 1938, the Governor would sometimes, where the facts warranted it, pardon a prisoner to "restore citizenship ... or to prevent deportation or to permit naturalization" (*Problems Relating to Executive Administration and Powers*, 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 8 at *66* [1938]).

Executive discretion in the immigration field, however, did not remain untrammeled for long. By successive revisions to the Immigration and Nationality Act (INA) in 1952 and 1990, Congress first curtailed and then eliminated the availability of JRADs, while preserving the United States Attorney General's discretion to grant relief from deportation (*see* 66 U.S. Stat. 163, 201–208 [1952]; 104 U.S. Stat. 4978, 5050–5052 [1990]). In 1996, Congress finally stripped the Attorney General of his discretion to prevent a noncitizen defendant's deportation (*see* 110 U.S. Stat. 3009–546, 3009–567, 3009–594, 3009–596, 3009–597 [1996]). And, under the current version of the INA, an alien may be deported for a wide array of crimes, including most drug offenses, "aggravated felonies," domestic violence crimes, and any crime for which a sentence of more than a year is authorized (*see* 8 U.S.C. §§ 1101[a][43]; 1227[a][2]). Therefore,

> "[u]nder contemporary law, if a noncitizen has committed a removable offense after the 1996 effective ***188** date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses" (*Padilla*, 559 U.S. at 363–364, 130 S.Ct. 1473; *see generally* 8 U.S.C. § 1227; 110 U.S. Stat. 1214 [1996]).

Changes in immigration enforcement have also increased the likelihood that a noncitizen defendant will be deported after a guilty plea. For example, at the time of the passage of the 1996 amendments to the INA, the number of annual deportations resulting from criminal convictions stood at 36,909 (*see* Department of Homeland Security, 1996 Yearbook of Immigration Statistics, Annual Report on

Immigration Enforcement Actions at 171 [1997], available at http://www.dhs.gov/archives [accessed Sept. 18, 2013]). Thereafter, the federal government deported an ever-growing number of individuals each year, and in 2011, the United States removed 188,382 noncitizens based on their criminal convictions (*see* Department of Homeland Security, 2011 Yearbook of Immigration Statistics, Annual Report on Immigration Enforcement Actions at 5–6 [2012], available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_ 2011.pdf [accessed Sept. 18, 2013]; *see also* Douglas S. Massey & ****631 ***294** Karen A. Pren, *Unintended Consequences of U.S. Immigration Policy: Explaining the Post–1965 Surge from Latin America*, 38 Population & Dev. Rev. [Issue 11], 15–16 [2012]). And, since 1995, the Institutional Removal Program, a joint initiative of New York and federal authorities, has enabled New York to transfer thousands of convicted foreign-born criminals from state custody to ICE custody prior to the expiration of their prison terms (*see* Correction Law § 5[4]; Executive Law § 259–i[2][d] [i]; New York State Department of Corrections and Community Supervision, Research Report: The Foreign–Born under Custody Population and the IRP at 1, 9–11 [2012], available at http://www.doccs.ny.gov/Research/Reports/2013/ ForeignBorn_IRP_Report2012.pdf [accessed Sept. 18, 2013]; *see also* brief of Immigrant Defense Project, as amicus curiae, at 15–20).

Present-day immigration law and enforcement practice impose what can only be described as an enormous penalty upon noncitizen convicts. Once state and federal authorities identify a defendant as a potentially removable alien, ICE may detain the defendant until administrative or judicial review ***189** causes him to be released or adjudged deportable, and that detention will last at least several days and, in some cases, for months or years before the defendant's removal status is finally settled (*see* 8 U.S.C. § 1226[c] [1]; *Demore v. Kim*, 538 U.S. 510, 529, 123 S.Ct. 1708, 155 L.Ed.2d 724 [2003] [noting average detention period of 47 days]; *see also* Amnesty International, *Jailed without Justice: Immigration Detention in the USA* at 1, 22 [2009] [describing an alien convict's four-year detention during removal proceedings], available at http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf [accessed Sept. 21, 2013]; Joren Lyons, *Recent Development: Mandatory Detention During Removal Proceedings: Challenging the Applicability of Demore v. Kim to Vietnamese and Laotian Detainees*, 12 Asian L.J. 231, 231–232 [2005] [recounting an immigrant convict's 16–month detention]). If an immigration judge orders the defendant's deportation, ICE can automatically hold the defendant in custody for another 90 days and may continue to confine the defendant beyond that period subject to a judicial determination that further detention is reasonably necessary to secure the defendant's removal (*see Zadvydas v. Davis*, 533 U.S. 678, 682–684, 699–701, 121 S.Ct. 2491, 150 L.Ed.2d 653 [2001]). Additionally, immigrant detention resembles criminal incarceration, and the conditions of that detention are such that "in general, criminal inmates fare better than do civil detainees" (Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 Am Crim. L. Rev. 1441, 1445 [2010]).[4]

Of course, a convicted noncitizen defendant's actual removal from the country exacts the greatest toll on the defendant and his or her family. Once the federal government forces the defendant beyond our borders, the defendant loses the precious rights and opportunities available to all residents of the United States. After being removed from the country, the defendant rarely, if ever, has further in-person contact with any family members remaining in America. Additionally, deportation effectively strips the defendant of any employment he or she had in this country, thus depriving the defendant and his or her family of critical financial ****632 ***295** support. And, the defendant must begin life anew in a country that, in some cases, is more foreign to the defendant than the United States.

***190** Despite those severe qualities, deportation is not technically a criminal punishment for past behavior, but rather a civil penalty imposed upon noncitizens whose continuing presence in the country is deemed undesirable by the federal government based on their misconduct or other aggravating circumstances (*see Padilla*, 559 U.S. at 365, 130 S.Ct. 1473; *INS v. St. Cyr*, 533 U.S. 289, 324, 121 S.Ct. 2271, 150 L.Ed.2d 347 [2001]; *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 [1984]; *Morris v. Holder*, 676 F.3d 309, 317 [2d Cir.2012]). However, in *Padilla v. Kentucky*, the United States Supreme Court recognized that deportation could not be neatly confined to the realm of civil matters unrelated to a defendant's conviction.

Specifically, the Court held that, because deportation is so closely related to the criminal process and carries such high stakes for noncitizen defendants, a defense attorney deprives a noncitizen defendant of his or her Sixth Amendment right to the effective assistance of counsel by failing to advise, or by misadvising, the defendant about the immigration consequences of a guilty plea (*see* 559 U.S. at 366–374, 130 S.Ct. 1473). In discussing the significance of the possibility of deportation and the need for competent advice from counsel on the subject, the Court observed, "Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century ... [a]nd, importantly, recent changes in our immigration law have made removal nearly an automatic

result for a broad class of noncitizen offenders" (*id.* at 365–366, 130 S.Ct. 1473). The Court continued, "Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence" of a guilty plea for Sixth Amendment purposes (*id.* at 366, 130 S.Ct. 1473).

In determining whether the Supreme Court's discussion of the character of deportation holds true for due process purposes, it is necessary to account for the distinct nature of the right to due process and the right to the effective assistance of counsel at issue in *Padilla.* Although both of those rights exist to preserve the defendant's entitlement to a fair trial or plea proceeding, they operate in discrete ways in the plea context. The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, gives the defendant essential advice specific to his or her personal circumstances and enables the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the ***191** defendant understands the most fundamental and direct consequences of the plea (*see Alford,* 400 U.S. at 31, 91 S.Ct. 160; *Strickland v. Washington,* 466 U.S. 668, 684–687, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]; *Hill v. Lockhart,* 474 U.S. 52, 56–58, 106 S.Ct. 366, 88 L.Ed.2d 203 [1985]; *People v. Angelakos,* 70 N.Y.2d 670, 672–674, 518 N.Y.S.2d 784, 512 N.E.2d 305 [1987]; *People v. Harris,* 61 N.Y.2d 9, 18–19, 471 N.Y.S.2d 61, 459 N.E.2d 170 [1983]). Given the distinct duties of counsel and the court under these two constitutional doctrines, *Padilla*'s legal classification of deportation as a plea consequence necessitating counsel's advice under the Sixth Amendment does not inexorably compel the conclusion that deportation implicates the court's responsibility to ensure the voluntariness of a guilty plea.

*****296 **633** Nonetheless, the *Padilla* Court's factual observation about the nature of deportation rings true in both the due process and effective assistance contexts; it is difficult to classify deportation as either a direct or collateral consequence of a noncitizen defendant's guilty plea.[5] On the one hand, deportation is not always an immediate consequence of an alien defendant's guilty plea because the federal government must await the defendant's release from state custody and the outcome of a removal hearing before deporting the defendant. And, immigration authorities may not even initiate that process, much less complete it, until many years after the defendant's criminal conviction. Furthermore, deportation is not a part of the defendant's criminal punishment and sentence, making it distinct from other direct consequences of a guilty plea such as the imposition of postrelease supervision. So, too, deportation, like most collateral consequences, remains a matter "not within the control of the court system" (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265).

However, under current federal law, deportation is a virtually automatic result of a New York felony conviction for nearly every noncitizen defendant (*see Padilla,* 559 U.S. at 363–366, 130 S.Ct. 1473), and New York defendants are often released to ICE custody even before they finish serving their prison sentences. Significantly, deportation has punitive qualities not entirely unlike the core components of a criminal sentence. Judges Graffeo, Read and I conclude that those circumstances cause deportation to ***192** resemble in many respects a direct consequence of a guilty plea, even though we concur with Judges Pigott and Smith that it is technically on the collateral side of the direct/collateral divide.[6]

We have previously contemplated the existence of such a peculiar consequence of a guilty plea, though we had not actually encountered one until now. And, in prior decisions, we discussed how a trial court must address these most uncommon consequences at a plea proceeding. Particularly, we stated that there may be a "rare" case where a court must inform the defendant of "a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed" (*Gravino,* 14 N.Y.3d at 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048; *see Harnett,* 16 N.Y.3d at 207, 920 N.Y.S.2d 246, 945 N.E.2d 439). This is that rare case.

*****297 **634** As discussed, deportation is an automatic consequence of a guilty plea for most noncitizen defendants; absent some oversight by federal authorities, a defendant duly convicted of almost any felony will inevitably be removed from the United States. Unlike SORA registration, SOMTA confinement or other collateral consequences, the deportation process deprives the defendant of an exceptional degree of physical liberty by first detaining and then forcibly removing the defendant from the country. Consequently, the defendant may not only lose the blessings of liberty associated with residence in the United States, but may also suffer the emotional and financial hardships of separation from work, home and family. Given the severity and inevitability of deportation for many noncitizen defendants, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes" (*Padilla,* 559 U.S. at 364, 130 S.Ct. 1473). Thus, a noncitizen defendant convicted of a removable crime can hardly make "a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*Ford,* 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265) unless the court informs

***193** the defendant that the defendant may be deported if he or she pleads guilty.

But, the People protest, that is not the case. In their view, deportation remains a strictly collateral consequence of a guilty plea, about which a trial court has no duty to inform a defendant. They observe that ICE retains considerable discretion to decline to enforce federal immigration laws against any particular defendant, making deportation such an uncertain outcome that the court should never be compelled to notify a defendant of the possibility of it. However, the roughly 188,000 noncitizen convicts who are deported each year would probably beg to differ on this point, and rightly so. After all, although New York courts have no role in ICE's enforcement decisions, they do render judgments of conviction which routinely ensure the defendants' eventual transfer, by way of state correctional authorities, into federal custody, where they will almost certainly be deported. At bottom, the factors cited by the People merely show that deportation does not fit squarely within the direct consequences mold. Although that is true, fundamental fairness still requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty.

The People assure us there is no need for the trial court to tell a noncitizen defendant about the possibility of deportation because *Padilla* now requires defense counsel to provide a noncitizen defendant with specific and detailed advice about a guilty plea's impact on his or her immigration status. However, "assuming defense counsel 'will' do something simply because it is required of effective counsel" is "an assumption experience does not always bear out" (*Moncrieffe v. Holder*, 569 U.S. ——, ——, 133 S.Ct. 1678, 1692, 185 L.Ed.2d 727 [2013]). More to the point, while counsel's participation in the relevant proceedings may tend to support the validity of the plea (*see People v. Harris*, 61 N.Y.2d 9, 16, 471 N.Y.S.2d 61, 459 N.E.2d 170 [1983]; *People v. Nixon*, 21 N.Y.2d 338, 353, 287 N.Y.S.2d 659, 234 N.E.2d 687 [1967]), the court has an independent obligation to ascertain whether the defendant is pleading guilty voluntarily (*see People v. Francis*, 38 N.Y.2d 150, 153–154, 379 N.Y.S.2d 21, 341 N.E.2d 540 [1975]), which the court must fulfill by alerting the defendant that he or she may be deported.

*****298 **635** In short, Chief Judge Lippman, Judges Graffeo, Read, Rivera and I conclude that deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness.

***194** D

Because the Court's conclusion regarding a trial court's duty is at odds with *Ford*'s pronouncement that a court's failure to warn a defendant about potential deportation never impacts the validity of the defendant's guilty plea, that aspect of *Ford* must be reexamined in light of the doctrine of stare decisis.

"Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future" and that a rule of law "once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*People v. Damiano*, 87 N.Y.2d 477, 488, 640 N.Y.S.2d 451, 663 N.E.2d 607 [1996, Simons, J., concurring]). Stare decisis promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court (*see People v. Taylor*, 9 N.Y.3d 129, 148, 848 N.Y.S.2d 554, 878 N.E.2d 969 [2007]).

Under stare decisis principles, a case "may be overruled only when there is a compelling justification for doing so" (*People v. Lopez*, 16 N.Y.3d 375, 384 n. 5, 923 N.Y.S.2d 377, 947 N.E.2d 1155 [2011]; *see Taylor*, 9 N.Y.3d at 148–149, 848 N.Y.S.2d 554, 878 N.E.2d 969; *Eastern Consol. Props. v. Adelaide Realty Corp.*, 95 N.Y.2d 785, 787, 710 N.Y.S.2d 840, 732 N.E.2d 948 [2000]). Such a compelling justification may arise when the Court's prior holding "leads to an unworkable rule, or ... creates more questions than it resolves" (*Taylor*, 9 N.Y.3d at 149, 848 N.Y.S.2d 554, 878 N.E.2d 969); adherence to a recent precedent "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience" (*People v. Hobson*, 39 N.Y.2d 479, 487, 384 N.Y.S.2d 419, 348 N.E.2d 894 [1976], quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 [1940]); or "a preexisting rule, once thought defensible, no longer serves the ends of justice or withstands the cold light of logic and experience" (*Policano v. Herbert*, 7 N.Y.3d 588, 604, 825 N.Y.S.2d 678, 859 N.E.2d 484 [2006] [internal quotation marks and citation omitted]). In determining the precedential effect to be given to a prior decision, this Court must consider "the exercise of restraint in overturning established well-developed doctrine and, on the other hand, the justifiable rejection of archaic and obsolete doctrine which has lost its touch with reality" (*Hobson*, 39 N.Y.2d at 487, 384 N.Y.S.2d 419, 348 N.E.2d 894),

As noted above, in *Ford*, we concluded that, because deportation was a collateral consequence of a guilty plea, the trial court did not have to advise the defendant of the possibility of deportation during the plea allocution (*see* 86 N.Y.2d at 403–404, 633 N.Y.S.2d 270, 657 N.E.2d 265). Specifically, after setting forth the general factors distinguishing direct ***195** and collateral consequences and providing some illustrative examples, we stated

> "Deportation is a collateral consequence of conviction because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system. Therefore, our Appellate Division and the Federal courts have consistently held that the trial court need not, before accepting a plea ****636 ***299** of guilty, advise a defendant of the possibility of deportation. We adopt that rule and conclude that in this case the court properly allocuted defendant before taking his plea of guilty to manslaughter in the second degree." (*Id.* [citations omitted].)

Thus, we determined, "The [plea] court was under no obligation to inform the defendant of any possible collateral consequences of his plea, including the possibility of deportation, nor was defendant denied effective assistance of counsel" due to counsel's lack of advice on the subject (*id.* at 405, 633 N.Y.S.2d 270, 657 N.E.2d 265). Accordingly, *Ford* rested largely on the weight of authority at the time, i.e., prior to the 1996 amendments to the INA, which held deportation to be a collateral consequence of a guilty plea (*see e.g. United States v. Parrino*, 212 F.2d 919, 921–922 [2d Cir.1954]).

[4] However, the weight of authority and the will of Congress have shifted since our decision in *Ford.* To the extent *Ford* stands for the proposition that the court's complete omission of any discussion of deportation at the plea proceeding can never render a defendant's plea involuntary, that discrete portion of our opinion in *Ford* "no longer serves the ends of justice or withstands the cold light of logic and experience" (*Policano*, 7 N.Y.3d at 604, 825 N.Y.S.2d 678, 859 N.E.2d 484). *Ford*'s discussion of deportation was rooted in a legal and practical landscape that no longer exists, and the realities of the present-day immigration system have robbed it of much of its logical and experiential foundation. Given the nearly inevitable consequence of deportation, it no longer serves the ends of justice to perpetually uphold, without regard to the significance of deportation to the individual's decision to plead guilty, every guilty plea of a noncitizen defendant entered in ignorance of the likelihood of removal from this country We therefore overrule only so much of *Ford* as suggests that a trial ***196** court's failure to tell a defendant about potential deportation is irrelevant to the validity of the defendant's guilty plea.[7]

In taking this extraordinary step, Judges Graffeo, Read and I do not treat as inconsequential the considerable reliance which *Ford*'s assessment of deportation has engendered among prosecutors and trial courts throughout the State. Certainly, our repeated approving citations of *Ford* provided no reason to doubt the continued vitality of its pronouncement with respect to the immigration consequences of a guilty plea. So, too, we are mindful that *Ford*'s discussion of deportation reinforced the repose afforded to the People by a noncitizen defendant's guilty plea. And, for nearly two decades, trial courts have relied on *Ford*'s characterization of deportation as a collateral consequence of a plea to avoid potentially time-consuming litigation regarding the possibility of deportation. However, those significant reliance interests cannot overcome the fundamental injustice that would result from completely barring a noncitizen defendant from challenging his or her guilty plea based on the court's failure to advise the ****637 ***300** defendant that he or she might be deported as a result of the plea.

To avoid any confusion about the scope of our decision, we emphasize that it is quite narrow. Nothing in this opinion should be construed as casting doubt on the long-standing rule that, almost invariably, a defendant need be informed of only the direct consequences of a guilty plea and not the collateral consequences. We continue to adhere to the direct/collateral framework, and we do not retreat from our numerous prior decisions holding a variety of burdensome consequences of a guilty plea to be strictly collateral and irrelevant to the voluntariness of a plea (*see Monk*, 21 N.Y.3d at 32, 966 N.Y.S.2d 739, 989 N.E.2d 1; *Belliard*, 20 N.Y.3d at 385, 961 N.Y.S.2d 820, 985 N.E.2d 415; *Harnett*, 16 N.Y.3d at 205–206, 920 N.Y.S.2d 246, 945 N.E.2d 439; *Gravino*, 14 N.Y.3d at 553–554, 902 N.Y.S.2d 851, 928 N.E.2d 1048). Indeed, the Court's decision in the instant appeals arises from the truly unique nature of deportation as a consequence of a guilty plea; there is nothing else quite like it.

***197** E

As the Court[8] recognizes today, to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation.[9] Mindful of the burden this rule imposes on busy and calendar-conscious trial courts, they are to be

afforded considerable latitude in stating the requisite advice. As this Court has repeatedly held, "trial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea" (*People v. Moissett*, 76 N.Y.2d 909, 910, 563 N.Y.S.2d 43, 564 N.E.2d 653 [1990]). As long as the court assures itself that the defendant knows of the possibility of deportation prior to entering a guilty plea, the plea will be deemed knowing, intelligent and voluntary.

The trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea. The court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may recite the admonition contained in CPL 220.50(7) that "if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." Again, these examples are illustrative, not exhaustive, of potentially acceptable advisements regarding deportation.

F

As explained above, a majority of the Court, including Chief Judge Lippman, Judges Graffeo, Read, Rivera and me, concludes that due process requires a trial court to warn a defendant that, if the defendant is not a citizen of this country, the defendant may be deported as a result of a guilty plea to a felony. A separate majority of the Court, comprised of Judges Graffeo, Read, ***198** Smith and me, now turns ****638 ***301** to the question of the proper remedy.[10] In this section of the opinion, this remedial majority describes the general parameters of the proper remedy of the relevant due process violation, and in section G, infra, we apply that remedy to defendants in these cases.

The failure to apprise a defendant of deportation as a consequence of a guilty plea only affects the voluntariness of the plea where that consequence "was of such great importance to him that he would have made a different decision had that consequence been disclosed" (*Gravino*, 14 N.Y.3d at 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048). Therefore, in order to withdraw or obtain vacatur of a plea, a defendant must show that there is a reasonable probability that he or she would not have pleaded guilty and would have gone to trial had the trial court informed the defendant of potential deportation.[11]

***199** In determining whether the defendant has shown such prejudice, the court should consider, among other things, the favor-ability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation. This assessment should be made in a commonsense manner, with due regard for the significance that potential deportation holds for many noncitizen defendants. To aid in this undertaking, where possible, the ****639 ***302** defendant should make every effort to develop an adequate record of the circumstances surrounding the plea at sentencing, which will permit the trial court to efficiently determine the plea's validity and enable appellate review of the defendant's claim of prejudice.[12]

Chief Judge Lippman, with whom Judge Rivera joins, maintains that we are unfaithful to our *Catu* line of cases because we do not mandate automatic vacatur of a plea as the result of the court's failure to mention the possibility of deportation at the plea allocution (*see* Lippman, Ch. J., dissenting op. at 209–212, 980 N.Y.S.2d at 309–12, 3 N.E.3d at 646–49; *see also* op. of Rivera, J., at 218–219, 980 N.Y.S.2d at 315–17, 3 N.E.3d at 652–54). However, we are simply adhering to *Gravino* and *Harnett*, not departing from *Catu*. *Gravino* and *Harnett* make clear that when a uniquely significant plea consequence, while technically collateral, impacts the voluntariness of a defendant's plea, the defendant may receive his plea back only upon a showing of prejudice (*see Harnett*, 16 N.Y.3d at 206–207, 920 N.Y.S.2d 246, 945 N.E.2d 439; *Gravino*, 14 N.Y.3d at 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048). By contrast, the defendant is entitled to automatic vacatur of the ***200** plea only where, as in *Catu*, the court fails to mention a direct consequence of the defendant's plea (*see Catu*, 4 N.Y.3d at 245, 792 N.Y.S.2d 887, 825 N.E.2d 1081). Here, as we have explained, deportation is a consequence of the sort described in *Gravino* and *Harnett* rather than a direct consequence, and to obtain vacatur of a plea based on the court's failure to mention deportation at the plea proceeding, a noncitizen defendant must demonstrate that he or she was prejudiced by the court's omission. Thus, our opinion is consistent with *Gravino*, *Harnett* and *Catu*.

In the Chief Judge's view, we are "telescop[ing]" the remedy for a due process violation and the ineffective assistance of counsel (Lippman, Ch. J., dissenting op. at 211, 980 N.Y.S.2d at 310–11, 3 N.E.3d at 647–48). But, to the extent our remedial approach to the instant appeals resembles the remedy for an attorney's constitutionally

deficient performance, that makes eminent sense because, as we have previously observed, "the issue of whether [a] plea was voluntary," a matter of core concern for due process purposes, "may be closely linked to the question of whether a defendant received the effective assistance of counsel" (*Harnett,* 16 N.Y.3d at 207, 920 N.Y.S.2d 246, 945 N.E.2d 439). Thus, while the remedy for a due process violation as identified by the Court in these appeals is not coextensive with *Padilla*'s remedial rule in the ineffective assistance context, the two doctrines are similar.

G

As previously noted, defendant Peque did not preserve his claim that his plea was involuntary, and therefore we consider ****640 ***303** the application of the principles delineated above only in *Diaz* and *Thomas.*

In *Diaz,* the trial court clearly failed to tell defendant that he might be deported if he pleaded guilty. Thus, if defendant has been prejudiced by that error, he is entitled to vacatur of his plea. Given that Supreme Court did not address the deficiency in the plea allocution at all, much less assess prejudice, defendant is entitled to a remittal to that court to allow him to move to vacate his plea and develop a record relevant to the issue of prejudice. Likewise, in future cases of this kind, where the deficiency in the plea allocution appears on the face of the record, the case should be remitted to the trial court to allow the defendant to file a motion to vacate the plea. Upon a facially sufficient plea vacatur motion, the court should hold a hearing to provide the defendant with an opportunity to demonstrate prejudice. In the instant case, if defendant can demonstrate that he ***201** was prejudiced by the defect in the plea allocution upon remittal to Supreme Court, the court must vacate his plea. In the absence of a showing of prejudice, the court should amend the judgment of conviction to reflect its ruling on defendant's plea vacatur motion and otherwise leave the judgment undisturbed.[13]

Unlike defendant Diaz, however, defendant Thomas cannot obtain relief based on the trial court's plea allocution in his case. Specifically, defendant Thomas's challenge to the voluntariness of his plea must be evaluated in light of the practical and legal relationship between a criminal conviction and deportation at the time he pleaded guilty in 1992. As discussed in detail above, at that time, deportation was a far less certain consequence of most defendants' guilty pleas because the federal government deported far fewer convicts and possessed far broader discretion to allow them to remain in the United States. Indeed, in acknowledgment of the federal government's broad discretion and latitude pertaining to deportation of immigrants around the time of defendant's plea, this Court and many federal courts recognized the strictly collateral nature of the immigration consequences of a guilty plea and held that a trial court did not have to advise a noncitizen defendant that his or her plea might subject the defendant to deportation (*see e.g. Ford,* 86 N.Y.2d at 403–405, 633 N.Y.S.2d 270, 657 N.E.2d 265; *United States v. Littlejohn,* 224 F.3d 960, 965 [9th Cir.2000]; *Gonzalez,* 202 F.3d at 27; *United States v. United States Currency in the Amount of $228,536.00,* 895 F.2d 908, 915 [2d Cir.1990]; *United States v. Romero–Vilca,* 850 F.2d 177, 179 [3d Cir.1988]; *Fruchtman v. Kenton,* 531 F.2d 946, 948–949 [9th Cir.1976]). That being so, trial courts then had no general duty to advise noncitizen defendants of the possibility of deportation as a consequence of their guilty pleas. And, here, the court had every reason to believe that defendant could avoid deportation as a result of his ****641 ***304** plea, notwithstanding that, ***202** unbeknownst to the court, he had not resided in the United States for a sufficient period of time to avail himself of the Attorney General's discretionary power to exempt him from deportation (*see* 8 U.S.C. § 1182[c] [1994]). Thus, defendant Thomas is not entitled to vacatur of his plea based on the trial court's failure to advise defendant of what was, at the time, an entirely collateral consequence of his plea.

III

Relying on *Padilla,* defendants Peque and Thomas additionally contend that their attorneys were ineffective for failing to tell them that their guilty pleas could result in deportation.[14] We must first determine whether those claims are properly before us on direct appeal. In that regard, we have admonished defendants claiming ineffective assistance of counsel to develop a record sufficient to allow appellate review of their claims (*see People v. Haffiz,* 19 N.Y.3d 883, 885, 951 N.Y.S.2d 690, 976 N.E.2d 216 [2012]; *People v. McLean,* 15 N.Y.3d 117, 121, 905 N.Y.S.2d 536, 931 N.E.2d 520 [2010]). Where a defendant's complaint about counsel is predicated on factors such as counsel's strategy, advice or preparation that do not appear on the face of the record, the defendant must raise his or her claim via a CPL 440.10 motion (*see People v. Denny,* 95 N.Y.2d 921, 923, 721 N.Y.S.2d 304, 743 N.E.2d 877 [2000]; *People v. Love,* 57 N.Y.2d 998, 1000, 457 N.Y.S.2d 238, 443 N.E.2d 486 [1982]).

In *Peque,* the plea and sentencing minutes do not reveal

whether defense counsel misadvised or failed to advise defendant about the possibility of deportation before he pleaded guilty. At sentencing, counsel stated that defendant would be subject to deportation as a result of his plea and that counsel had informed defendant of his right to access the Guatemalan consulate, thereby indicating that counsel may have advised defendant on those matters prior to his plea. In light of the record evidence tending to contradict defendant's current complaints about his lawyer, it was incumbent on defendant to substantiate his allegations about counsel's advice below by filing a CPL 440.10 motion, and his failure to file a postjudgment motion renders his claim unreviewable (*see Haffiz,* 19 N.Y.3d at 885, 951 N.Y.S.2d 690, 976 N.E.2d 216 [because the defendant's *Padilla* claim was "predicated on ***203** hearsay matters and facts not found in the record on appeal," it should have been "raised in a postconviction application under CPL article 440"]).[15]

[9] In *Thomas,* the limited record here and the trial court's credibility determinations doom defendant's claim. The record of the plea proceeding does not reveal whether defense counsel apprised defendant of the immigration consequences of his guilty plea. In support of his plea withdrawal motion, defendant averred that ****642 ***305** counsel had spoken with him about the immigration consequences of his plea and had misled him on that score, thus belying his current assertion that counsel completely failed to advise him about immigration issues. Additionally, defendant's newly retained attorney did not have personal knowledge of his prior counsel's advice, and therefore new counsel's allegation that predecessor counsel had failed to advise defendant about deportation did not reliably establish the nature of predecessor counsel's advice. Furthermore, the court did not abuse its discretion by discrediting defendant's contradictory allegations about counsel's performance (*see People v. Baret,* 11 N.Y.3d 31, 33–34, 862 N.Y.S.2d 446, 892 N.E.2d 839 [2008]), and there is "no basis for disturbing the conclusion of both courts below" that defendant's claim was "too flimsy to warrant further inquiry" or vacatur of his plea (*id.* at 34, 862 N.Y.S.2d 446, 892 N.E.2d 839).

IV

Accordingly, in *People v. Diaz,* the order of the Appellate Division should be modified by remitting the matter to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed. In *People v. Peque* and *People v. Thomas,* the order of the Appellate Division should be affirmed.

PIGOTT, J. (concurring in *People v. Peque* and *People v. Thomas,* and dissenting in *People v. Diaz*).

I

In my view, the majority (for want of a better word), seeking a middle ground between the diametrically opposed positions of ***204** the People and the defendants in these cases, creates no new law, and simply leaves us where we were before. One majority comprised of Chief Judge Lippman, and Judges Graffeo, Read, Rivera and Abdus–Salaam, concludes that the risk of deportation "must be mentioned by the trial court to a defendant as a matter of fundamental fairness" (op. of Abdus–Salaam, J., at 193, 980 N.Y.S.2d at 298, 3 N.E.3d at 635). Then, a different majority, Judges Graffeo, Read, Smith and Abdus–Salaam, which refers to itself as the "remedial majority" (*id.* at 198, 980 N.Y.S.2d at 301, 3 N.E.3d at 638), takes away with one hand what had been given with the other. A court's failure to warn of the possibility of deportation does *not* automatically invalidate the plea (unlike the failure to warn a defendant of direct consequences of his plea, such as postrelease supervision). Rather, according to the remedial majority, a defendant's recourse is merely "a hearing to provide the defendant with an opportunity to demonstrate prejudice" (*id.* at 200, 980 N.Y.S.2d at 303, 3 N.E.3d at 640). But that remedy was already available to defendants under CPL 440.10. In short, the remedial majority's analysis takes us nowhere new.

I would take a more straightforward approach. Deportation is a collateral consequence of a guilty plea, as the remedial majority concedes. We can infer from this that a defendant has no constitutional right to be informed by a state trial court judge of the possibility that the federal government may deport him or her.[*] ****643 ***306** However, under *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the Sixth Amendment requires a defendant's *counsel* to "inform her client whether his plea carries a risk of deportation" (559 U.S. at 374, 130 S.Ct. 1473). " Whether he is entitled to relief depends on whether he has been prejudiced" (*id.* at 360, 130 S.Ct. 1473), and, in showing prejudice, defendant must demonstrate that, in addition to his counsel's failure to give the required advice, he was not informed by the trial court of the risk of deportation. If defendant can show that neither his counsel nor the trial court informed him of the possibility of

deportation, and that he would not have pleaded guilty ***205** had he been so informed, he will prevail at his postjudgment proceeding.

In short, I would reach a very similar conclusion to the remedial majority's, and, like the remedial majority, I would create no new law, but I would follow a far more direct path, based strictly on *Padilla.* The remedial majority's analysis gives defendants no practical benefit that *Padilla* does not already give them.

II

Another, equally fundamental weakness affects the "majority" opinion. The majority comprised of Chief Judge Lippman, and Judges Graffeo, Read, Rivera and Abdus–Salaam does not agree on a rationale for its due process holding. Although Judge Abdus–Salaam does not say so expressly, no precedential analysis emerges from her opinion.

Judges Graffeo, Read and Abdus–Salaam "reaffirm[ ] the central holding of [*People v.*] *Ford* [(86 N.Y.2d 397, 633 N.Y.S.2d 270, 657 N.E.2d 265 [1995])] regarding ... the distinction between direct and collateral consequences of a guilty plea" (op. of Abdus–Salaam, J., at 176, 980 N.Y.S.2d at 285, 3 N.E.2d at 622; *see id.* at 196, 980 N.Y.S.2d at 299–300, 3 N.E.3d at 636–37). The same Judges also reaffirm *Ford*'s holding that deportation is a collateral consequence of a guilty plea, adding only the qualifier "technically" before "collateral" (*id.* at 191 n. 5, 191–192, 199, 980 N.Y.S.2d at 296, 295–96, 301–02, 3 N.E.3d at 633, 632–33, 638–39), but never retreating from the basic premise.

So far, I have no quarrel; Judge Smith and I agree with Judges Graffeo, Read and Abdus–Salaam that deportation is a collateral consequence of a guilty plea. However, the plurality consisting of Judges Graffeo, Read and Abdus–Salaam (*see* op. of Abdus–Salaam, J., at 191–192, 980 N.Y.S.2d at 295–96, 3 N.E.3d at 632–33) then attempts to treat deportation as a sui generis consequence that is at once collateral and uniquely significant. In doing so, the plurality fails to do justice to the severity of collateral consequences such as SORA registration and SOMTA confinement. A person who has been civilly confined, possibly for the rest of his life, under Mental Hygiene Law article 10, would be surprised to learn that three members of our Court believe that he has not been "deprive[d] ... of an exceptional degree of physical liberty" (op. of Abdus–Salaam, J., at 192, 980 N.Y.S.2d at 296, 3 N.E.3d at 633). In my view, the plurality's position contradicts our holdings in *People v. Gravino,* 14 N.Y.3d 546, 902 N.Y.S.2d 851, 928 N.E.2d 1048 (2010) [SORA registration is a significant, but a collateral, consequence of a conviction] and ****644 ***307** *People v. Harnett,* 16 N.Y.3d 200, 920 N.Y.S.2d 246, 945 N.E.2d 439 (2011) [same with respect to SOMTA commitment].

***206** III

I agree that the Appellate Division orders in *People v. Peque* and *People v. Thomas* should be affirmed. However, with respect to *People v. Diaz,* I do not agree that "the trial court clearly failed to tell defendant that he might be deported if he pleaded guilty" (op. of Abdus–Salaam, J., at 200, 980 N.Y.S.2d at 302–03, 3 N.E.3d at 639–40), the view taken by Chief Judge Lippman, and Judges Graffeo, Read, Rivera and Abdus–Salaam. Supreme Court told Diaz, "if you're not here legally *or if you have any immigration issues* these felony pleas could adversely affect you" (emphasis added), and the court elicited an acknowledgment that Diaz understood this. Although Diaz was a legal permanent resident of the United States, he was not a citizen. As such, he was not able to vote in United States elections, or remain outside the United States for lengthy periods of time, without running the risk of his permanent residency being deemed abandoned. In the circumstances, I believe that the reference to "immigration issues" was sufficient to make Diaz aware that the trial court's warning applied to him. It might have been preferable for Supreme Court to advise Diaz that, even if he was in the United States legally, a guilty plea might result in his deportation if he was not a United States citizen. But I cannot accept that, as a matter of law, Supreme Court's words implied that a guilty plea would not entail adverse immigration consequences for Diaz.

IV

Nor should Diaz be permitted a second bite of the apple. Supreme Court denied Diaz's CPL 440.10 motion, agreeing with Diaz that his defense attorney had been ineffective, but holding that Diaz had not met his burden of

showing prejudice, i.e. showing that he would not have pleaded guilty if warned by counsel of the risk of deportation. The Appellate Division denied Diaz leave to appeal Supreme Court's order, and consequently the proceeding did not reach us. Now the remedial majority remits the direct appeal to the trial court to, once again, "allow [defendant] to move to vacate his plea and develop a record relevant to the issue of prejudice" (op. of Abdus–Salaam, J., at 200, 980 N.Y.S.2d at 302–03, 3 N.E.3d at 639–40). But Diaz has already had his 440.10 proceeding (*see id.* at 179, 980 N.Y.S.2d at 286–87, 3 N.E.3d at 623–24), and failed to establish any prejudice. It is therefore difficult to see what proceeding the remedial majority imagines should now occur.

***207** V

For these reasons, I cannot join Judge Abdus–Salaam's opinion. I would affirm in all three appeals (*but see People v. Hernandez*, 22 N.Y.3d 972, 977, 978 N.Y.S.2d 711, 1 N.E.3d 785 [2013, Pigott, J., dissenting and voting to vacate defendant's plea following a CPL 440.10 proceeding] [decided today]).

Chief Judge Lippman (dissenting).

I respond to the opinion subscribed to by three Judges, whom I refer to as the plurality, because that is the only writing offering reasons for the results announced in the above-captioned appeals. Although I would join a writing finding a due process entitlement on the part of a noncitizen defendant to be advised by the court of the possible immigration consequences of pleading guilty *and* making relief available when that entitlement is not honored, the plurality opinion does not meet the latter condition and I accordingly do not join it. ****645 ***308** I do, however, agree with the Judges who have signed the plurality opinion and with Judge Rivera, that deportation is such an important plea consequence that "it must be mentioned by the trial court to a defendant as a matter of fundamental fairness" (plurality op. at 193, 980 N.Y.S.2d at 297–98, 3 N.E.3d at 634–35).

The United States Supreme Court acknowledged in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence" (*id.* at 366, 130 S.Ct. 1473). The Court, accordingly, declined to use the direct/collateral distinction to ascertain whether deportation was a conviction consequence of which a pleading noncitizen defendant was required to be advised. Instead, the Court took note of certain realities whose crucial bearing upon a noncitizen's decision whether to enter a plea of guilty were, by the time of the Court's decision, undeniable. Prominent among these was that deportation had, since the mid–1990s, become for noncitizen defendants a virtually automatic consequence of convictions falling within several very broad penal categories, and that deportation was a particularly harsh superadded exaction—one that the Court did not shrink from referring to as a "penalty" (559 U.S. at 364, 130 S.Ct. 1473). Indeed, the Court had already recognized that deportation was a conviction consequence often more dreaded by noncitizen defendants than any prison sentence that might be imposed, either pursuant to a plea agreement or after trial (*see* ***208** 559 U.S. at 368, 130 S.Ct. 1473, citing *INS v. St. Cyr*, 533 U.S. 289, 322, 121 S.Ct. 2271, 150 L.Ed.2d 347 [2001]). In holding then that the constitutionally effective representation of a noncitizen contemplating the entry of a guilty plea required the provision of accurate advice as to the immigration consequences of the conviction that would ensue, the Court was driven by the recognition that a plea entailing deportation very often will be impossible to characterize as voluntary where that uniquely important consequence has not been disclosed to the defendant—that such pleas are categorically different from "the vast majority ... [in which] the overwhelming consideration for the defendant is whether he will be imprisoned and for how long" (*People v. Gravino*, 14 N.Y.3d 546, 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048 [2010]).

The question now presented is whether, after *Padilla*, the description of deportation as a direct or a collateral plea consequence retains viability as a means of defining, not counsel's, but the court's duty in assuring the voluntariness of a plea. The plain answer to this question must be that it does not. If deportation is "uniquely difficult to classify as either a direct or a collateral consequence," logically it is so for all purposes, not simply for the purpose of determining what advice counsel must give in satisfaction of the Sixth Amendment requirement of effective representation.

Once it is settled that the relevant inquiry is not whether deportation may be formally categorized as a direct or collateral consequence, but whether it is, as the *Padilla* Court observed, a consequence so certain, potentially pivotal and prevalent as to make its disclosure essential to assuring that the guilty plea of a noncitizen is knowing, intelligent and voluntary, it should be clear that the court's allocutional obligations in taking a noncitizen's plea are fully implicated. The realities shaping the court's obligations, with respect to the conviction consequence of deportation, are not ****646 ***309** essentially different from those to which counsel must be responsive in advising a noncitizen defendant.

It is by now practically self-evident that the judicial obligation in taking a plea—i.e., assuring on the record that the defendant fully understands what the plea connotes and its consequences (*see Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 [1969]), or, in other words, that "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 [1970], citing *Boykin*, 395 U.S. at 242, 89 S.Ct. 1709)—cannot realistically be met in the case of a noncitizen defendant unless the court's canvass extends to ascertaining that the plea is made with the awareness that it may well result in the pleader's deportation.

***209** The plurality, wisely, does not avoid this conclusion; to do so would, in a very large number of cases, be to reduce to a painfully obvious fiction the notion so favored by the law that the taking of a plea in open court serves as an effective procedural bulwark against an uninformed and thus involuntary surrender of basic constitutional protections to which the defendant would otherwise be entitled prior to any adjudication of guilt (*see e.g. Brady v. United States*, 397 U.S. 742, 747 n. 4, 90 S.Ct. 1463, 25 L.Ed.2d 747 [1970] ["the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily"]; *Boykin*, 395 U.S. at 242, 89 S.Ct. 1709 ["prosecution (must) spread on the record the prerequisites of a valid waiver"]; *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 [1962] ["The record must show ... that an accused ... intelligently and understandingly rejected (a constitutional right). Anything less is not waiver"]; *and see People v. Cornell*, 16 N.Y.3d 801, 802, 921 N.Y.S.2d 641, 946 N.E.2d 740 [2011] ["due process requires that the record must be clear that the plea represents a voluntary and intelligent choice among ... alternative courses of action" (internal quotation marks and citations omitted)]; *People v. Louree*, 8 N.Y.3d 541, 544–545, 838 N.Y.S.2d 18, 869 N.E.2d 18 [2007]; *see also* plurality op at 184). Yet, while recognizing that the court has an independent due process obligation to notify a noncitizen defendant that his or her plea may result in deportation (plurality op at 176 ["We ... hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony"])—a proposition with which I certainly agree—the plurality affords no remedy where that condition of due process has not been met, and in fact not one of the present appellants will in the end obtain relief.

If a plea proceeding fails of its essential purpose—if it does not create a record from which the knowing and voluntary nature of the defendant's waiver and concomitant choice between available alternative courses of action may be readily understood—the plea is infirm. And, in that case, the appropriate response is to permit the plea's withdrawal, not to cast about for a means of deeming the infirmity harmless (*see McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 [1969] ["if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"]). We have, in fact, permitted withdrawal as a matter of course where the defect in the plea amounts to a due process violation. In *People v. Catu*, 4 N.Y.3d 242, 792 N.Y.S.2d 887, 825 N.E.2d 1081 (2005), for example, we said:

> *****310 *210 **647** "Because a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, *the failure of a court to advise of postrelease supervision requires reversal of the conviction. The refusal of the trial court and Appellate Division to vacate defendant's plea on the ground that he did not establish that he would have declined to plead guilty had he known of the postrelease supervision was therefore error (see also People v. Coles*, 62 N.Y.2d 908, 910 [479 N.Y.S.2d 1, 467 N.E.2d 885] [1984] ['harmless error rules were designed to review trial verdicts and are difficult to apply to guilty pleas']).
>
> "*In light of this result, we do not reach defendant's alternative claim of ineffective assistance of counsel*" (*id.* at 245, 792 N.Y.S.2d 887, 825 N.E.2d 1081 [emphasis supplied]).

The Court's[1] present approach to dealing with a due process violation identical in kind to that addressed by *Catu*, although practically far more consequential, is precisely contrary to that deemed "require[d]" in *Catu*. The defendant's remedy now is said to lie in a postconviction motion in which it will be up to him or her—often without

the aid of counsel and in a non-native tongue[2]—to navigate the postconviction relief maze in order to prove a circumstance that should have been, but was not, negated by the accepted plea—namely, that the plea was entered in ignorance of its deportation consequence, which, if disclosed, would, with reasonable probability, have caused its rejection. In short, having demonstrably been denied due process, a defendant is, under today's decision, relegated to a claim that reduces to one for ineffective assistance—a claim that would, in the vast majority of cases, have been obviated by a constitutionally adequate plea. It was, of course, in recognition of the primacy of the plea court's due process obligation, that *Catu* premised the right to plea withdrawal exclusively on the plea court's default, and consequently did not reach Catu's ineffective assistance claim. While the plurality stresses that the judicial obligation in ***211** taking a plea is independent of the obligation of counsel to provide accurate advice as to a plea's immigration consequence (plurality op. at 193, 980 N.Y.S.2d at 297–98, 3 N.E.3d at 634–35), the net effect of its decision is remedially to telescope the two, so that a due process claim based on a judicial default will not occasion relief except where there is also an attendant meritorious *Padilla* claim. The plurality acknowledges that this is so but says that it is appropriate since in *People v. Harnett,* 16 N.Y.3d 200, 920 N.Y.S.2d 246, 945 N.E.2d 439 (2011) it was observed in a purely theoretical aside that "the issue of whether the plea was voluntary may be closely linked to the question of whether a defendant received the effective assistance of counsel" (*id.* at 207, 920 N.Y.S.2d 246, 945 N.E.2d 439). But the issue of whether a plea is actually voluntary, appropriately implicated in determining whether a plea should in fairness be vacated where the plea is not facially deficient—the circumstance ****648 ***311** to which the above-quoted language from *Harnett* speaks—is not the issue presented here. The issue posed in the present appeals is instead whether the plea itself comports with due process when its canvass does not extend to its immigration consequence. Having evidently held that it does not, it makes no sense at all to then require, as a condition of relief, that a defendant whose plea was facially deficient prove a negative—namely, that the due process denial was not harmless. Due process violations are presumptively prejudicial—that is why they are so classified. The accommodation of the contrary, illogical premise, could not have been within *Harnett*'s contemplation.

The delicacy with which the plurality treats *People v. Ford,* 86 N.Y.2d 397, 633 N.Y.S.2d 270, 657 N.E.2d 265 (1995)—a decision which, after *Padilla,* is in its two principal holdings, if not in its ratio decidendi, no longer viable—stands in strikingly awkward contrast to its abandonment of the remedial course charted in and required by *Catu.* Perhaps the plurality reasons that because deportation does not precisely fit the description of a direct conviction consequence and is, in its view "technically" a collateral consequence (plurality op. at 192, 980 N.Y.S.2d at 296–97, 3 N.E.3d at 633–34), that it is not governed by *Catu.* But this simply revives the direct/collateral distinction as a meaningful tool in characterizing deportation as a plea consequence. Not only is this use of the distinction demonstrably inapt after *Padilla,* it is utterly inconsistent with the plurality's correct conclusion that due process requires the plea to establish that a noncitizen defendant was advised of its possible deportation consequence. If, in fact, it continues to be material—even after *Padilla*—that deportation is not, strictly speaking, a "direct" conviction consequence within the meaning of *Ford,* it should follow that a plea court's nondisclosure of that consequence does not rise to ***212** the level of a due process defect. But, that is a conclusion that the plurality with ample empirical and legal justification, rightly eschews.

The plurality does not, however, eschew the remedial path hypothetically sketched in *Gravino* (14 N.Y.3d at 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048) and *Harnett* (16 N.Y.3d at 207, 920 N.Y.S.2d 246, 945 N.E.2d 439). Traveling it, however, is, as noted, inappropriate where the plea is affected by a due process deficiency such as the one the plurality identifies today. Plainly, the address of a due process violation was not what was intended when it was suggested in *Gravino* that a court might, as an "exercise [of] discretion" (14 N.Y.3d at 559, 902 N.Y.S.2d 851, 928 N.E.2d 1048) vacate a plea if various conditions were met, among them that the defendant proved that, but for the nondisclosure of a consequence "of such great importance to him" (*id.; and see Harnett,* 16 N.Y.3d at 207, 920 N.Y.S.2d 246, 945 N.E.2d 439), he would not have pleaded guilty. The relief adverted to in *Harnett* and *Gravino* did not depend upon or respond to a default by the court in establishing the voluntariness of the plea; its purpose was rather to allow for a remedy precisely in those situations where the defendant was materially uninformed as to a plea consequence which, although of "great importance to him," was not one about which the plea court was obliged to warn. In the cases before us, by contrast, we deal with judicial omissions incompatible with due process and bearing critically upon the very basis of the plea. The remedy in that latter circumstance is not "discretionary" as per *Gravino*'s dicta, it is "required" as per *Catu*'s holding.

Today's plurality decision speaks eloquently of the severity of deportation as a conviction consequence (plurality op. at ****649 ***312** 192–193, 980 N.Y.S.2d at 296–98, 3 N.E.3d at 633–34), but in the end treats removal as just another collateral consequence that may be of "great importance" to a defendant, leaving the defendant to prove to the satisfaction of the court that took the plea, that the

plea was uninformed as to the important consequence, and that, had that consequence been disclosed, the plea would not have been entered—or, at least, that the plea's rejection would have been reasonably probable. Thus, although the Court now roots the judicial obligation to inform a pleading noncitizen of immigration consequences in due process, as a practical matter judges and defendants remain just as they were—a judge's default in informing a noncitizen defendant that he may be deported will only be rectified in the context of a claim for what is essentially ineffective assistance of counsel, which is to say in the context of a claim that, of course, already exists, but is extraordinarily difficult to make ***213** out (*see e.g. People v. Hernandez,* 22 N.Y.3d 972, 978 N.Y.S.2d 711, 1 N.E.3d 785 [2013] [no reasonable probability that a defendant with six young children in this country would have rejected a plea to preserve a possibility of avoiding deportation]). The disjunction between the right recognized and the remedy offered is palpable. If due process requires a warning "to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York" (plurality op. at 197, 980 N.Y.S.2d at 300, 3 N.E.3d at 637), it must be that the failure to give the warning is at least presumptively prejudicial. Here, however, the plurality illogically and unfairly places upon the demonstrably unwarned members of the vulnerable noncitizen class the formidable burden of proving individual prejudice.

In advocating the conceptually straightforward and until now legally uncontroversial notion, that a guilty plea unequal to the basic due process purpose of demonstrating that its entry was knowing and voluntary should be permitted to be withdrawn, I acknowledge the inevitable concern that its embrace in the present context would provoke a stampede to the courthouse. That concern, rationally assessed, I believe is exaggerated. New York has required by statute, now for some 18 years, that judges warn noncitizens of their pleas' potential immigration consequences (*see* CPL 220.50[7]). It cannot be presumed that the statute has been pervasively ignored (*see Padilla,* 559 U.S. at 372, 130 S.Ct. 1473 ["For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea ... We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty"]). But, if it has been, that is all the more reason to doubt the efficacy of substituting one toothless command[3] for another, as the plurality today proposes. Nor is there reason to believe that noncitizen defendants will rush to scuttle pleas that were genuinely advantageous, notwithstanding an unallocuted deportation consequence (*see Padilla,* 559 U.S. at 372–373, 130 S.Ct. 1473). Moreover, inasmuch as *Padilla* broke new ground "by ***214** breaching the previously chink-free wall between direct and collateral consequences ****650 ***313** (*Chaidez v. United States,* 568 U.S. ——, ——, 133 S.Ct. 1103, 1110, 185 L.Ed.2d 149 [2013]), there is strong reason to suppose that any remedy stemming from the demise of that "chink-free wall" would be limited to cases still on direct appeal (*see id.).* Finally, in the long term, affording noncitizens prompt and effective relief from pleas that manifestly fail to provide the assurance of voluntariness that due process requires, will reduce rather than increase postconviction claims and thus protect rather than subvert the finality of plea-based judgments of conviction.

The conscientious provision of the already statutorily prescribed judicial warning—which all of the present appellants agree is adequate—would itself obviate the overwhelming majority of postconviction claims relating to undisclosed immigration consequences. And, in those presumably rare cases where, despite the remedy of plea withdrawal, there was a judicial default, all of the concerned parties would be spared complicated and prolonged motion practice; the defendant would simply, logically, fairly and expeditiously be given his or her plea back and proceed to trial on the indictment. I note that several jurisdictions have such a rule (*see* R.I. Gen. Laws § 12–12–22[c]; Cal. Penal Code § 1016.5[b]; Conn. Gen. Stat. Ann. § 54–1j [c]; D.C. Code § 16–713 [b]; Mass. Gen. Laws ch. 278, § 29D; Ohio Rev. Code Ann. § 2943.031[D]; Vt. Stat. Ann. tit. 13, § 6565[c][2]; Wash. Rev. Code § 10.40.200[2]; Wis. Stat. Ann. § 971.08[2]); the sky has not fallen as a result.

The literal-minded application of the direct/collateral distinction, *Padilla* notwithstanding, has given rise to a state of affairs where a court must, on pain of reversal, inform a pleading defendant of a term of postrelease supervision (PRS) but may, without consequence, fail to disclose to the same defendant that the plea will result in deportation, an outcome not merely overshadowing but usually nullifying the term of postrelease supervision.[4] An analytic paradigm that would yield such an objectively skewed ordering of interests and corresponding ***215** judicial concerns cannot and will not be viewed except as unmoored from the considerations of fundamental fairness that ought to animate our jurisprudence in passing upon pleas, the means by which guilt is established in the vast majority of criminal cases. Nothing in today's very long plurality decision functions to diminish this signal anomaly one whit. Calling the court's failure to advise of an immigration consequence a due process denial without affording the defendant a remedy for that denial amounts to no more than a verbal gesture. While the plurality insists that our precedents do not allow more, that is transparently incorrect. As noted, this Court has been clear as to the remedy required when a plea court fails to establish on the record, to the extent that due process requires, that a plea is

a knowing and intelligent choice between available alternative courses of action. The notion, then, that the plurality is somehow constrained to withhold relief for the nonperformance of the "distinct" and "independent" judicial due process obligation it has postulated is altogether puzzling. It would be one thing if, like Judge Pigott, the plurality simply found that, *Padilla* ****651 ***314** notwithstanding, *Ford* remained good law for the proposition that judges have no due process duty to advise pleading noncitizens of immigration consequences. But, having found to the contrary, the failure to afford any logically and legally responsive remedy to noncitizen defendants left unwarned by the court as to the possible immigration consequences of their pleas represents a perplexing election—one that is in no way explained post*Padilla* by clinging, practically as an article of faith, to an orthodoxy that, as the plurality opinion acknowledges at length, time and circumstance have overwhelmed, at least with respect to the characterization of immigration consequences for plea purposes.

Given the plurality's indisposition to navigate the not so complicated route from its understanding of what due process requires of a court taking a plea, to a logical and efficacious remedy when the standard it has set has not been met—indeed, its evident determination instead to follow a tortuous path influenced by what is, in the present context, a thoroughly discredited formalism—a legislatively prescribed remedy will be necessary to untie the Gordian knot now fashioned and protect the adjudicative rights of noncitizen criminal defendants.

I would reverse in each of the cases before us.

***216** In *Peque*, although there was some fairly random mention of deportation at the sentencing proceeding (*see* n. 4, *supra*), there was no judicial advisement at either plea or sentence as to the prospect of deportation, and Peque was manifestly confused as to what his plea involved. I do not, moreover, believe it reasonable to require preservation in this context. The purpose of the judicial advisement here at issue is to assure that the defendant is aware of the plea consequence. A preservation requirement presumes knowledge that would make the advisement unnecessary—a classic "Catch–22," particularly inappropriate when dealing with the class of defendants "least able to represent themselves" (*Padilla*, 559 U.S. at 370–371, 130 S.Ct. 1473) and where a meritorious claim for plea withdrawal—at least under the plurality formulation—presupposes that the defendant has been ineffectively represented.[5]

The advisement provided in connection with defendant Diaz's plea was, I believe, affirmatively misleading as to the likelihood of any immigration consequence and, on that ground, Diaz should be permitted to withdraw his plea and face trial on the indictment charging an A–I drug felony; if that is a risk he wishes to take to preserve the possibility of remaining in this country where he has resided legally for most of his life and has an infant child, he should be permitted to do so.

*****315 **652** I would note in passing that Diaz's case illustrates the extreme procedural difficulty of obtaining relief by the means now prescribed. Although the plurality acknowledges that the "trial court clearly failed to tell [Diaz] that he might be deported" (plurality op. at 200), and purports to afford him the possibility of relief, it logically precludes him from prevailing in any ensuing litigation, since the showing of prejudice it requires has already been made and found wanting; Diaz's CPL 440.10 motion was denied on the ground that he failed to satisfy the ***217** *Strickland* prejudice prong, and leave to appeal was thereafter denied by an Appellate Division Justice. Like Diaz, all defendants alleging a due process violation by reason of an inadequate plea, in order to obtain relief, would, under today's plurality decision, be compelled to split their claim between a direct appeal and a separate 440.10 proceeding—a complication that is pointless, since a defendant under current law, which the plurality does not alter in any practical respect, can in the end only obtain relief via a 440.10 claim for ineffective representation. Rather than temporize, I would afford Diaz actual relief from a plea that was not demonstrably knowing and voluntary.

Finally, as to defendant Thomas, inasmuch as his case is on direct appeal, I believe he is entitled to the benefit of our current jurisprudence. His postplea fraud upon the court logically has no bearing upon whether his plea was knowing, intelligent and voluntary, and there is no ground advanced by the plurality or the People to except from the rule that, ordinarily, a direct appeal from a judgment of conviction will be governed by the law as it exists at the time the appeal is decided (*see People v. Jean–Baptiste*, 11 N.Y.3d 539, 542, 872 N.Y.S.2d 701, 901 N.E.2d 192 [2008])—a bright line demarcation we have adhered to, even where there has been lengthy delay attributable to the appellant (*see e.g. People v. Martinez*, 20 N.Y.3d 971, 959 N.Y.S.2d 674, 983 N.E.2d 751 [2012]).

The People, I note, really do not identify any relevant prejudice traceable to defendant's fabrication of his demise. Thomas has already served his enhanced sentence.

Even if his plea withdrawal motion is granted, and the People are unable to reprosecute him for lack of witnesses or physical evidence,[6] he will have been amply punished for his criminal conduct and for his chicanery. There is nonetheless a real and persisting issue as to the validity the plea upon which this punishment was based, and, in that connection, the People can claim no vested interest in the application of outdated precedent, or, in other words, the retention of the pre-*Padilla* legal context. This is especially so since *Padilla* was remedial; it responded to circumstances existing long before its issue in 2010 (*see Padilla,* 559 U.S. at 362–363, 130 S.Ct. 1473). Indeed, by 1992, the year of defendant's plea, deportation had become mandatory for noncitizens convicted of crimes falling into several broadly defined categories, one of which was for drug offenses; with a few closely drawn exceptions not applicable ***218** cable to defendant, virtually all drug convictions by that time entailed automatic removal.[7]

*****316 **653** The People, whose interest properly lies not simply in winning this appeal but doing justice, can claim no prejudice from *Padilla*'s application to Thomas's case. To the extent that the decision's " new rule" retroactively applied may unduly impair the finality of convictions, that has been dealt with by the Supreme Court in *Chaidez,* which limits *Padilla*'s backward reach to cases that have not become final, i.e., those, like defendant's, still on direct appeal (568 U.S. at ——, 133 S.Ct. at 1113).

In my view, Thomas's right to relief is made out by the record of his plea proceeding at which, five days after his alleged wrongdoing and before being indicted, Thomas, then a 21–year–old novice to the criminal justice system, entered a plea to attempted criminal sale of a controlled substance in the third degree in exchange for a disarmingly attractive 30–day jail sentence without being advised by the court, or indeed by anyone present, that, upon his release, he would be deported. It is, I believe, clear that Thomas's was not a knowing and voluntary plea.

RIVERA, J. (dissenting in *People v. Peque* and *People v. Diaz,* and concurring in *People v. Thomas*).

I concur with Judge Abdus–Salaam's opinion in *People v. Thomas* that "defendant Thomas's challenge to the voluntariness of his plea must be evaluated in light of the practical and legal relationship between a criminal conviction and deportation at the time he pleaded guilty in 1992" (op. of Abdus–Salaam, J., at 201, 980 N.Y.S.2d at 303–04, 3 N.E.3d at 640–41), and as such, defendant is not entitled to relief for the reasons stated therein.

I join the Chief Judge's dissent in *People v. Peque* and *People v. Diaz* in all respects because I believe the trial court's failure to advise a noncitizen that the plea may potentially subject defendant to deportation requires automatic vacatur.[*] I write separately because, in addition to all of the arguments so cogently and comprehensively discussed in the Chief Judge's dissent, to the extent Judge Abdus–Salaam's opinion grounds its ***219** due process analysis on the immigration status of noncitizen defendants, then violation of these defendants' rights as so recognized mandates a status-based response. The "reasonable probability" test, however, is not status-based, but rather an individualized multifactor balancing test under which the defendant must establish prejudice.

If deportation implicates due process for a noncitizen defendant, based solely on, and because of, that very immigration status and its attendant devastating consequences, then those consequences are no less consequential as an individualized matter. By locating noncitizen defendants in a rarefied criminal justice system—one that recognizes immigration status as the basis for a due process claim, but which simultaneously denies a status-based remedy—the opinion constructs an ultimately flawed legal framework.

****654 ***317** Judges GRAFFEO and READ concur with Judge ABDUS–SALAAM; Judge PIGOTT concurs in result in an opinion in which Judge SMITH concurs; Chief Judge LIPPMAN dissents and votes to reverse in an opinion in which Judge RIVERA concurs in a separate opinion.

In *People v. Peque:* Order affirmed.

Judges GRAFFEO and READ concur with Judge ABDUS–SALAAM; Judge SMITH concurs in result; Chief Judge LIPPMAN dissents and votes to reverse in an opinion in which Judge RIVERA concurs in a separate opinion; Judge PIGOTT dissents and votes to affirm in an opinion.

In *People v. Diaz:* Order modified by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Judges GRAFFEO and Read concur with Judge ABDUS–SALAAM; Judge PIGOTT concurs in result in an opinion in which Judge SMITH concurs; Judge RIVERA concurs in result in a separate opinion; Chief Judge LIPPMAN dissents and votes to reverse in an opinion.

In *People v. Thomas:* Order affirmed.

All Citations

22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280, 2013 N.Y. Slip Op. 07651

Footnotes

1 Judge Pigott, in an opinion joined by Judge Smith, dissents from the Court's due process holding and concludes that a defendant has only a Sixth Amendment right to advice from counsel concerning deportation, but does not have a due process entitlement to a warning about the possibility of deportation from the trial court (see dissenting in part op. at 204–205, 980 N.Y.S.2d at 305–07, 3 N.E.3d at 642–44). While Judge Smith agrees with Judge Pigott that the court's failure to warn a defendant about the possibility of deportation does not implicate due process, he nonetheless agrees with Judges Graffeo, Read and me to the extent that, if this were indeed a failure to mention a particularly unique and significant plea consequence in violation of a due process obligation as described by the Court today, the appropriate remedy would be remittal to the trial court to afford the defendant an opportunity to demonstrate prejudice and not automatic vacatur of the plea. Thus, Judge Smith concurs that, given the majority's view that there has been a due process violation, the appropriate remedy in *People v. Diaz* is a remittal to allow defendant to show prejudice.

2 In a dissenting opinion in which Judge Rivera largely concurs, Chief Judge Lippman determines that *Ford*'s analytical framework regarding plea consequences does not apply to deportation, and that a trial court's failure to warn a defendant that deportation may result from his or her guilty plea mandates automatic vacatur of the plea without any showing of prejudice (*see* dissenting op. at 208–210, 980 N.Y.S.2d at 308–10, 3 N.E.3d at 645–47). In a separate opinion, Judge Rivera expresses the same view, but joins the Court's disposition of defendant Thomas's appeal (*see* op. of Rivera, J., at 218–219, 980 N.Y.S.2d at 315–17, 3 N.E.3d at 652–54).

3 In their respective opinions, the Chief Judge and Judge Rivera disagree with the Court's conclusion that defendant Peque had to preserve his claim and failed to do so, and therefore they do not join in this section of our opinion with respect to Peque (*see* Lippman, Ch. J., dissenting. at 216, 980 N.Y.S.2d at 314–15, 3 N.E.3d at 651–52; *see also* op. of Rivera, J., at 218–219 n. *, 980 N.Y.S.2d at 316, 3 N.E.3d at 653).

4 We commend the defendants' attorneys, the prosecutors and counsel for amicus for their excellent work in bringing a wealth of authorities, research, data and scholarly articles to our attention to assist us in our resolution of these appeals.

5 Chief Judge Lippman and Judge Rivera conclude that the direct/collateral framework does not apply to deportation, and that regardless of deportation's particular classification as a plea consequence, it is sufficiently important to warrant the court's advisement on the matter (*see* Lippman, Ch. J., dissenting op. at 207, 208–209, 980 N.Y.S.2d at 307–08, 308–09, 3 N.E.3d at 644–45; *see also* op. of Rivera, J., at 219, 980 N.Y.S.2d at 316–17, 3 N.E.3d at 653–54). Accordingly, they do not agree with us that deportation is a technically collateral consequence of a guilty plea, and they do not join this opinion to the extent it contradicts the views expressed in their respective opinions.

6 Judges Pigott and Smith agree that deportation is not a direct consequence of a guilty plea, but they would go further and hold that deportation is a strictly collateral consequence of a guilty plea, such that a trial court's failure to mention deportation can never invalidate a guilty plea (*see* Pigott, J., dissenting in part op. at 204–205, 980 N.Y.S.2d at 305–07, 3 N.E.3d at 642–44). As already noted, Chief Judge Lippman and Judge Rivera find the distinction between direct and collateral consequences to be inapplicable to this case. Accordingly, with the exception of the Chief Judge's and Judge Rivera's concurrence in the last paragraph of this section of this opinion regarding the necessity of a trial court's advisement about deportation, those four Judges do not join the remainder of this section.

7 Chief Judge Lippman and Judge Rivera concur in the Court's decision to overrule this specific portion of *Ford*'s holding, but unlike a majority of this Court, comprised of Judges Graffeo, Read, Smith, Pigott and me, they doubt the validity of our precedents following *Ford* (*compare* Lippman, Ch. J., dissenting op. at 211, 980 N.Y.S.2d at 310–11, 3 N.E.3d at 647–48 [stating that *Ford* "is in its two principal holdings, if not in its ratio decidendi, no longer viable"], *with* Pigott, J., dissenting in part op. at 205, 980 N.Y.S.2d at 306–07, 3 N.E.3d at 643–44 ["creat(ing) no new law"]). Therefore, the Chief Judge and Judge Rivera do not join the remainder of this section of this opinion.

8 The Court here refers to Chief Judge Lippman, Judges Graffeo, Read, Rivera and me.

9 Given that defendants were convicted of felonies here, we have no occasion to consider whether our holding should apply to misdemeanor pleas.

10 Again, Judge Smith does not concur in the Court's due process holding, but rather concurs only in the remedy which this opinion specifies in light of that holding.

11 Judge Pigott's opinion dissenting in part reaches "a very similar conclusion" to our own and "would create no new law" (Pigott, J., dissenting in part op. at 205, 980 N.Y.S.2d at 306, 3 N.E.3d at 643), but the dissent faults us for, in its view, implicitly "contradict[ing]" our decisions in *Gravino* and *Harnett* (*id.* at 205, 980 N.Y.S.2d at 306, 3 N.E.3d at 643) and failing to provide noncitizen defendants with any practical benefit beyond that to which they are already entitled under *Padilla* (*id.* at 206, 980 N.Y.S.2d at 306, 3 N.E.3d at 643). But, as stated at length above, our decision does nothing to disturb *Gravino*, *Harnett* or our settled jurisprudence in this area; as was the case with SORA registration or SOMTA confinement at issue in those decisions, the direct or collateral character of deportation, and the necessity of the trial court's advice with respect to it, depends on its particular qualities. In addition, our decision here provides noncitizen defendants with a significant practical benefit in addition to *Padilla*'s mandate. After all, a defendant challenging his plea under *Padilla* must possess an adequate record of both counsel's deficient performance and prejudice, and because counsel's advice or omissions with respect to the immigration consequences of a plea are often outside the record on direct appeal, the defendant must usually resort to a postjudgment motion to satisfy the performance prong of *Padilla*, not to mention the prejudice prong. By contrast, the defendant may raise a due process claim on direct appeal based on the court's failure to mention deportation as a consequence of the plea, which will be apparent on the face of the record. Thus, the defendant will be entitled to a remittal to attempt to establish prejudice stemming from the readily apparent error. So, too, in some cases, the record on direct appeal may reveal factors which would have strongly compelled the defendant to reject the plea in an effort to avoid deportation, and thus the defendant could establish prejudice for due process purposes on direct appeal, without remittal, even though he could not show that his attorney was ineffective under *Padilla.* Indeed, there may be a variety of cases involving an ineffective assistance claim under *Padilla* and a due process claim under the instant decision where a showing sufficient to warrant vacatur of the plea under one of those two doctrines will not satisfy the requirements of the other one. Accordingly, while we exercise restraint in balancing defendants' liberty and the State's interests to resolve the instant appeals, our decision is not the empty gesture that Judge Pigott's opinion mistakes it for.

12 In light of our conclusion that a trial court's failure to inform a defendant of potential deportation may render his or her guilty plea involuntary under certain circumstances, CPL 220.50(7) cannot be read to deny vacatur of a plea when due process commands that relief. Rather, the statutory language stating that the court's failure to inform the defendant of potential deportation "shall not be *deemed* to affect the voluntariness of a plea of guilty" (*id.* [emphasis added]) can be plausibly read as an instruction to the court that it may not automatically "deem" the plea to be invalid based on the court's inadequate advice alone but rather must determine whether the defendant has been prejudiced before concluding that the plea was in fact involuntary. Indeed, we adopt this interpretation in large part to avoid constitutional concerns (*see Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 267, 115 N.E. 915 [1917]).

13 As mentioned above, defendant Diaz previously filed a CPL 440.10 motion seeking relief under *Padilla,* and Supreme Court denied the motion because defendant did not establish that he was prejudiced by his attorney's failure to inform him that his guilty plea could lead to his deportation. Notably, though, the Appellate Division denied defendant permission to appeal from the lower court's decision, and therefore we have no occasion to consider the denial of defendant's postjudgment motion in determining whether he should be granted relief on direct appeal. Furthermore, the People do not argue that the court's rejection of defendant's claim under *Padilla* should estop him from seeking to establish that the court's failure to warn him about potential deportation caused him prejudice. Accordingly, on these specific facts, defendant's prior postjudgment motion does not warrant an affirmance of his conviction without a remittal.

14 Because Chief Judge Lippman would reverse Peque's and Thomas's convictions on due process grounds, he does not express any view of their ineffective assistance claims. For the same reason, Judge Rivera does not address Peque's ineffective assistance claim, but she concurs with the Court's disposition of Thomas's due process and ineffective assistance claims (*see* op. of Rivera, J., at 218, 980 N.Y.S.2d at 315–16, 3 N.E.3d at 652–53).

15 Defendant Peque also asks us to reduce his sentence as a matter of discretion in the interest of justice. However, because defendant received a lawful and statutorily authorized sentence in this noncapital case, his claim is beyond our purview, as only an intermediate appellate court is authorized to grant the discretionary sentencing relief which he seeks (*see* CPL 470.15[6][b]; *People v. Discala,* 45 N.Y.2d 38, 44, 407 N.Y.S.2d 660, 379 N.E.2d 187 [1978]).

* Such a warning is required by a statute, CPL 220.50(7), which courts should, of course, follow, even if failure to do so is not reversible error. The statute was added

> "as a component of budget legislation designed to reduce prison population by facilitating deportation of convicted felons who are not citizens of the United States. The admonition the court is required to impart ... is aimed at diluting the effectiveness of arguments made by aliens at deportation hearings that they would not have pleaded guilty had they known the conviction would result in loss of the privilege of remaining in this country" (Peter Preiser, McKinney's Cons. Laws of N.Y., Book 11A, CPL 220.50 at 167).

1 I refer here to the approach shared by the plurality and the dissenters for whom Judge Pigott has written, for as Judge Pigott has noted, those approaches are in their resolution practically indistinguishable. Neither affords noncitizen defendants relief from pleas that fail to establish the defendants' awareness of their deportation consequence.

2 We speak here of what *Padilla,* with doubtless accuracy, described as the "class ... least able to represent themselves" (559 U.S. at 370–371, 130 S.Ct. 1473).

3 After requiring that noncitizen defendants be warned as to the possible immigration consequences of their contemplated pleas, CPL 220.50(7) adds the proviso that the failure to give the prescribed warning "shall not be deemed to affect the voluntariness of a plea of guilty." That the plurality ultimately finds this proviso compatible with its notion of what due process avails a pleading defendant (plurality op. at 199 n. 12, 980 N.Y.S.2d at 301–02, 3 N.E.3d at 638–69) is strikingly indicative of how very narrow its decision is.

4 The nullifying effect of deportation upon a PRS term was, of course, the circumstance about which defendant Peque's attorney wondered aloud, when the deportation issue surfaced at Peque's sentencing. He said, "Mr. [Peque] is subject to deportation following the completion of his sentence. I'm not sure how that's going to impact, assuming the Court imposes the sentence that's been agreed upon, I'm not sure how that will affect the post-release supervision aspect of it."

5 In view of this latter circumstance, the utility of the plurality's advice that a noncitizen defendant seeking plea withdrawal for nonadvisement as to an immigration consequence "should make every effort to develop an adequate record of the circumstances surrounding the plea at sentencing" (plurality op. at 199, 980 N.Y.S.2d at 301–02, 3 N.E.3d at 638–39) is dubious. If counsel has, by hypothesis, been ineffective it does not seem reasonable to expect the same attorney to make a record as to the very matter as to which the representation was deficient. If, as the plurality points out, it is not generally prudent to assume that "defense counsel 'will' do something simply because it is required of effective counsel" (*Moncrieffe v. Holder,* 569 U.S. ——, ——, 133 S.Ct. 1678, 1692, 185 L.Ed.2d 727 [2013]) (plurality op. at 193, 980 N.Y.S.2d at 297–98, 3 N.E.3d at 634–35), surely it cannot be prudent to suppose that ineffective counsel will do something because it is required of effective counsel.

6 It is noted that while the People raise these impediments to reprosecution on appeal in a general way, they have never made any concrete allegation that they would be unable to proceed against defendant on the sale counts with which he was initially charged.

7 As defendant observes, the immigration consequences of his plea to an attempted drug sale were dictated by 8 U.S.C. § 1251(a)(2)(B)(i), a statute materially identical to its successor, 8 U.S.C. § 1227(a)(2)(B)(i), the provision that applied to Padilla, and which was described by the Supreme Court as "succinct, clear, and explicit" (559 U.S. at 368, 130 S.Ct. 1473).

* I also agree with the Chief Judge's dissent in *Peque* that requiring preservation is not reasonable. In my opinion, defendant should not be penalized by demanding preservation when at the time that defendant Peque entered a plea the law in New York specifically foreclosed the relief he now seeks (*see People v. Ford,* 86 N.Y.2d 397, 403–404, 633 N.Y.S.2d 270, 657 N.E.2d 265 [1995] [finding deportation is a collateral consequence of a guilty plea and therefore the court has no duty to inform defendant of such consequence during allocution]; *see also* CPL 220.50[7] [failure to advise defendant that guilty plea could result in deportation "shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction"]).

37 A.D.3d 117
Supreme Court, Appellate Division, Second Department, New York.

ROBINSON MOTOR XPRESS, INC., appellant,
v.
HSBC BANK, USA, respondent.

Dec. 5, 2006.

Synopsis

Background: Bank customer brought action against bank, seeking to recover approximately $116,000 in checks drawn on customer's account on signatures allegedly forged by an employee. The Supreme Court, Nassau County, Ira B. Warshawsky, J., granted summary judgment in favor of bank, and denied customer's cross-motion for leave to amend the complaint to add cause of action for commercial bad faith. Customer appealed.

Holdings: The Supreme Court, Appellate Division, Spolzino, J., held that:

bank failed to make statements available to customer, within meaning of Uniform Commercial Code (UCC) provision barring suit to recover amounts paid by bank on forged endorsement unless customer gives written notice of forgery within one year of time account statement was "made available";

genuine issue of material fact existed as to whether customer gave timely notice of forgery to bank, precluding summary judgment; and

bank was not liable to customer for commercial bad faith.

Affirmed as modified.

Attorneys and Law Firms

****352** Herzfeld & Rubin, P.C., New York, N.Y. (Herbert Rubin, David B. Hamm, and Jeannine LaPlace of counsel), for appellant.

Phillips Lytle, LLP, New York, N.Y. (Meredith L. Friedman and Anthony DiPaolo of counsel), for respondent.

****353** STEPHEN G. CRANE, J.P., WILLIAM F. MASTRO, REINALDO E. RIVERA, and ROBERT A. SPOLZINO, JJ.

Opinion

SPOLZINO, J.

***118** This is an action to recover approximately $116,000 in checks drawn on the plaintiff's account on signatures allegedly forged by an employee of the plaintiff. The principal issue is whether the plaintiff, a banking customer of the defendant, is barred from recovery against the defendant by UCC 4–406(4). The Supreme Court, among other things, granted the defendant's motion for summary judgment dismissing the complaint on the ground that the plaintiff had failed to notify the defendant of the alleged forgery in writing within one year of the date on which the statements were mailed, as it understood that provision to require. We hold that the Supreme Court erred in doing so.

The alleged forgeries occurred during a period of several months beginning in December 2000. The plaintiff's principals first became aware of the forgeries in the spring of 2001 when they discovered several of the allegedly forged items at the plaintiff's business premises. According to their affidavits, they visited the bank branch at which the account had been opened within a few days after discovering the forgeries and showed copies of the allegedly forged items to an officer of the defendant. The officer admits that he met with the plaintiff's principals at that time, but denies that they showed him copies of any of the allegedly forged items and recalls only that he provided them with the defendant's form of affidavit for making a forgery claim. The plaintiff did not submit the affidavit, or any other written notice of the forgery claim, until January 2003.

***119** The issue arises on the defendant's motion for summary judgment dismissing the complaint. In this posture, we view the evidence in the light most favorable to the plaintiff, the party opposing the motion for summary judgment, and draw all reasonable inferences in its favor (*see McNulty v. City of New York*, 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661). To be entitled to summary judgment dismissing the complaint, the defendant is required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Even if such a showing is made, the motion must be denied if the plaintiff "produce[s] evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*see Zuckerman v. City of New York*, 49

N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

A bank is strictly liable to its customer when it pays a check on a forged signature (*see* UCC 4–401; *Monreal v. Fleet Bank,* 95 N.Y.2d 204, 207, 713 N.Y.S.2d 301, 735 N.E.2d 880; *Putnam Rolling Ladder Co. v. Manufacturers Hanover Trust Co.,* 74 N.Y.2d 340, 345, 547 N.Y.S.2d 611, 546 N.E.2d 904). The bank avoids such liability, however, under UCC 4–406(4), when it makes statements of the account and the allegedly forged items available to the customer, and the customer fails to report the alleged forgery to the bank within one year.

"When a customer requests that a bank mail the statements either to himself or to another person, and the bank complies, the statements are considered ****354** 'made available to the customer' for the purposes of the UCC" (*Matin v. Chase Manhattan Bank,* 10 A.D.3d 447, 448, 781 N.Y.S.2d 158). Thus, where the statements are provided as directed by the customer, or in a manner of which the customer is aware but to which the customer does not object, the statements are "made available" within the meaning of the statute (*see Woods v. MONY Legacy Life Ins. Co.,* 84 N.Y.2d 280, 285–286, 617 N.Y.S.2d 452, 641 N.E.2d 1070; *see also Brown v. Cash Mgt. Trust of Am.,* 963 F.Supp. 504; *Henrichs v. Peoples Bank,* 26 Kan.App.2d 582, 584, 992 P.2d 1241, 1243–1244; *Borowski v. Firstar Bank Milwaukee, N.A.,* 217 Wis.2d 565, 579 N.W.2d 247; *Stowell v. Cloquet Co-op Credit Union,* 557 N.W.2d 567, 570; *Jensen v. Essexbank,* 396 Mass. 65, 483 N.E.2d 821; *Cooley v. First Natl. Bank of Little Rock,* 276 Ark. 387, 389, 635 S.W.2d 250, 252; *Terry v. Puget Sound Natl. Bank,* 80 Wash.2d 157, 492 P.2d 534), and the bank is entitled to the protections ***120** afforded by UCC 4–406(4) even if the statements are thereafter intercepted by a dishonest employee or other ill-intentioned third party (*see Union Planters Bank, NA v. Rogers,* 912 So.2d 116, 121–122; *Kiernan v. Union Bank,* 55 Cal.App.3d 111, 115, 127 Cal.Rptr. 441, 443–444).

Here, the account agreement provided that the statements would be mailed to the address provided on the signature card unless that address was subsequently changed by a document executed by an authorized signatory. The original signature card for the account directed that the statements be mailed to the office of the plaintiff's accountants. The plaintiff's principals, who are the only authorized signatories on the account, deny that they directed the defendant to change the address to which the statements were to be sent, and the defendant did not produce any properly-executed document directing a change in that address. The record reflects, however, that, commencing with the third monthly statement, several months before the alleged forgeries began, the statements ceased to be mailed to the plaintiff's accountants' address, and began to be mailed to the plaintiff's office address. The defendant proffers no explanation for the change, asserting only that "HSBC mailed plaintiff its Statements of Account monthly to the address provided on plaintiff's Signature Card and subsequent address changes which are reflected on the Statements."

In the circumstances presented here, even though the statements were mailed to a business address of the plaintiff, they were not "made available" to the plaintiff within the meaning of the statute because they were mailed to an address other than that which the plaintiff had designated for that purpose. A mailing is normally sufficient if it reaches the customer at its business address, even if that was not the business address identified for the delivery of such documents (*see generally Woods v. MONY Legacy Life Ins. Co., supra* at 282, 617 N.Y.S.2d 452, 641 N.E.2d 1070; *Mesnick v. Hempstead Bank,* 106 Misc.2d 624, 626, 434 N.Y.S.2d 579). Nevertheless, where, as here, the customer has expressly directed that the statements be mailed to a specific address or officer, as it might for the purpose of preventing a fraud such as was perpetrated here (*see Putnam Rolling Ladder Co. v. Manufacturers Hanover Trust Co., supra* at 343, 547 N.Y.S.2d 611, 546 N.E.2d 904), and the bank fails to comply with that instruction, such delivery is equivalent to the statements having been improperly directed to an address unrelated to the plaintiff, and the statements cannot be said to have been "made available" to the plaintiff by the mailing (*Matin v. Chase* ***121** *Manhattan Bank,* ****355** *supra* at 449, 781 N.Y.S.2d 158; *see York Specialties Co. v. Bank of Buffalo,* 30 A.D.2d 1044, 1045, 294 N.Y.S.2d 717).

The only authority that appears to reach a different conclusion is *Wetherill v. Putnam Inv.,* 122 F.3d 554. In *Wetherill,* however, the plaintiff, who was the principal of the defendant bank's corporate customer, had completely entrusted the management of the corporate finances to the dishonest employee and, in connection with doing so, had authorized the employee to change the corporate address of record to the employee's home. The employee then had the address to which the defendant was directed to send statements changed to a nearby post office box that was used by the corporation for its business. Thus understood, *Wetherill* simply stands for the proposition that the customer, having essentially consented to place the statements in the forger's hands, was in no position to avoid the consequences of UCC 4–406(4). Since there is no comparable conduct by the plaintiff here, the defendant has failed, except with respect to the cancelled checks discovered by the plaintiff's principals at its business premises, to establish when the statements were made available to the plaintiff and, consequently, it did not demonstrate that the notice provided to it in January 2003 was untimely.

The plaintiff had actual notice in the spring of 2001, however, of the 24 allegedly forged checks that were located at its business premises at that time. As to those items, the defendant did establish its prima facie entitlement to judgment as a matter of law by submitting evidence that it did not receive notice of the alleged forgery that occurred in 2000 and 2001 until January 2003 (*see Sabatino v. Atlantic Savings Bank,* 314 S.C. 402, 404–405, 444 S.E.2d 537, 538). In opposition, however, the plaintiff raised an issue of fact on the basis of the affidavits of its principals asserting that they had met with an official of the defendant and shown him the allegedly forged items within days of their discovery.[1]

The act required of the customer to avoid being precluded from recovery by UCC 4–406(4) is to "report" the unauthorized ***122** signature to the bank. The UCC does not define the term "report" (*see* UCC 1–201, 4–104). It does, however, explicitly address the concept of notice, by providing that "[a] person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it" and that "[a] person 'receives' a notice or notification when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications" (UCC 1–201[26]). There is nothing in either of these definitions that requires a writing.

In *Woods v. MONY Legacy Life Ins. Co., supra* at 282, 617 N.Y.S.2d 452, 641 N.E.2d 1070, the Court of Appeals stated that "UCC 4–406(4) bars suit to recover amounts paid by a bank on a forged instrument unless the customer gives *written* notice of the forgery within one year of the time the account statement was made ****356** available" (emphasis supplied). The form of the notice was not in issue in *Woods,* however, since the plaintiff in that case gave the bank no notice of the forgery of any kind during the one-year period following the date on which it received monthly statements with respect to the account. We have nevertheless restated the requirement that notice be written, as have our colleagues in the First and Fourth Departments, in several cases in which the form of the notice was similarly not in issue (*see Garage Mgt. Corp. v. Chase Manhattan Bank,* 22 A.D.3d 432, 803 N.Y.S.2d 60; *Ryan v. Fleet Bank of N.Y.,* 286 A.D.2d 923, 730 N.Y.S.2d 628; *Vantrel Enters. v. Citibank,* 272 A.D.2d 609, 610, 708 N.Y.S.2d 452; *New Gold Equities Corp. v. Chemical Bank,* 251 A.D.2d 91, 674 N.Y.S.2d 41; *Weiner v. Sprint Mtge. Bankers Corp.,* 235 A.D.2d 472, 474, 652 N.Y.S.2d 629). The only case in which the form of notice was actually in issue, *Ryan v. Fleet Bank of N.Y., supra,* simply relies on the prior "authority" and does not present any independent basis for its holding.

Written notice was also at issue in *New Gold Equities Corp. v. Chemical Bank, supra.* In that case, the Appellate Division, First Department, relied on an unreported decision from the Supreme Court, Westchester County, which, in turn, cited a Georgia case, *Indemnity Ins. Co. v. Fulton Natl. Bank,* 108 Ga.App. 356, 133 S.E.2d 43, that imposed a writing requirement on the notice of a forged check. As the Georgia decision explains, however, the relevant Georgia statute explicitly required written notice (133 S.E.2d at 43). The Supreme Court, in turn, relied for the writing requirement ***123** on a 1963 decision of the United States District Court for the Southern District of New York, in which the court held that notice under section 43 of the Negotiable Instruments Law was not given until the customer provided the bank with "a list which gave the details of each check bearing forged indorsements" (*see Am. Building Maintenance Co. of California v. Federation Bank & Trust Co.,* 213 F.Supp. 412, 416). Although the language of that provision bears some similarity to that of UCC 4–406(4), the Negotiable Instruments Law was repealed at the time of the adoption of the UCC (*see* UCC 13–105), which, as has been stated, makes no mention of a "list" or any writing requirement.

Significantly, the UCC generally has not been read as requiring written notice of a forged check. The general rule, consistency with which is important (*see Monreal v. Fleet Bank,* 95 N.Y.2d 204, 209, 713 N.Y.S.2d 301, 735 N.E.2d 880), appears to be that written notice, while preferable, is not required (*see* Anderson, UCC 4–406:114 [3d ed.2000], citing *Duralite Co. v. New Jersey Bank & Trust Co.,* 97 N.J.Super. 48, 52, 234 A.2d 247; *see also Trammell v. Farmers & Merchants Bank of Summerville,* 170 Ga.App. 347, 348, 317 S.E.2d 323). Rather, the critical element of the notice is not its form, but the specificity with which it identifies the allegedly fraudulent items (*see New Properties, Inc. v. Newpower,* 2006 WL 2632310 [Mich.App.]; *Watseka First Natl. Bank v. Horney,* 292 Ill.App.3d 933, 939, 227 Ill.Dec. 19, 686 N.E.2d 1175, 1179–1180; *First Place Computers v. Security Natl. Bank of Omaha,* 251 Neb. 485, 490, 558 N.W.2d 57, 61; *Knight Communications v. Boatmen's Natl. Bank,* 805 S.W.2d 199, 203; *American Home Assurance Co. v. Scarsdale Natl. Bank & Trust Co.,* 96 Misc.2d 715, 717, 409 N.Y.S.2d 608).

We are, of course, obligated to follow the determinations of the Court of Appeals. In order for a statement of the law made by the Court of Appeals to have such binding precedential effect, however, ****357** it must have addressed an issue that was before that court (*see Adirondack Trust Co. v. Farone,* 245 A.D.2d 840, 842, 666 N.Y.S.2d 352; *People v. Bourne,* 139 A.D.2d 210, 216, 531 N.Y.S.2d 899;

Monroe v. City of New York, 67 A.D.2d 89, 103, 414 N.Y.S.2d 718; *cf. Art Masters Assocs. v. United Parcel Serv.*, 77 N.Y.2d 200, 208, 566 N.Y.S.2d 184, 567 N.E.2d 226; *Matter of Knight–Ridder Broadcasting v. Greenberg*, 70 N.Y.2d 151, 160, 518 N.Y.S.2d 595, 511 N.E.2d 1116). "Principles are not established by what was said, but by what was decided; and what was said is not evidence of what ***124** was decided, unless it relates directly to the question presented for decision" (*People ex rel. Metropolitan St. Ry. Co. v. State Board of Tax Commrs.*, 174 N.Y. 417, 447, 67 N.E. 69, *affd.* 199 U.S. 1, 25 S.Ct. 705, 50 L.Ed. 65). Dicta, while not without importance, is not required to be followed (*see Race v. Krum*, 222 N.Y. 410, 414, 118 N.E. 853; *Colonial City Traction Co. v. Kingston City R.R. Co.*, 154 N.Y. 493, 495, 48 N.E. 900).

Viewed in this light, we do not read the Court of Appeals' reference to "written" notice in *Woods* to be controlling with respect to the question before us. The issue of "written" notice was simply not presented in that case. Since a contrary rule is consistent with both the language of the statute and UCC jurisprudence generally, we conclude that written notice of the unauthorized signature is not required to satisfy the requirements of UCC 4–406(4).

Accordingly, the Supreme Court erred in granting the defendant's motion for summary judgment in this case. Furthermore, since the defendant's opposition to the plaintiff's cross motion for leave to amend the complaint to add a sixth cause of action, asserting a claim based on UCC 4–401, was predicated on the absence of written notice, the Supreme Court improvidently exercised its discretion in denying leave to amend to assert that claim.

The Supreme Court providently exercised its discretion, however, in denying the plaintiff's cross motion for leave to amend the complaint insofar as it sought to add a claim for commercial bad faith. The proposed complaint in that regard fails to allege any wrongdoing, the defendant's knowledge thereof or complicity therewith, or that the alleged party to the forgery scheme who worked for the defendant had not, "while ostensibly acting for [the defendant], in fact totally abandon[ed] the [defendant's] interests and act[ed] entirely for [her] own or others' purposes" (*Prudential–Bache Sec. v. Citibank, N.A.*, 73 N.Y.2d 263, 276, 539 N.Y.S.2d 699, 536 N.E.2d 1118). In the absence of such allegations, the proposed amended pleading is palpably insufficient to state a cause of action for commercial bad faith (*see Prudential–Bache Sec. v. Citibank, N.A., supra* at 275–277, 539 N.Y.S.2d 699, 536 N.E.2d 1118; *Peck v. Chase Manhattan Bank*, 190 A.D.2d 547, 548–549, 593 N.Y.S.2d 509), and leave to add the claim by amendment was thus properly denied (*see Jacobowitz v. Leak*, 19 A.D.3d 453, 455, 798 N.Y.S.2d 67).

Thus, the order is modified by (1) deleting the provision thereof granting the defendant's motion for summary judgment dismissing the complaint and substituting therefor a provision denying the motion and (2) deleting the provision thereof denying ***125** that branch of the plaintiff's cross motion which was for leave to amend the complaint to add a sixth cause of action pursuant to UCC 4–401 and substituting therefor a provision granting that branch of the cross motion.

ORDERED that the order is modified, on the law, by (1) deleting the provision thereof granting the defendant's motion for summary judgment dismissing the ****358** complaint and substituting therefor a provision denying the motion and (2) deleting the provision thereof denying that branch of the plaintiff's cross motion which was for leave to amend the complaint to add a sixth cause of action pursuant to UCC 4–401 and substituting therefor a provision granting that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

CRANE, J.P., MASTRO and RIVERA, JJ., concur.

All Citations

37 A.D.3d 117, 826 N.Y.S.2d 350, 61 UCC Rep.Serv.2d 438, 2006 N.Y. Slip Op. 09212

Footnotes

1 Since our decision in this regard is predicated on the plaintiff's assertion that it met with the defendant's manager "within days" of its discovery of the checks, an assertion which we resolve in the plaintiff's favor for purposes of this motion (*see Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 194, 538 N.Y.S.2d 771, 535 N.E.2d 1311), we need not address the defendant's contention that such notice was untimely under the deposit agreement, even assuming that such an agreement is enforceable (*see Regatos v. North Fork Bank*, 5 N.Y.3d 395, 804 N.Y.S.2d 713, 838 N.E.2d 629).

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171 A.D.3d 465
Supreme Court, Appellate Division, First Department, New York.

In re SCHAFFER, SCHONHOLZ & DROSSMAN, LLP, Petitioner,
v.
Rachel S. TITLE, M.D., Respondent.

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Index 1602015/18
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ENTERED: APRIL 4, 2019

Attorneys and Law Firms

Hughes Hubbard & Reed LLP, New York (Amina Hassan of counsel), for petitioner.

Richard A. Klass, Brooklyn, for respondent.

Sweeny, J.P., Manzanet–Daniels, Kern, Oing, Singh, JJ.

Opinion

Upon facts submitted to this Court pursuant to CPLR 3222(b)(3), it is declared that petitioner is entitled to the cash proceeds resulting from the demutualization of nonparty Medical Liability Mutual Insurance Company (MLMIC). The Clerk of Supreme Court, New York County is directed to enter judgment awarding petitioner said cash proceeds, including interest accrued while the proceeds were in escrow.

Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment (*see Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 [9th Cir.1990], *cert denied* 498 U.S. 899, 111 S.Ct. 254, 112 L.Ed.2d 212 [1990]; *Chicago Truck Drivers, Helpers & Warehouse Workers Union [Ind.] Health & Welfare Fund v. Local 710, Intl. Bhd. of Teamsters, Chicago Truck Drivers, Helper and Warehouse Workers Union [Ind.] Pension Fund*, 2005 WL 525427, *4, 8 [N.D. Ill., Mar. 4, 2005]).

All Citations

171 A.D.3d 465, 96 N.Y.S.3d 526 (Mem), 2019 N.Y. Slip Op. 02617

64 Misc.3d 1215(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Supreme Court, New York,
Saratoga County.

Kim E. SCHOCH, CNM, Ob/Gyn NP, Plaintiff,
v.
LAKE CHAMPLAIN OB-GYN, P.C., Defendant.

2018-4228
|
Decided on June 7, 2019

Attorneys and Law Firms

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Dreyer Boyajian LaMarche Safarnko, Attorneys for Defendant, 75 Columbia Street, Albany, New York 12210

Opinion

Ann C. Crowell, J.

***1** The plaintiff, Kim E. Schoch, CNM, OB/GYN NP ("Schoch") requests an Order pursuant to CPLR § 3212 granting summary judgment declaring that Schoch is entitled to $74,747.03 in cash proceeds being held in escrow. The defendant, Lake Champlain OB-GYN, P.C. ("Lake Champlain") requests an Order pursuant to CPLR § 3212 granting summary judgment declaring that Lake Champlain is entitled to $74,747.03 in cash proceeds being held in escrow.

From June 18, 2007 to February 27, 2015, Schoch was employed by Lake Champlain as a Certified Nurse Midwife (CNM) pursuant to a written employment agreement. Lake Champlain purchased professional liability insurance for all of its physicians, certified nurse midwives and nurse practitioners, including Schoch, from Medical Liability Mutual Insurance Company ("MLMIC"). New York law does not permit Schoch to practice as a CNM unless she is in a collaborative relationship with enumerated medical practitioners or entities. See, Insurance Law § 6950 (1). Lake Champlain was able to purchase coverage for Schoch because of her collaborative relationship with Lake Champlain. Lake Champlain selected, bargained for, purchased, controlled and maintained the MLMIC policies for Schoch. Lake Champlain paid all of the premiums for the policies and received any policy dividends or premium reductions. Lake Champlain requested Schoch be listed as the "insured" on the applicable insurance policies that provided her individual coverage while practicing at Lake Champlain in the amount of 1 million/ 3 million dollars. The endorsements to the policy were issued to "Lake Champlain OB-GYN, P.C." Lake Champlain was named as the "Policy Administrator" on the policy. Upon Schoch's departure from the practice in February of 2015, Lake Champlain received the policy cancellation premium refund of $8,664.00. Schoch does not make any claim to the policy refund.

In 2018, MLMIC announced that it was converting from a mutual insurance company into a stock insurance company. As part of the conversion, MLMIC was required to distribute a "cash consideration" to policy holders/members to extinguish their membership interests in an amount calculated upon the premiums paid on the policies. The amount of cash consideration for the policies with Schoch listed as the named insured is $74,747.03.

Schoch's motion for summary judgment relies upon Justice Sedita's March 22, 2019 decision in *Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 63 Misc 3d 703 [Sup. Ct., Erie Cty. 2019]. Justice Sedita determined that Insurance Law § 7307(e) and the New York State Department of Financial Service's decision on the demutualization of MLMIC required that the cash consideration be paid to the "policyholder," named insured. Justice Sedita found that the practices' allegations of unjust enrichment to be nothing more than bare legal conclusions.

Lake Champlain's cross-motion for summary judgment relies upon the Appellate Division, First Department's decision, issued two and half weeks later on April 4, 2019, in *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 AD3d 465 [1st Dept. 2019]. Upon facts submitted to the Appellate Division, First Department pursuant to CPLR § 3222(b)(3), the Court determined:

> ***2** "Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment." (citations omitted)

The doctrine of *stare decisis* provides that once a court has resolved a legal issue, it should not be re-examined each and every time it is presented. *Battle v. State*, 257 AD2d 745 [3d Dept. 1999] (internal citations omitted). Schoch discounts the Appellate Division, First Department's

decision in *Schaffer, Schonholz & Drossman, LLP v. Title*, *supra* based upon its terseness and lack of detail. However terse, the First Department found as a matter of law that an award of the MLMIC proceeds to the named insured doctor would result in her unjust enrichment. The significant facts relied upon by the First Department are not distinguishable from the significant facts in this case. This Court is bound to follow the Appellate Division, First Department until such time as the Appellate Division, Third Department or the Court of Appeal issues a contrary decision. Based upon the doctrine of *stare decisis* Schoch's motion for summary judgment is denied. Lake Champlain's cross-motion for summary judgment is granted.

It is declared that judgment be entered awarding defendant Lake Champlain OB-GYN, P.C. the MLMIC proceeds in the amount of is $74,747.03, plus the interest accrued while the proceeds were in escrow, plus costs and disbursements. Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the Judgment of the Court. The original Decision and Judgment shall be forwarded to the attorney for defendant Lake Champlain for filing and entry. The underlying papers will be filed by the Court.

All Citations

Slip Copy, 64 Misc.3d 1215(A), 2019 WL 3227444 (Table), 2019 N.Y. Slip Op. 51176(U)

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64 Misc.3d 1216(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York,
Greene County.

URGENT MEDICAL CARE, PLLC, Plaintiff,
v.
Amy J. Brueckner AMEDURE, Defendant.

19-0121
|
Decided on July 12, 2019

Attorneys and Law Firms

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Opinion

Raymond J. Elliott, III, J.

***1** When a person lawfully receives a payment for an ownership interest that was created through payments made by another person, can a claim be stated, based in equity, for unjust enrichment? In short, that is the issue this motion requires the Court to resolve.

Defendant worked as a doctor in a practice owned by Plaintiff. Plaintiff paid Defendant's malpractice premiums. Due to the demutualization of a malpractice insurance provider, Defendant received a payment of nearly double the amount of three years' worth of premium payments for her ownership interest in that company. Plaintiff is suing Defendant alleging that Defendant has become unjustly enriched through receipt of these proceeds since Plaintiff paid the premiums throughout the relevant period and believes it has an equitable claim to the distribution. Before the Court is Defendant's Motion to Dismiss. Plaintiff has submitted an Amended Summons and Complaint correcting the previously erroneously named Plaintiff. Defendant does not contest the amendment; however, she elects to have her Motion applied to the new pleadings.

Motion to Dismiss

In determining a motion to dismiss a complaint, the court's role is ordinarily limited to determining whether the complaint states a cause of action (*see Frank v. Daimler Chrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]). The court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v. City of New York*, 9 NY3d 825, 874 [2007]). "The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law, a motion for dismissal will fail" (*Harris v. IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]). "A motion [to dismiss] must be decided without regard to evidence submitted by defendants, unless that evidence 'conclusively establishes the falsity of an alleged fact' " (*ARB Upstate Communications LLC v. R.J. Reuter, L.L.C.*, 93 AD3d 929, 930 [3d Dept 2012], *citing Gray v. Schenectady City School Dist.*, 86 AD3d 771, 772 [3d Dept 2011]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of the motion to dismiss" (*Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2nd Dept 2006], citing *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Even were this Court to have doubts about the viability of the claim, the existence of potentially meritorious claims within the record, even if inartfully pleaded, requires denial of a motion to dismiss (*see Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

Unjust Enrichment

Although "unjust enrichment is not a catchall cause of action to be used when others fail" (*Corsello v. Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]), the Court of Appeals has noted the broad equity jurisdiction of the Courts and our power to correct unjust enrichment, going so far as to cite Aristotle in this context, stating "[l]aw without principle is not law; law without justice is of limited value. Since adherence to principles of 'law' does not invariably produce justice, equity is necessary" (*Simonds v. Simonds*, 45 NY2d 233, 239 [1978]). To recover under a theory of unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good

conscience to permit the other party to retain what is sought to be recovered" (*New York State Workers' Compensation Bd. v. Program Risk Mgt., Inc.*, 150 AD3d 1589, 1594 [3d Dept 2017] [internal quotation marks, brackets and citations omitted]; *see Georgia Malone & Co., Inc. v. Rieder*, 19 NY3d 511, 516 [2012]).

***2** "The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another" (*Clifford R. Gray, Inc. v. LeChase Const. Servs., LLC*, 31 AD3d 983, 988 [3d Dept 2006]). This requirement of ownership is in the context of an equitable claim, not legal ownership rights; therefore, a party may be legally entitled to a benefit through a contract but still equitably owe those funds to another (*see Simonds v. Simonds*, 45 NY2d at 239; *see also* Restatement [Third] Restitution and Unjust Enrichment § 26, Illustration 11). " 'The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered' " (*Goel v. Ramachandran*, 111 AD3d 783, 791 [2013], *quoting Paramount Film Distrib. Corp. v. State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]).

"[I]t is not prerequisite of unjust enrichment claim that one enriched commit wrongful or unlawful act" (*Mayer v. Bishop*, 158 AD2d 878, 878 [3d Dept 1990], *lv denied* 76 NY2d 704 [1990]). A claim for unjust enrichment "is undoubtedly equitable and depends upon broad considerations of equity and justice" (*Paramount Film Distrib. Corp. v. State of New York*, 30 NY2d at 421. "In determining whether this equitable remedy is warranted, a court should look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent" (*Betz v. Blatt*, 160 AD3d 696, 701 [2d Dept 2018] [internal quotation marks and citations omitted]). Ultimately, "to determine whether there has indeed been unjust enrichment the inquiry must focus on the 'human setting involved', not merely upon the transaction in isolation" (*Mayer v. Bishop*, 158 AD2d at 880, quoting *McGrath v. Hilding*, 41 NY2d 625, 629 [1977]).

Statement of Facts

In 2018, Medical Liability Mutual Insurance Company (hereinafter MLMIC) approved a demutualization, resulting in a payment based on the ownership interest in the insurance policy at issue in this suit, which Plaintiff believes to be approximately $57,000 [Amended Complaint ¶ 19]. Defendant worked as a doctor for Plaintiff from 2009 until December 2018. Defendant swears she obtained a policy with MLMIC to provide malpractice coverage prior to her employment with Plaintiff [Defendant's Affidavit: ¶ 7]. Defendant states that not until 2011, when she ended her private practice, did Plaintiff assume responsibility for the MLMIC premiums [Defendant's Affidavit: ¶ 7-8]. Defendant asserts that she agreed to diminished compensation and the premium payments were "in lieu of" an increase in salary [Defendant's Affidavit: ¶ 8].

Plaintiff alleges that "[a]s a provider of health care services, Plaintiff's liability protection needs required all employees, providing health care services, to be covered by insurance" [Amended Complaint ¶ 4]. Therefore, "during the course of her employment and specifically for the period of July 15, 2013 through July 14, 2016, [Defendant] was covered with malpractice insurance by [Plaintiff]" [Plaintiff's Affidavit: ¶ 4]. Plaintiff alleges that "[d]espite the fact that [it] was maintaining the policy and making the premium payment directly to the insurer, through a clerical error, [Plaintiff] was mistakenly listed as the policy administrator" [Plaintiff's Affidavit: ¶ 6]. Further, Plaintiff asserts that "the premiums were simply an operating/overhead expense of [Plaintiff]" and not an employee benefit [Plaintiff's Affidavit: ¶ 7].

Demutualization

The New York Superintendent of Financial Services' September 6, 2018, decision (hereinafter DFS Decision) explains the nature of the demutualization and the ownership stake as follows:

> A mutual insurance company is owned by and operated for the benefit of its policyholders. A policyholder's ownership interest in a mutual company is known as a "membership interest." These membership interests provide policy holders with certain benefits, including the right to vote on matters submitted to a vote of members such as the election of directors, and the right to receive a distribution of profits earned by the mutual insurance company in the form of a dividend. Membership interests are not freely transferrable; they exist only in connection with a policyholder's ownership of a policy.
>
> When a demutualization occurs, membership interests in the mutual insurance company are converted to equity interests in the converted stock insurance company and eligible policyholders of the mutual insurance company

> thereby become shareholders of the converted stock insurance company. Under the Insurance Law, a plan of conversion is the operative document governing a demutualization, with such document subject to various procedural requirements and the Superintendent's approval. In the case of a property/casualty insurer such as MLMIC, such approval is subject to the standards set forth in Insurance Law § 7307 (h) (l) [DFS Decision p. 3-4].

Demutualization has been referred to as a "windfall" in some cases because it is often unclear if parties knew the ownership stake even existed prior to the demutualization plan (*see e.g. Bank of New York v. Janowick*, 470 F3d 264, 272 [6th Cir 2006] ["Here, it is clear that none of the parties expected to receive the demutualization proceeds, which will constitute a windfall to whoever receives them"]; *see also Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F2d 1232, 1238 [9th Cir 1990]; *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters, Chicago Truck Drivers, Helper & Warehouse Workers Union (Indep.) Pension Fund*, No. 02 C 3115, 2005 WL 525427, at *4 [ND Ill March 4, 2005]). Following the trend of demutualization in the life insurance industry one expert wrote, regarding property/casualty insurance as at issue here, that "[m]ost policyholders in such companies--including not only individuals but businesses, non-profit institutions, and municipalities--are undoubtedly unaware that they have substantial rights as owners which could be realized in the form of stock ownership, or in cash or otherwise, upon demutualization" (Peter M. Lencsis, *Demutualization of New York Domestic Property/casualty Insurers*, NY St BJ 42 [October 1998]).

MLMIC Demutualization

A recent Supreme Court case (Sedita III, J.) lays out the relevant history of this transaction:

> The MLMIC Board of Directors approved a proposed transaction by which MLMIC would demutualize, convert to a stock insurance company, and be acquired by the National Indemnity Company (NICO) for $ 2.502 billion. The MLMIC Board later adopted a plan of conversion, whereby cash consideration would be paid to policyholders/members in exchange for the extinguishment of the policyholder membership interests. Pursuant to § 8.2 (a) of the Plan of Conversion (the Plan), "Each Eligible Policyholder (or it's designee) shall receive a cash payment in an amount equal to the applicable conversion." Pursuant to § 2.1 of the Plan, an "eligible policyholder" was the person designated as the insured, while a "designee" meant employers or policy administrators, "designated by Eligible Policyholders to receive the portion of the Cash Consideration allocated to such Eligible Policyholders." The Plan did not provide for the policy administrator to receive cash consideration absent such a designation from the policyholder/member.
>
> ***4** The New York Superintendent of Financial Services held a public hearing and approved the Plan. In her September 6, 2018 decision (DFS Decision), the Superintendent wrote: "MLMIC's eligible policyholders will receive cash consideration. Insurance Law § 7307 (e) (3) expressly defines those persons who are entitled to receive the proceeds of the Demutualization as each person who had a policy in effect during the three-year period preceding the MLMIC Board's adoption of the resolution (the 'Eligible Policyholders') and explicitly provides that each Eligible Policyholder's equitable share of the purchase price shall be determined based on the amount of the net premiums paid on eligible policies" (DFS Decision, p.4).
>
> The DFS Decision also acknowledged testimony and written comments from medical groups. Nearly identical to the plaintiff's contentions in this case, the medical groups had argued that the cash consideration belonged to them because they had paid the premiums on behalf of the policyholders and/or had acted as the policy administrators. Addressing these arguments, the Superintendent of Financial Services wrote: "Insurance Law § 7307 (e) (3) defines the policyholders eligible to be paid their proportional shares of the purchase price, but also recognizes that such policyholders may have assigned such legal right to other persons. Therefore, the plan appropriately includes an objection and escrow procedure for the resolution of disputes for those persons who dispute whether the policyholder is entitled to the payment in a given case." Such a claim would be, "decided either by agreement of the parties or by an arbitrator or court" (DFS Decision, p.25).

(*Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 63 Misc 3d 703, 704 [Sup Ct, Erie County 2019, Sedita III, J.]).

Ownership Interest: Policyholder vs. Policy Administrator

Both Insurance Law § 3435 and Regulation 135 (11 NYCRR 153) permit the issuance of group property/casualty insurance only with respect to public and not-for-profit insureds. Thus, under New York law with the

limited exception of a risk retention group authorized under Federal law, group property/casualty insurance for physician groups may not be written in New York (*see* Office of General Counsel, Department of Financial Services, *New York Medical Professional Liability Insurance* [June 4, 2008] OGC Op No 08-06-02, available at https://www.dfs.ny.gov/insurance/ogco2008/rg080602.htm). Therefore, as a matter of course, medical malpractice insurance must generally be acquired for each provider rather than for a group. Thus, regardless for who paid the premium, the providers were the policyholders.

"A court may take judicial notice of matters of public record, such as an incontrovertible official document or other reliable documents, the existence and accuracy of which are not disputed, and information culled from public records" (10A Carmody-Wait 2d § 56:33; *see Matter of 60 Mkt. St. Assoc. v. Hartnett*, 153 AD2d 205, 208 n [3d Dept 1990], *affd* 76 NY2d 993 [1990]; *Matter of Sunhill Water Corp. v. Water Resources Commn.*, 32 AD2d 1006, 1008 [3d Dept 1969]). As both parties rely significantly on the demutualization process approved by the New York Superintendent of Financial Services, this Court finds it appropriate to take judicial notice of the entire record of the process as provided through the New York Superintendent of Financial Services (*see* Department of Financial Services, Public Hearings and Decisions: Medical Liability Mutual Insurance Company [MLMIC] Demutualization Plan of Conversion from Property and Casualty Mutual Insurance Company to Property and Casualty Stock Insurance Company, available at https://www.dfs.ny.gov/reports_and_publications/public_hearings [Last Accessed July 12, 2019]).

***5** Although the provider was the policyholder, MLMIC's counsel explained in written testimony that "a Policy Administrator is a Person designated by a Policyholder to act as administrator of the Policy for certain specified purposes. Designations are made on a form provided by MLMIC as part of the application process or at any point in time selected by the Policyholder. The form has been available on-line continuously throughout the Eligibility Period. Designations received as part of the application process are reflected on the declaration page of the applicable Policy. Policy Administrators can also be 'otherwise designated' by the submission of the prescribed form by the Policyholder following the issuance of the Policy. In such a case, the Policy Administrator would not be named on the declarations page of the Policy until the Policy is renewed, but an endorsement to the Policy would be issued in the interim" (Willkie Farr & Gallagher LLP, *Written Testimony at Public Hearing In the Matter of Medical Liability Mutual Insurance Company*, [August 28, 2018], available at https://www.dfs.ny.gov/docs/about/hearings/mlmic_08232018/willkie.pdf).

As part of the hearing process, several representatives for hospitals and other practices expressed concerns regarding the distribution of proceeds of the demutualization. MLMIC's Plan of Conversion (MLMIC, *Plan of Conversation of Medical Liability Mutual Insurance Company*, available at https://www.mlmic.com/wp-content/uploads/2018/09/mlmic_plan_of_conversion.pdf [June 15, 2018]), included "Schedule I: Objection Procedures." This procedure created a process for Policy Administrators to object to the distribution to the policyholder, causing the payment to be escrowed. The fact that the plan itself contemplated objections between policy administrators and policyholders creates, at least some, inference of acknowledge that these proceeds would be in dispute.

A significant point of contention exists regarding the nature of the policy administrator designation. Dr. Richard Frimer of Maple Medical LLP testified that his practice made all the premium payments "actually suffering sometimes to pay the premiums" (Department of Financial Services, Hearing Transcript, 124-134, [August 23, 2018], available at https://www.dfs.ny.gov/system/files/documents/2019/01/mlmic_transcript_20180823.pdf [hereinafter Hearing Transcript]). Frimer testified that despite MLMIC's estimate of 40 percent of policyholders having a different policy administrator, the common practice for many practices, including his own was for premiums to be paid on behalf of employees without designation [Hearing Transcript p.127-128]. Frimer also asserted that although the designation may have existed within the period at issue for calculating the proceeds, the designation has not always existed, thereby longtime employees could have a policy beginning before designation was even possible [Hearing Transcript p.131].

Frimer's testimony was further corroborated by one hospital system that went so far as book approximately $24 million in proceeds as part of their cash flow projection due to their belief that as the payor of the premiums, they were entitled to the payment [Hearing Transcript p.156-176]. That testimony also noted the obstacle to group policies forcing the current conflict [Hearing Transcript p.170]. In response to this testimony, the Superintendent specifically noted that that "nothing in this procedure prevent anyone from exercising whatever legal rights they have" [Hearing Transcript p. 175].

These examples are emblematic of multiple oral and written testimonies that were provided to the Department of Financial Services regarding the claims of employers

having paid the premiums to MLMIC and having acted as the owners of the policy, despite not being the policyholders or, in some cases, even declared as the policy administrator. Notably, MLMIC's counsel submitted written testimony that stated, "In all events [regarding declaration of a Policy Administrator] there must be an affirmative designation in writing on MLMIC's prescribed form. The mere acceptance of a policy application and premium on a Policy from a Person not designated by the Policyholder as a Policy Administrator does not confer the status of Policy Administrator on such Person" [Willkie Farr & Gallagher LLP, *Written Testimony*].

***6** The DFS Decision stated that "[t]he Objection Procedure provides a reasonable framework for the resolution of disputes between certain policyholders and entities that claim to be Policy Administrators. Importantly, the Objection Procedure does not, in any way, impact any person's rights to resolve their dispute in any forum of their choosing or as required by contract or law. Rather, the sole purpose of the Objection Procedure is to create a category of disputed claims for which the cash consideration attributable to such claims will be placed in an escrow and released by MLMIC upon one of two events: MLMIC either receives (a) 'joint written instructions from the Eligible Policyholder and the Policy Administrator... as to how the allocation is to be distributed,' or (b) 'a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator... or the Eligible Policyholder' " (DFS Decision p.23).

First, the Court need not now resolve the dispute regarding what creates a policy administrator. Second, the Court does not, at this time, credit or give weight to the testimony provided at the hearing except to merely put context to the DFS Decision. Both the Superintendent's statement at the hearing and the decision's clear language stating that "the Objection Procedure does not, in any way, impact any person's rights to resolve their dispute in any forum of their choosing or as required by contract or law" clearly establish that the Department of Financial Services did not resolve the issues around equitable claims nor did they seek to in any way limit the ability of parties to bring these claims.

Precedent

There is a dearth of case law regarding demutualization of a property/casualty insurance company. Significantly, much of the case law that does exist is in the context of mutual life insurance and is driven by state law as well as the Federal Employee Retirement Income Security Act (hereinafter ERISA).

In *Maple-Gate Anesthesiologists, P.C. v. Nasrin*, (*supra*), Supreme Court considered similar claims to those at issue here. The Court dismissed the complaint finding there was no claim of ownership and, therefore, no claim of unjust enrichment. Notably, in that case there were written employment agreements defining the relationship between the parties, which stated that "professional liability insurance premiums as an 'employment benefit for and on behalf of' the employee" (*Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 63 Misc 3d at 704). Neither party claims such an agreement exists here.

The only Appellate Court decision regarding this issue is from the First Department in *Schaffer, Schonholz & Drossman, LLP v. Title* (171 AD3d 465, 465 [1st Dept 2019]). There, the Court ruled on stipulated facts that were submitted and relied on ERISA demutualization (*Id.*). The Court found that despite respondent being named as the policyholder, plaintiff had paid the premiums and all costs related to the policy and there was no record of bargaining for the benefit of demutualization proceeds, so [a]warding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment" (*Id.*) Here, the parties contest the nature of the understanding by which Plaintiff assumed payment of the premiums.

The Motion to Dismiss Must be Denied

In essence, an unjust enrichment claim accrues when one person has obtained money from the efforts of another person under such circumstances that, in fairness and good conscience, the money should not be retained (*see Miller v. Schloss*, 218 NY 400, 407 [1916]). In such circumstances, the law requires the enriched person to compensate the other person (*see Bradkin v. Leverton*, 26 NY2d 192, 196-197 [1970]). Such a claim is based not in legal title, but in equity (*see Simonds v. Simonds*, 45 NY2d at 239).

Here, viewing the Complaint in the light most favorable to Plaintiff and giving it all reasonable inferences, Plaintiff has stated a claim for unjust enrichment. Plaintiff paid the premiums. Plaintiff claims that, but for a mistake of fact, it would be the policy administrator, and it was its payments and efforts that created the proceeds from demutualization. Defendant vigorously disagrees and properly notes she has legal title to the proceeds. Legal title does not end the inquiry (*see Simonds v. Simonds*, 45 NY2d at 239;

Castellotti v. Free, 138 AD3d 198, 207 [1st Dept 2016]). "In determining a motion to dismiss ..., the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom. The question of credibility is irrelevant, and should not be considered" (*Gonzalez v. Gonzalez*, 262 AD2d 281, 282, [2d Dept 1999]). Therefore, it is not currently before the Court to resolve whether Plaintiff's claims are true or even plausible, but only if they state a claim. Here, Plaintiff has clearly stated such a claim.

***7** According, it is

ORDERED, Defendant's Motion to Dismiss the Amended Complaint is **denied**.

This shall constitute the Decision, Order and Judgment of the court. This Decision, Order and Judgment is being returned to the attorney for Plaintiff. All original supporting documentation is being filed with the Greene County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that rule relating to filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

Papers Considered:

1. Defendant's Notice of Motion to Dismiss dated March 28, 2019; Defendant's Affidavit in Support of the Motion to Dismiss sworn March 28, 2019; Attorney's Affirmation in Support of the Motion to Dismiss dated March 28, 2019; Defendant's Memorandum of Law in Support of the Motion to Dismiss dated March 28, 2019; Annexed Exhibits 1-8.

2. Plaintiff's Attorney Affirmation in Opposition to the Motion to Dismiss dated April 22, 2019; Plaintiff's Affidavit sworn April 19, 2019; Annexed Exhibit A.

3. Defendant's Reply Affirmation in Further Support of the Motion to Dismiss dated April 26, 2019; Annexed Exhibits 1-2.

All Citations

Slip Copy, 64 Misc.3d 1216(A), 2019 WL 3331795 (Table), 2019 N.Y. Slip Op. 51188(U)

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49 N.Y.2d 557
Court of Appeals of New York.

Muriel ZUCKERMAN, Plaintiff,
v.
CITY OF NEW YORK et al., Respondents,
New York City Transit Authority, Appellant, et al.,
Defendant.

April 1, 1980.

Synopsis

Plaintiff who was injured when she fell at curb near bus stop in city of New York while she was attempting to board a bus brought action against city as owner of sidewalk, city transit authority as operator of bus, owner of abutting property and tenant in abutting property, and all defendants cross-claimed against others for indemnification or apportionment. The Supreme Court at Special Term, Sidney H. Asch, J., New York County, denied motion by transit authority for summary judgment, and authority appealed. The Supreme Court, Appellate Division, Sandler, J., 66 A.D.2d 248, 413 N.Y.S.2d 657, denied motion by New York City Transit Authority for summary judgment dismissing cross claims, and city transit authority and others appealed. The Court of Appeals, Jones, J., held that affirmation of attorney that city transit authority was negligent and that its negligence caused accident, without personal knowledge, would not preclude summary judgment in favor of transit authority.

Appellate Division reversed.

Meyer, J., concurred with opinion in which Gabrielli, J., concurred.

Attorneys and Law Firms

***559 ***596 **718** Kenneth J. Chertoff, Helen R. Cassidy and John A. Murray, Brooklyn, for appellant.

Allen G. Schwartz, Corp. Counsel, New York City (Bernard Abel and L. Kevin Sheridan, New York City, of counsel), for City of New York, respondent.

Nathan Cyperstein and Alvin P. Bluthman, Brooklyn, for Royfost Co., Inc., respondent.

***560** OPINION OF THE COURT

JONES, Judge.

We repeat today a precept frequently stated where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement.

On April 3, 1975 plaintiff (who is not a party to the present appeal) was injured when she fell at a curb near a bus stop located in the City of New York while she was attempting to board a bus. She thereafter instituted an action against the city as owner of the sidewalk, the New York City Transit Authority as operator of the bus, Royfost Co., Inc., the owner of the abutting property, and Harvey's Seafood House, Inc., the tenant in the abutting property. Each ****719** of the four defendants cross-claimed against the others, simply asking for indemnification or apportionment of liability under Dole v. Dow Chem. Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288.

Because the only basis for liability of the transit authority set out in the complaint was its alleged failure to have maintained the sidewalk and curb at the site of the accident in a safe condition and its negligence in permitting it to have become dangerous, the transit authority moved for summary judgment dismissing plaintiff's pleading as to it, asserting that it was under no legal obligation to maintain the sidewalk or curb. Agreeing with that contention, on June 19, 1977 Supreme Court granted the relief requested. No appeal from that disposition was taken by plaintiff or by any of the other defendants, each of whom had been served with notice of the transit authority's motion.

The transit authority then moved for summary judgment ***561** dismissing all cross claims against it, renewing its disclaimer of obligation with regard to sidewalk or curb maintenance and pointing out that if, as had been determined on the previous motion for summary judgment, it owed no duty to plaintiff for the condition of the sidewalk, it could owe no obligation of contribution to the codefendants. The city opposed the motion on a ground subsequently abandoned after it had aligned itself with the position of Royfost, owner of the abutting *****597** property. The latter opposed the motion to dismiss by an affirmation of its attorney stating that, although plaintiff's complaint alleging liability of the transit authority predicated on an obligation to maintain the sidewalk and curb had been dismissed, in a comptroller's hearing[1]

plaintiff said that as she prepared to enter the bus her foot sank into mud at the curb and that this happened because the bus did not stop at the curb. The attorney concluded that the accident was therefore caused by the transit authority because its bus did not pull up to the curb and urged that a trial with respect to the cross claims should be had because "(u)pon the trial of the action, which will doubtless entail a thorough examination of plaintiff and which may entail a thorough examination of other witnesses to the occurrence, the evidence will doubtless support the view that New York City Transit Authority through the negligent and reckless operation of its buses particularly with regard to boarding passengers, caused plaintiff to suffer the injuries of which she complains." Nothing accompanied the attorney's affirmation.

Supreme Court denied the transit authority's motion for summary judgment and the Appellate Division, 66 A.D.2d 248, 413 N.Y.S.2d 657, by a divided court, affirmed, thereafter granting the transit authority leave to appeal to our court and certifying the question, "Was the order of the Supreme Court, as affirmed by this Court, properly made?"[2] In affirming the denial of the motion by which the transit authority sought disposition of all claims asserted against it arising out of plaintiff's accident the majority of the court below held that the transit authority might be held liable under the Dole theory to one or more of its codefendants by reason of negligence in the operation of its bus negligence not pleaded nor asserted by plaintiff but suggested by a codefendant for the first time in opposition to the transit ***562** authority's summary judgment motion despite the summary dismissal of plaintiff's complaint against the transit authority by which she had sought to hold it liable for her injuries by reason of alleged negligence in sidewalk and curb maintenance. The court also concluded that the hearsay affirmation by Royfost's counsel was sufficient with respect to the claimed negligence in bus operation to preclude the grant of summary judgment.

Because this latter conclusion was error, on this record we do not reach the question ****720** whether the Appellate Division's disposition reflected a proper application of the Dole principle. We recently restated the principles applicable to the disposition of motions for summary judgment in Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790, 791-792, 390 N.E.2d 298, 299: "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. (b)). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form (e. g., Phillips v. Kantor & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882, 291 N.E.2d 129; *****598** Indig v. Finkelstein, 23 N.Y.2d 728, 296 N.Y.S.2d 370, 244 N.E.2d 61; also CPLR 3212, subd. (f))." We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Alvord and Swift v. Stewart M. Muller Constr. Co., 46 N.Y.2d 276, 281-282, 413 N.Y.S.2d 309, 385 N.E.2d 1238; Fried v. Bower & Gardner, 46 N.Y.2d 765, 767, 413 N.Y.S.2d 650, 386 N.E.2d 258; Platzman v. American Totalisator Co., 45 N.Y.2d 910, 912, 411 N.Y.S.2d 230, 383 N.E.2d 876; Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass'n, 32 N.Y.2d 285, 290, 344 N.Y.S.2d 925, 298 N.E.2d 96).

In this instance the transit authority, the moving party, has ***563** met its burden by submission of the pleadings in the action by plaintiff against it together with the final judicial dismissal of that action. We turn then to the submission on the part of Royfost and the city to determine its sufficiency to defeat the grant of summary judgment to which the transit authority would otherwise be entitled. This consisted only of the bare affirmation of Royfost's attorney who demonstrated no personal knowledge of the manner in which the accident occurred. Such an affirmation by counsel is without evidentiary value and thus unavailing (Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp., 42 N.Y.2d 496, 500, 398 N.Y.S.2d 1004, 369 N.E.2d 4; Israelson v. Rubin, 20 A.D.2d 668, 247 N.Y.S.2d 85, affd. 14 N.Y.2d 887, 252 N.Y.S.2d 90, 200 N.E.2d 774; Lamberta v. Long Is. R. R., 51 A.D.2d 730, 379 N.Y.S.2d 139). His speculation as to what would "doubtless" appear at the trial is patently inadequate to establish the existence of a factual issue requiring a trial as to the manner of operation of the transit authority's bus. The record contains no affidavit of plaintiff or of any eyewitness and no transcript of any examination before trial;[3] no request was made for an adjournment of the motion to permit any such examination; no identification of the hypothetical "other witnesses to the occurrence", with an accompanying statement as to the substance of their testimony and explanation for failure to submit affidavits from them, was

proffered.

****721** The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form", e. g., documents, transcripts. Such an affidavit or affirmation could also be accepted with respect to admissions of a party made in the attorney's presence. In the present instance, however, the attorney was not present at the comptroller's hearing, nor was anyone else on behalf of his client. As to that hearing the attorney was a total stranger.

Thus, there is a failure to tender evidentiary proof in admissible form and no offer of excuse for such failure. In this circumstance it was error to deny the transit authority's ***564** motion for summary judgment on the speculative ground that recovery against it on one or more of the cross claims might be premised on negligent operation of its bus.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion for summary judgment granted against all codefendants.

*****599** MEYER, Judge (concurring).

I concur in the conclusion of the majority that the transit authority's motion for summary judgment should have been granted, but do so on the ground, articulated in Presiding Justice Murphy's dissent below (66 A.D.2d, at pp. 267-268, 413 N.Y.S.2d 657), that the failure of the authority's bus driver to stop close to the curb could not be found to be a proximate cause of plaintiff's injury.

I cannot agree, however, to the reasoning of the majority, which in my view is a hypertechnical exaltation of form over substance. That an attorney's affidavit is insufficient to put before the court on a motion for summary judgment facts of which he has no personal knowledge is an eminently sound rule well known to the Bar, but it is likewise well known that an affidavit based on documentary evidence in an attorney's possession is probative and sufficient, notwithstanding his lack of personal knowledge (Getlan v. Hofstra Univ., 41 A.D.2d 830, 831, 342 N.Y.S.2d 44, app. dsmd. 33 N.Y.2d 646, 348 N.Y.S.2d 554, 303 N.E.2d 72).

The latter rule, moreover, permits use of an attorney's affidavit to put before the court factual data from a deposition (Dorkin v. American Express Co., 43 A.D.2d 877, 351 N.Y.S.2d 190; see 4 Weinstein-Korn-Miller, N.Y. Civ.Prac., par. 3212.09). Lamberta v. Long Is. R. R., 51 A.D.2d 730, 379 N.Y.S.2d 139, relied on by the majority, is not to the contrary, for it was the conclusory nature of the restatement rather than the failure to annex the deposition which formed the basis for the ruling in that case. Here, the factual data is set forth in the affidavit as fact, rather than as conclusion (see 66 A.D.2d, at p. 250, 413 N.Y.S.2d 657). While it would certainly have been better practice to annex the deposition summarized, to seize upon the failure to do so as the ground for dismissal would appear to be contrary to the practice as presently understood.

Nor should denial by the Appellate Division of plaintiff's application to supplement the record by annexing the transcript of the examination before the comptroller be given significance in view of the acceptance by the majority of that court of the attorney's affidavit as sufficient to present the ***565** facts.* To deal with its doing so as an error of law, rather than an unreviewable act of discretion, is needlessly to ignore the realities of litigation practice and to expose attorneys to possible malpractice liability without material benefit to the administration of justice.

COOKE, C. J., and JASEN, WACHTLER and FUCHSBERG, JJ., concur with JONES, J.

MEYER, J., concurs in a separate opinion in which GABRIELLI, J., concurs.

****722** Order reversed, with costs, and the motion for summary judgment granted against all codefendants. Question certified answered in the negative.

All Citations

49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595

Footnotes

1 Not otherwise described and without indication of the participants thereat.

2 It appears that Harvey's Seafood House, Inc., the tenant, defaulted at Special Term and at the Appellate Division. It has taken no part

in the appeal in our court.

3 As indicated, reference is made in the attorney's affirmation to a hearing before the city comptroller at which plaintiff testified. While conclusory restatements of her testimony at that hearing were included in the affirmation, no copy of the transcript was attached. Indeed, we are informed that Royfost's application made at the Appellate Division to supplement the record to include such transcript was denied by that court. No benefit may be derived from these conclusory statements (Lamberta v. Long Is. R. R., 51 A.D.2d 730, 379 N.Y.S.2d 139, supra), to say nothing of the speculative extrapolation of liability the attorney would erect on them.

* Of possible significance also in that respect is Presiding Justice Murphy's statement that in considering the merits of the appeal the court had taken judicial notice of the entire county clerk's file (66 A.D.2d, at p. 261, 413 N.Y.S.2d 657).

End of Document

McKinney's Insurance Law § 7307

§ 7307. Conversion of domestic mutual property/casualty insurance companies or advance premium corporations into domestic stock property/casualty insurance companies; insurers not in rehabilitation

Effective: October 3, 2011

Currentness

(a) In this article:

(1) "Affiliate" of a mutual insurer means any person who controls, is controlled by or is under common control with, the mutual insurer being converted. A corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of persons manage the two corporations.

(2) "Control" has the meaning assigned to it in paragraph two of subsection (a) of section one thousand five hundred one of this chapter.

(3) A "domestic mutual insurer" or "mutual insurer" means a domestic mutual property/casualty insurance company organized under article twelve of this chapter and licensed under article forty-one of this chapter, or a domestic advance premium corporation organized and licensed under article sixty-six of this chapter, in either case authorized to issue non-assessable policies only and not operating under an order of rehabilitation.

(4) A "holder of a section 1307 agreement" means the holder of an agreement executed pursuant to section one thousand three hundred seven of this chapter.

(b) A domestic mutual insurer may apply to the superintendent for permission to convert into a domestic stock property/casualty insurer complying with the relevant organization and licensing provisions of articles twelve and forty-one of this chapter. The application to the superintendent shall be pursuant to a resolution, adopted by no less than a majority of the entire board of directors, specifying the reasons for and the purposes of the proposed conversion, and the manner in which the conversion is expected to benefit policyholders and the public. A copy of the resolution, together with a statement of its adoption, both certified by the president and secretary, or officers corresponding to either of them, and affirmed by them as true under the penalties of perjury and under the seal of the mutual insurer, shall accompany the application. The superintendent may thereafter request any additional documents and information which he may reasonably require. Unless the superintendent finds that:

(1) the resolution is defective upon its face;

(2) the proposed conversion is contrary to law or is not in the best interests of the policyholders or the public; or

(3) the mutual insurer does not have a surplus to policyholders at least equal to the minimum capital and surplus required to be maintained for a newly organized stock insurer doing the same kinds of insurance, in which cases the proposed conversion shall terminate, the superintendent shall order an examination of the mutual insurer pursuant to section three hundred ten of this chapter as of the last day of the period covered in its latest filed statement. The superintendent may also examine any affiliate of the mutual insurer.

(c) The superintendent shall also appoint one or more qualified disinterested persons to appraise and report to the superintendent the fair market value of the mutual insurer and, to the extent necessary, its affiliates, on the basis of its latest filed annual or quarterly statement, and of any significant subsequent developments. Such persons shall consider the assets and liabilities of the mutual insurer and any factors bearing on the value of the mutual insurer or its affiliates. The appraisers shall receive reasonable compensation and be reimbursed for reasonable expenses incurred in discharging their duties. They may, as necessary, employ consultants to advise them on any technical matters.

(d) The superintendent shall make copies of such examination report and appraisal report available to the board of directors within fifteen days of his receipt of the reports. After receiving such reports the superintendent may grant or deny permission to the board of directors to submit to him a plan of conversion. If permission is granted, the plan shall include the provisions, and be submitted in the manner and under the conditions, required by subsection (e) hereof. If permission is denied, the superintendent shall make a written statement of his findings and the board shall have the right to a hearing before the superintendent within thirty days of the date of denial.

(e) Such plan shall be adopted by a majority of the entire board. It shall be signed by the president and attested by the secretary, or officers corresponding to either of them, under the corporate seal of the insurer. A copy of the plan and resolution, both certified by such officers as true under the penalties of perjury and under the seal of the insurer, shall be submitted to the superintendent not later than forty-five days after permission was granted under subsection (d) hereof. The plan shall include:

(1) The proposed charter and by-laws of the insurer as a stock corporation set out in accordance with paragraph five of subsection (a) of section one thousand two hundred one of this chapter.

(2) The manner of treating a holder of a section 1307 agreement, if any; such holder, if otherwise qualified, may, at its option, exchange such agreement for an equitable share of the securities or other consideration, or both, of the corporation into which the insurer is to be converted.

(3) The manner and basis of exchanging the equitable share of each eligible mutual policyholder for securities or other consideration, or both, of the stock corporation into which the mutual insurer is to be converted and the disposition of any unclaimed shares. The plan shall also provide that each person who had a policy of insurance in effect at any time during the three year period immediately preceding the date of adoption of the resolution described in subsection (b) hereof shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting common

shares of the insurer or other consideration, or both. The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies in effect during the three years immediately preceding the adoption of the resolution by the board of directors under subsection (b) hereof bears to the total net premiums received by the mutual insurer from such eligible policyholders. In computing a policyholder's equitable share, no credit shall be given for any net premiums which result from an endorsement which is effective on or after the date of adoption of the resolution; except that credit shall be given for any net premiums resulting from an audit or retrospective premium adjustment which is billed within one hundred eighty days after such date, provided such premium is paid timely. If the equitable share of the eligible policyholder entitles such policyholder to the purchase of a fractional share of stock, the policyholder shall have the option to receive the value of the fractional share in cash or purchase a full share by paying the balance in cash.

(4) The number of voting common shares proposed to be authorized for the stock corporation, their par value and the price at which they shall be offered, which price may not exceed one-half of the median equitable share of all policyholders under paragraph three hereof.

(5) Any other features requested by the superintendent.

(f) Prompt notice shall be given by the mutual insurer to all persons who become policyholders or holders of section 1307 agreements on or after the date of the adoption of the resolution described in subsection (b) hereof, of the pendency of a proposed conversion and of the effect thereof on them.

(g) The superintendent shall hold a public hearing, adequate notice of which shall be mailed by the mutual insurer to each person who was a policyholder on the day preceding the date of adoption of the resolution described in subsection (b) hereof, accompanied by a copy of the plan of conversion and any comment the superintendent considers necessary for the adequate information of the policyholders. In addition, the insurer shall give notice of the hearing by publication in a newspaper of general circulation in the county in which the insurer has its principal office and in the two largest cities in each state in which the insurer has underwritten insurance within the five years preceding the date of the adoption of the resolution described in subsection (b) hereof; such notice shall be accompanied by a summary approved by the superintendent of the plan and any comment the superintendent considers necessary for the adequate information of former policyholders and the public.

(h)(1) After the hearing the superintendent shall approve the plan as submitted, refuse to approve the plan, or request modification of the plan before granting approval. If the superintendent finds that the plan does not violate this chapter, is not inconsistent with law, is fair and equitable and is in the best interests of the policyholders and the public, he shall approve such plan. If the superintendent finds that the plan does not meet the foregoing standards for approval he shall either refuse to approve the plan and the plan shall become null and void or return the plan to the mutual insurer for modification to meet his stated objections.

(2) If within ninety days after receipt of the superintendent's request for modifications the insurer submits an amended plan which meets the superintendent's objections and complies with the standards for approval he shall approve such amended plan.

(i) After approval by the superintendent the plan shall be submitted to a vote of the persons who were policyholders of the

mutual insurer on the day preceding the date of adoption of the resolution described in subsection (b) hereof. The plan shall provide for proxy voting in a manner to be prescribed by the superintendent. The board shall submit the question of the plan to such policyholders at a meeting thereof, by causing a full, true and correct copy or a summary thereof approved by the superintendent, together with notice, stating the time, place and purpose of such meeting, to be delivered personally, or deposited in the post office, postage prepaid, at least thirty days (unless a shorter time, not less than ten days, be approved by the superintendent) prior to the time fixed for such meeting, addressed to each such policyholder at his last post office address appearing on the records of the insurer.

(j) Each such policyholder eligible to vote pursuant to subsection (i) hereof shall be entitled to such number of votes as may be provided for in the by-laws of the mutual insurer. The votes of two-thirds of all the votes cast by policyholders represented at the meeting in person or by proxy, shall be necessary for the adoption of the plan. Upon the conclusion of the vote the insurer shall submit to the superintendent a certified copy of the plan voted on together with a certificate setting forth the results of the vote, both of which shall be subscribed by the president and attested by the secretary, or officers corresponding to either of them, under the corporate seal of the insurer, and affirmed by them as true under the penalties of perjury.

(k) No domestic mutual insurer which is affiliated with other mutual companies may be converted to a stock company unless all such affiliated companies are converted to stock companies at the same time, except to the extent the superintendent may determine that the interests of the policyholders of any of the other mutual companies can be permanently protected by limitations on the corporate powers of the stock corporation or on its authority to do business.

(l) If at any stage in the process of a conversion under this section the superintendent finds that the mutual insurer is impaired or that the further transaction of business will be hazardous to its policyholders, its creditors, or the public, the proposed conversion shall terminate.

(m) If the conversion plan is adopted pursuant to subsection (j) hereof, the superintendent, upon being satisfied that the insurer will have at least the minimum capital and surplus required to be maintained for a newly organized domestic stock insurer doing the same kinds of insurance, shall issue a new certificate of authority to the insurer, thereby converting the mutual insurer into a stock insurer. At the same time, the superintendent may issue such license as may be required pursuant to section one thousand two hundred four of this chapter.

(n) Upon such conversion, the stock insurer shall give notice thereof by publication in a newspaper of general circulation in the county in which the insurer has its principal office and in the two largest cities in each state in which the insurer shall be licensed to do business. The notice shall include a correct copy of the plan, or a summary thereof approved by the superintendent.

(o) Upon the conversion of the mutual insurer in the manner herein provided, all the rights, franchises and interests of the former mutual insurer, in and to every species of property, real, personal and mixed, and things in action thereunto belonging, shall be deemed as transferred to and vested in the stock insurer, without any other deed or transfer; and simultaneously therewith such company shall be deemed to have assumed all of the obligations and liabilities of the former mutual insurer.

(p) No action or proceeding, pending at the time of the conversion to which the mutual insurer may be a party shall be abated or discontinued by reason of such conversion, but the same may be prosecuted to final judgment in the same manner as if the conversion had not taken place, or the stock corporation may be substituted in place of such mutual insurer by order of the

court in which the action or proceeding may be pending.

(q) The directors and officers of the mutual insurer shall serve until new directors and officers have been duly elected and qualified pursuant to the charter and by-laws of the stock insurer.

(r) The insurer, whether before or after conversion, shall pay no compensation of any kind to any person other than regular salaries to existing personnel, in connection with the proposed conversion, other than for clerical and mailing expenses, except that, with the superintendent's approval, payment may be made at reasonable rates for printing costs, and for legal and other professional fees for services actually rendered. All expenses of the conversion, including the expenses incurred by the department of financial services, shall be borne by the insurer.

(s) No voting common shares shall be subscribed by or issued to persons other than eligible policyholders or holders of section 1307 agreements until all subscriptions by such policyholders or agreement holders have been filled or other consideration has been provided in accordance with the plan. Thereafter, any new issue of common shares within three years after the conversion shall first be offered to the persons who have become voting common shareholders, pursuant to subsection (e) hereof in proportion to their holdings of such shares.

(t) No insurer becoming a domestic stock insurer under the provisions of this section shall: for a period of ten years after conversion, redomesticate directly or indirectly or remove its principal offices from within the state; or for a period of five years after conversion:

(1) enter into any agreement by the terms of which any person, partnership or corporation agrees to pay all or a portion of the expenses of management of the insurer in consideration of the insurer's agreement to pay him or it either commissions on premiums due the insurer or any other compensation for his or its services, or

(2) enter into any agreement with an officer or director of the insurer or with any firm or corporation in which any officer or director of the insurer is pecuniarily interested, directly or indirectly, under which agreement the insurer agrees to pay, for the acquisition of business, any commissions or other compensation which by the terms of such agreement varies with the amount of such business or with the earnings of the insurer on such business.

(u) Any action taken pursuant to the provisions of this section shall in no way impede or impair the exercise by the superintendent of his authority under any other provision of this chapter.

Credits

(L.1984, c. 367, § 1. Amended L.1984, c. 805, § 168; L.2011, c. 62, pt. A, § 104, subd. (a), eff. Oct. 3, 2011.)

Notes of Decisions (2)

McKinney's Insurance Law § 7307, NY INS § 7307
Current through L.2019, chapter 758 & L.2020, chapter 21. Some statute sections may be more current, see credits for details.

End of Document

McKinney's CPLR Rule 3222

Rule 3222. Action on submitted facts

Currentness

(a) Commencement. An action, except a matrimonial action, may be commenced by filing with the clerk a submission of the controversy, acknowledged by all parties in the form required to entitle a deed to be recorded. The submission shall consist of a case, containing a statement of the facts upon which the controversy depends, and a statement that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties. If made to the supreme court, the submission shall specify the particular county clerk with whom the papers are to be filed.

(b) Subsequent proceedings. Subsequent proceedings shall be had according to the civil practice law and rules except that:

1. an order of attachment or a preliminary injunction shall not be granted;

2. the controversy shall be determined on the case alone;

3. if the submission is made to the supreme court, it shall be heard and determined either by the court, or by the appellate division, or, with his consent, by a specified judge or referee, as the parties may stipulate;

4. on such a submission the court, judge or referee may find facts by inference from the facts stipulated; and

5. if the statement of facts in the case is not sufficient to enable the court to enter judgment the submission shall be dismissed or the court shall allow the filing of an additional statement.

Credits

(L.1962, c. 308. Amended L.1984, c. 313, § 1; L.1986, c. 355, § 9.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by John R. Higgitt

2017

C3222:1 Action on Submitted Facts, Generally.

It's Okay to Invoke the CPLR 3222 Procedure in the Middle of the Action.

CPLR 3222 provides for the action on submitted facts. The device allows the parties to a dispute (any dispute except a matrimonial one) to agree on the facts underlying the dispute, and prepare a complete statement of those facts. The statement of facts, along with a statement that the controversy is real, constitutes the submission to the court. The court will review the parties' submission, decide the relevant legal issues presented by it, and render a judgment.

The parties typically employ CPLR 3222 at the very outset of litigation, using the submission to initiate the action. CPLR 3222(a). That procedural course spares the parties from engaging in the activities central to litigation: trading pleadings, engaging in the disclosure process, making and answering motions, etc. In the event an action starts off as a plenary one and the parties subsequently decide that they wish to have it determined on submitted facts, the court will oblige the parties. The procedure can be invoked in the middle of the action. *See* Commentary C3222:1 (main vol.). That occurred in *D.H. v. State of New York*, 54 Misc.3d 390, 41 N.Y.S.3d 356 (Court of Claims 2015, McCarthy, J.).

Counsel seeking an example of a CPLR 3222 statement of facts should review the *D.H.* decision, as it contains a full recitation of the statement used by the parties in that action.

PRACTICE COMMENTARIES

by David D. Siegel

Subdivision (a)

C3222:1 Action on Submitted Facts, Generally.

C3222:2 The Submission.

C3222:3 Completeness of Statement of Facts.

C3222:4 Demand for Relief.

C3222:5 Use by Government Agencies.

Subdivision (b)

C3222:6 No Provisional Remedies.

C3222:7 No Disclosure or Other Pretrial Procedures.

C3222:8 Which Court Gets the Case?

C3222:9 Court May Draw Inferences from Stated Facts.

C3222:10. Disposition of the Submission; Judgment.

Subdivision (a)

C3222:1 Action on Submitted Facts, Generally.

If the parties to a dispute can agree on the facts, so that no issue of fact exists between them and their dispute concerns only issues of law, they can bring their controversy to court under CPLR 3222 by the simplest of devices: a submission. No summons, pleadings, bill of particulars, disclosure devices, motions, note of issue, or any other of the myriad steps met in ordinary litigation. That the facts are agreed on is the only proviso, leaving only law issues to be heard.

The dispute must be genuine. This is not a vehicle for an advisory opinion or a method for litigating questions that have become academic. The dispute must be real and justiciable--of the kind that, but for the circumstance that both sides agree on all of the facts, would be prosecuted in court in conventional form.

The CPLR 3222 submission should be distinguished from other procedures. It differs from the declaratory judgment in that the latter is in effect merely a form of plenary action. Although the declaratory judgment, which is prosecuted in conventional summons-complaint-answer-etc. form, is often especially apt in disputes in which law issues preponderate over fact issues, it is still just an ordinary action and can involve (and would thus have to try) contested facts as well as well as contested legal issues. The CPLR 3222 submission concedes the facts and involves issue of law alone. Indeed, the relief sought in a CPLR 3222 submission can be a mere declaration of rights, such as would have required a plenary declaratory judgment action had the facts not been agreed on.

The CPLR 3222 submission is available in any kind of case: contract or tort, legal or equitable, money or non-money, public or private, etc. It was said in Ossining Urban Renewal Agency v. Lord, 49 A.D.2d 576, 371 N.Y.S.2d 19 (2d Dep't 1975), that a submission of controversy is not the "proper vehicle" for the determination of the rights of the parties when the question involved is "public in character" and involves "public policy", but that idea didn't last long. The case was reversed by the Court of Appeals, 39 N.Y.2d 628, 350 N.E.2d 405, 385 N.Y.S.2d 28 (1976), and disposed of on its merits.

The fact of the reversal should lend support to the use of CPLR 3222 for controversies of public as well as private import, as long as its stated requirements are fulfilled. Note also, in this respect, Commentary C3222:5 below.

An exception, in which CPLR 3222 is not available, is the matrimonial action, as defined in CPLR 105. This exception was born of the same legislative fear--the parties might try to dissolve their marriage by collusion--that at one time also precluded both summary judgment and default judgment in matrimonial actions. That rule has since changed, so that both devices are now okay in the matrimonial action--see Commentaries C3212:29 on CPLR 3212 and C3215:9 on CPLR 3215--but no coordinate release was made in CPLR 3222, so that the matrimonial action continues to be an exception to it.

The CPLR 3222 submission should also be distinguished from the "Simplified Procedure for Court Determination of Disputes" under CPLR 3031 et seq., which also dispenses with pleadings and a good deal of procedure but which can, unlike CPLR 3222, present issues of fact. The Simplified Procedure is a kind of "judicial arbitration". See the Commentaries on CPLR 3031 et seq.

Under CPLR 3222, the submission may be used even if one of the parties is an infant or incompetent, and without a preliminary court order. It would presumably be such person's representative, as specified in CPLR 1201, who signs the submission in the ward's behalf. There need be no qualms about the ward's rights in such a case because the court can look after them. See 3d Rep.Leg.Doc. (1959) No.17, p.164. Since the CPLR 3222 submission goes to court rather than to an out-of-court panel, the hesitancy manifest when the alternative is arbitration is not present. (A court order is required for the arbitration of a claim involving an infant or incompetent. See CPLR 1209.)

Combining Arbitration (for Facts) and CPLR 3222 (for Law)

Suppose that a contract agrees to arbitrate only "unresolved questions of fact, as distinguished from questions of law". The Second Department, sustaining and implementing such an agreement in Instructional T.V. Corp. v. N.B.C., Inc., 45 A.D.2d 1004, 357 N.Y.S.2d 915 (1974), ordered arbitration of the fact issues. It then added that when the arbitrators have found the facts, the findings can be submitted to the court for determination of the law questions. Such a procedure would at that point amount to nothing more than the commencement of an action on submitted facts under CPLR 3222. This is an imaginative conclusion that appears to uphold the parties' intentions, but a few procedural notes can be sounded.

The loser in the arbitration may balk at acknowledging the submission, as required by CPLR 3222(a). Such an acknowledgment ought to be dispensed with in such an instance. The winner's affidavit, perhaps accompanied by the arbitral award and a copy of the contract (giving the arbitrators only the fact issues), should suffice if this use of CPLR 3222 is to be effective. But how shall the balker get notice of the CPLR 3222 application? Since the rule contemplates the mutual submission of the parties, it makes no provision for notice. To effectuate the aim of the *Instructional* case, the court can interpolate a simple notice of motion procedure, the motion being one to have the court determine the law issues based on the arbitrators' fact findings.

Alternatively the court can allow a special proceeding to be brought to do the same thing. Special proceedings are the devices used to bring to court questions of arbitrability, CPLR 7502(a), and arbitration is closely enough involved in this situation to invoke the same procedure. It may even be permissible for the arbitrators themselves to make the CPLR 3222 submission. The arbitrator--or two of three if it is a three-member arbitration with a dissent--could be allowed to draw the CPLR 3222 statement and acknowledgements, acting as the parties' agents (the agency being found to derive from the contract submitting the fact issues to the arbitrators).

The venue provision concerning arbitration, CPLR 7502(a), can also offer guidance by analogy for where to bring the CPLR 3222 submission in this situation. And if the court is the supreme court, the appellate division may be the original forum for the law questions under CPLR 3222(b)(3).

Okay to Invoke Procedure in Middle of Action

While the submission on agreed facts will usually be exploited before any action is commenced, and with the very purpose of avoiding the burdens of an ordinary litigation, it has been held permissible to switch over to the procedure right in the middle of the action. See Treichler v. Niagara-Wheatfield Central School Dist., 184 A.D.2d 1, 590 N.Y.S.2d 954 (4th Dep't 1992), noted in Siegel's Practice Review No. 21:3-4.

C3222:2 The Submission.

The key paper in the CPLR 3222 procedure is the "submission". This contains the agreed statement of facts and a statement that the controversy is real and submitted in good faith. It must be acknowledged by all parties. If it is made to the supreme court, which it most often is, the submission must specify the county clerk in whose office the papers

are to be filed. This is apparently a requirement even if the submission is to be made to the appellate division under CPLR 3222(b)(3). This may sometimes be overlooked, and the papers filed only with the appellate division.

It would be best if, at whatever level the case is heard, there is a file of it at trial level. See Commentary C3222:10 below. The submission should be able to specify (for filing purposes) the county clerk of the county in which the appellate division is located. The venue requirements of CPLR Article 5 are inapplicable.

C3222:3 Completeness of Statement of Facts.

The submission's statement of facts must be a complete one. The omission of any material fact, in the absence of which the dispute can't be resolved, requires that the submission be dismissed (or, at best, that an additional statement be required, see Commentary C3222:10).

The statement of facts must be a direct recitation of them. It does not suffice to recite that witness X would testify to this and witness Y would testify to that. Ciunci v. Wella Corp., 26 A.D.2d 109, 271 N.Y.S.2d 317 (1st Dep't 1966). Nor will the submission be entertained if persons not parties to it have an apparent interest in the outcome. See Justino v. Fassi, 15 A.D.2d 676, 224 N.Y.S.2d 173 (2d Dep't 1962).

The question of whether inferences may be drawn from the stated facts is discussed below in Commentary C3222:9.

The gist of the CPLR 3222 requirement is that the submission be complete enough to enable the court merely to apply the law and dispose of the controversy.

C3222:4 Demand for Relief.

Since the CPLR 3222 submission will not be used unless there is sufficient rapport between the parties to enable them to agree on the facts, it is also likely that parties able to so agree will often be content with a mere declaration of who is entitled to what, i.e., to relief of a declaratory kind. But nothing in CPLR 3222 precludes its use for relief of any other kind if, upon the court's application of the law to the stated facts, relief of some other kind is indicated. Upon determining the submission, the court should direct entry of judgment for whatever relief the legal determination calls for, whether it be a money judgment, a replevin or ejectment judgment, or even equitable relief such as an injunction (but not a provisional injunction, see Commentary C3222:6).

The submission should therefore be able to demand any relief responsive to the rights of the parties as determined by the court. In fact, the court should be able to grant relief of any kind responsive to its determination even if the particular relief is not asked for. Such is the power conferred on the court by CPLR 3017(a), which should apply as much to a CPLR 3222 submission as to a plenary action.

C3222:5 Use by Government Agencies.

The CPLR 3222 submission may be used to resolve public disputes as well as private ones. Its use should in fact be encouraged for the use of any dispute at all (except the specifically exempted matrimonial). Any device that permits an immediate application of the law to be made to stipulated facts should be given every encouragement.

A person involved in some dispute with a public agency, such as a board, commission, authority, etc., will sometimes find that she and the agency agree entirely on the facts and disagree only on their legal obligations under them.

Assuming exhaustion of internal administrative review procedures applicable in the particular situation, and that the dispute is fully ripe for a court case, the CPLR 3222 submission would be an ideal device to make use of. Its increased use would benefit both the public (which has to pay the principal costs of litigation in New York) as well as the individual involved. Many practitioners report, however, that although they and the agency are in complete accord on the facts, the agency will still not agree to a submission under CPLR 3222.

Unless there is something in the enabling act of the particular agency that precludes its acceding to such a submission, arbitrarily rejecting the use of CPLR 3222 can be seen as a public disservice. Indeed, the attorney general is expressly empowered to participate in such a submission in behalf of the state itself, Exec. Law § 63(7), and what suffices for the sovereign should suffice for its agencies as well. The executive branch of New York's government, through whatever channels are open to it, should encourage all agencies and offices to use the CPLR 3222 submission whenever there is complete factual agreement between agency and individual. Refusal to submit under CPLR 3222 when the facts are not disputed is either the product of undue bureaucratic trepidation or the illegitimate aim of putting the individual involved to maximum inconvenience in contesting the agency. It puts the individual to the burden of a plenary action or special proceeding, and may add the cost of an additional step to the litigation process, since the submission, if used, can usually skip the trial court and go directly to the appellate division.

Subdivision (b)

C3222:6 No Provisional Remedies.

CPLR 3222(b)(1) specifically excludes the order of attachment (Article 62 of the CPLR) and the preliminary injunction (Article 63) from use in a CPLR 3222 case. Those are two of New York's four provisional remedies. See CPLR 6001. The other two are the receivership (Article 64) and the notice of pendency ("lis pendens", Article 65). The receivership should also be deemed excluded. It would be inconsistent with CPLR 3222(b)(1) to permit the appointment of a temporary receiver in a CPLR 3222 case while excluding such devices as attachment and injunction. It may be permissible, however, if the dispute affects real property, for a lis pendens to be filed with the appropriate county clerk during the pendency of the CPLR 3222 submission, but it would be a difficult thing to work out. (The use of an Article 65 notice of pendency requires, for example, the filing of a complaint, CPLR 6511(a), which is of course not used on a CPLR 3222 submission.) It was apparently the intention of CPLR 3222(b)(1) to exclude all of the provisional remedies from use in conjunction with a CPLR 3222 submission.

C3222:7 No Disclosure or Other Pretrial Procedures.

Although CPLR 3222 does not say so in terms, it is plain that the use of the disclosure devices or resort to any of the other usual pretrial procedures, such as a demand for a bill of particulars or the making of a corrective motion (CPLR 3024) or a dispositive motion (CPLR 3211, 3212, etc.) is inconsistent with a CPLR 3222 submission. Most of the devices just mentioned are designed as aids in developing the facts, while a CPLR 3222 submission concedes them. And as far as dismissal motions are concerned, the parties would appear to have abandoned all such proceedings by submitting their case under CPLR 3222.

The dispute must be determined "on the case alone", according to CPLR 3222(b)(2), which would in any event preclude the use of depositions or other emanations of the disclosure devices. Affidavits would also be excluded; they are designed to attest to facts and the facts in a CPLR 3222 case need no extrinsic attestation because they are agreed on between the parties.

C3222:8 Which Court Gets the Case?

CPLR 3222(b)(3) permits the parties to choose their court. The submission may be made to any court that would have jurisdiction of the subject matter of the relief being sought. An important feature of the statute is that if the submission is to be made to the supreme court, the parties can opt to submit it directly to the appellate division.

The parties can alternatively designate a particular judge or referee to hear their case, provided the designee consents.

The most common procedure, and surely the most preferable, is to stipulate to submit it to the appellate division. That's often the principal motivation of the submission: it removes one level of the judicial process and makes the appellate division the court of original instance, an appropriate enough result in view of the fact that the court is called on to resolve only legal issues.

If the case would otherwise be within the jurisdiction of, e.g., the New York City Civil Court, it should be possible, although CPLR 3222 does not say so, for the submission to be made initially to the appellate term, since it is that court (in the first and second departments) which hears appeals from the civil court. Such an analogy would be justifiable, since the appellate division, specified in CPLR 3222(b)(3), bears to the supreme court the same relationship that the appellate term bears to the civil court. In fact, whenever the submission could otherwise be made to one of the lower trial courts, such as a district, city, or justice court, it should be permissible for the submission to be made initially, instead, to the court that hears appeals from that court. That would implement the intent underlying CPLR 3222(b)(3) while at the same time relieving the appellate divisions of submissions that could otherwise be determined in lower appellate courts. Steps like these would require a stretch of CPLR 3222, but not an unreasonable one.

If the submission of a relatively small case is made to the appellate division, however, which seems clearly permissible under CPLR 3222(b)(3), the parties should not be penalized because of the size of the case. Cf. CPLR 8102.

If the case is initially submitted to the appellate division, the submission should of course be filed there, but it may also be advisable to assure that a copy of the submission is also filed with the clerk of some trial-level court. See Commentaries C3222:2 above and C3222:10 below.

C3222:9 Court May Draw Inferences from Stated Facts.

The major barrier to the use of the submission device under prior law was that the statement of facts had to be so complete that a determination did not even require the drawing of an inference. The submission had to be dismissed when such a need arose, "even if the submitted facts logically and reasonably admit[ted] of further important inferences". Cohen v. Manufacturers Safe Deposit Co., 297 N.Y. 266, 78 N.E.2d 604 (1948).

This prior-law limitation is removed by CPLR 3222(b)(4) in direct reaction to the *Cohen* case, which had dismissed the submission. See 3d Rep.Leg.Doc. (1959) No.17, p.165. The drawing of inferences naturally emanating from the stated facts appears to have been the only thing needed to make the *Cohen* case ripe for a determination. A like case would reach a determination today.

C3222:10 Disposition of the Submission; Judgment.

If the submission is sufficient, the court will render judgment on it. The judgment should be entered at trial level, or a copy of it filed and the judgment entered there, because it may be necessary to seek enforcement of the judgment, which is most appropriate to that level of the court system. Thus, if the appellate division renders a judgment on the submission and the judgment is such as to be susceptible of coercive enforcement--such as a mere money judgment, which would be enforceable under the procedures of CPLR Article 52--the order or judgment should be entered with the county clerk (who is the clerk of the supreme court). For these additional reasons there should always be a file of

the case in some trial-level court, notwithstanding that the submission is made to the appellate division or some other appellate court. See Commentaries C3222:2 and C3222:8. The appellate division may of course direct specifically on these matters in the order or judgment by which it disposes of the submission. See Kinney v. Kinney, 48 A.D.2d 1002, 369 N.Y.S.2d 258 (4th Dep't 1975).

The contents of the judgment-roll in a case under CPLR 3222 are listed in CPLR 5017(b).

Costs should be as agreed on in the stipulation. If the stipulation is silent, costs may be imposed in the discretion of the court.

If the submission is inadequate, the court may dismiss it or--and this is an important proviso in CPLR 3222(b)(5)--"allow the filing of an additional statement". If it appears that a fact is missing and that the parties can agree to what it is, the remedy should be the allowance of a further statement (which should of course be acknowledged like the original submission, unless the court directs otherwise). The court may in the alternative dismiss the submission without prejudice to the filing of a new one, which is what the court ordered in the *Cohen* case (Commentary C3222:9 above).

If an additional fact that the court calls for (being unable to obtain it by inference from the other facts stated) is one on which the parties can't agree, the submission will of course fail and a plenary action in conventional form would apparently have to be used.

Can the appellate division merely transfer such a case down to the trial court with instructions that it be assigned to a judge and allowed to proceed as a plenary action? Perhaps even with summons service dispensed with? In other words, may the original submission itself at least be deemed the parties' submission to jurisdiction?

It all sounds sound enough, but one can visualize a party's argument that it would not have signed the CPLR 3222 submission--and submitted to jurisdiction--if the case required a trial of the facts. That would be a reasonable enough argument if made by a nondomiciliary party who would not have been subject to New York jurisdiction in the absence of the submission, but an attenuated argument if made by a New York domiciliary or a party otherwise clearly subject to New York jurisdiction because of New York's contacts with the transactions or events involved in the case.

These are all speculations, of course. The explicit alternatives authorized by CPLR 3222(b)(4) are a dismissal, or the filing of an additional statement. A transfer to a lower court for adversary proceedings is not on the list, but might be considered if no jurisdictional issues are present.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) of this rule is taken from §§ 546 and 547 of the civil practice act. The Revisers explain that the procedure under this rule should be distinguished from that prescribed in § 3031 under which an action may be commenced and issue joined without pleadings, by filing an agreed statement of the claims and defenses between the parties. Under the latter rule, the pleading stage of the action alone is omitted; the questions of fact and of law still remain to be tried. Under the instant rule, on the other hand, the parties must agree as to the facts upon which the controversy depends and, apart from the possibility of drawing inferences of fact from the facts stated under subd. (b) (4) of this rule, nothing remains for the court but the determination of any issues of law presented by the agreed facts.

It is further noted that subd. (a) of this rule is not limited to "parties of full age" as is § 546 of the civil practice act. Thus,

actions by or against infants may be presented for judgment on submitted facts. There is no reason to make the procedure unavailable in these cases, for the court can insure the protection of the infant's interests. On its face, § 546 of the civil practice act would seem to be applicable to all types of controversies, but courts have indicated that it does not apply to matrimonial actions. See, e.g., Fraioli v. Fraioli, 1 A.D.2d 967, 150 N.Y.S.2d 665 (2d Dep't 1956). This exception has been explicitly stated in this subdivision.

Two other changes in the law are made by subd. (a) of this rule. First, the affidavit presently required has been eliminated and replaced by the statement specified in the next to last sentence of the subdivision. Second, the submission, if presented to the Supreme Court, is required to specify the particular county where the papers are to be filed. Under § 547 of the civil practice act, if the submission does not designate the county clerk with whom the papers are to be filed they may be filed with any such clerk.

Subd. (b) of this rule is derived from C.P.A. §§ 547 (last sentence) and 548. The provisions of § 548 relating to the judgment-roll have been placed in rule 5017, relating to judgment-rolls generally; but the requirement that the copy of the judgment must be certified has been dropped.

A new provision permitting parties to stipulate to have the case determined by a judge, a referee or a special term rather than the Appellate Division was inserted in subpar. 3 of subd. (b) of this rule in the original draft. The Revisers state in the Third Report to the Legislature that this additional flexibility gives some of the advantages of arbitration and may make the procedure more desirable from a litigant's point of view. The Revisers changed this subparagraph in the final draft to expressly allow parties choice of stipulating for hearing by Appellate Division. Special Term, or a specified judge or referee.

Subpar. 4 of subd. (b) is also a new provision designed to overcome the rule that the courts, upon a submission of a controversy, may not draw any inferences from the facts stated except those that follow as a matter of law. See, e.g., Lafrinz v. Whitney, 233 N.Y. 107, 134 N.E. 852 (1922); People v. Hewson, 224 N.Y. 136, 120 N.E. 115 (1918); Gorman's Restaurant v. O'Connell, 275 A.D. 166, 88 N.Y.S.2d 230 (1st Dep't), aff'd 299 N.Y. 733, 87 N.E.2d 454 (1949). It is said that this rule is rigorously applied, and excludes the power to find any additional fact "even if the submitted facts logically and reasonably admit of further important inferences which a trier of the fact might very well draw." Cohen v. Manufacturers Safe Deposit Co., 297 N.Y. 266, 269, 78 N.E.2d 604, 606 (1948). In the Cohen case, for example, the court refused to determine the right to possession of some currency that the plaintiff found in a booth within the defendant's safe deposit vault, although the defendant's control over the vault was clearly indicated by the facts submitted. Cf. Capasso v. Square Sanitarium, Inc., 285 A.D. 1131, 140 N.Y.S.2d 781 (1st Dep't 1955); Graham v. East 88th Street Corp., 282 A.D. 754, 122 N.Y.S.2d 634 (1st Dep't 1953). This is undoubtedly a major factor hampering the usefulness of the action on submitted facts.

The Revisers omitted the second sentence and part of the last sentence of § 548 of the civil practice act relating to costs. They state that the matter of costs is "always in the discretion of the court" under the second sentence of § 548. The limitation in the second sentence that costs "cannot be taxed for any proceeding before notice of trial" is unnecessary, since no such proceedings are contemplated by this procedure. Deletion of the prohibition of costs on dismissal, contained in the last sentence of § 548 of the civil practice act, permits such costs to be left to the discretion of the court.

Official Reports to Legislature for this rule:

3rd Report Leg.Doc. (1959) No. 17, p. 163.

5th Report Leg.Doc. (1961) No. 15, p. 508.

6th Report Leg.Doc. (1962) No. 8, p. 353.

Notes of Decisions (85)

McKinney's CPLR Rule 3222, NY CPLR Rule 3222
Current through L.2019, chapter 758 & L.2020, chapter 21. Some statute sections may be more current, see credits for details.

End of Document

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Only the Westlaw citation
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United States District Court,
S.D. New York.

BANK MIDWEST, N.A., Plaintiff,
v.
HYPO REAL ESTATE
CAPITAL CORP., Defendant.

No. 10 Civ. 232(WHP).
|
Oct. 13, 2010.

Attorneys and Law Firms

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Ronald Sussman, Esq., Cooley Godward Kronish, LLP, New York, NY, for Defendant.

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge.

***1** Plaintiff Bank Midwest, N.A. ("Bank Midwest") brings this diversity action against Defendant Hypo Real Estate Capital Corporation ("Hypo") for breach of contract and unjust enrichment. Defendant moves to dismiss the Complaint for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b) (6). Plaintiff moves for a preliminary injunction under Fed.R.Civ.P. 65. For the following reasons, Defendant's motion to dismiss is granted in part and denied in part, and Plaintiff's motion for a preliminary injunction is denied.

BACKGROUND

For the purposes of Hypo's motion to dismiss, the allegations of the Complaint are accepted as true and summarized here. On April 30, 2007, Bank Midwest, Hypo, and PrivateBank and Trust Company ("PrivateBank"; collectively, the "Lenders") entered into a Loan and Security Agreement (the "Agreement") with 7677 East Berry Avenue Associates L.P. ("East Berry"). (Complaint dated Jan. 12, 2010 ("Compl.") ¶ 1; Compl. Ex. A: Loan and Security Agreement dated Apr. 30, 2007 ("Agreement").) Under the Agreement, the Lenders extended a credit facility to East Berry for the purpose of financing a luxury residential, retail, and entertainment development in Greenwood Village, Colorado. (Compl.¶¶ 12–13.) The credit facility was secured by certain real property in the Greenwood Village development. (Compl.¶ 15.) East Berry gave the Lenders first priority on their loans up to $184,241,000. (Compl.¶¶ 15–16.) The Lenders' security interest in Greenwood Village could not be subordinated without their unanimous consent. (Agreement § 13.9.2.) Hypo is the administrative agent for the Lenders:

> [E]ach Lender hereby irrevocably authorizes [Hypo] to act as agent for Lenders and to take such actions as Lenders are obligated or entitled to take under the provisions of this Agreement and the other Loan Documents and to exercise such powers as are set forth

> herein or therein, together with such other powers as are reasonably incidental thereto.
>
> All acts of and communications by [Hypo], as agent for the Lenders, shall be deemed legally conclusive and binding on the Lenders....

(Agreement § 13.1.) The Agreement is governed by New York law. (Agreement § 11.3.)

On or about August 30, 2009, East Berry filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the District of Colorado. (Compl.¶¶ 2, 18.) At that time, East Berry owed approximately $90,000,000 to the Lenders. (Compl.¶ 17.) Prior to the filing, it made the interest and principal reduction payments required under the Agreement. (Compl.¶ 17.) After filing its Chapter 11 petition, East Berry sought approval from the Bankruptcy Court as a debtor-in-possession ("DIP") for a $15,000,000 loan from Carmel Landmark LLC ("Carmel"). (Compl.¶ 18.)

On September 22, 2009, Hypo, as agent for the Lenders, filed an objection to East Berry's motion for post-petition financing from Carmel. Hypo argued, in part, that the Carmel loan would not adequately protect the Lenders' security interest in East Berry's property. (Compl.¶¶ 22–23.) Three days later, Hypo submitted an Initial Term Sheet to East Berry, purportedly on behalf of the Lenders, proposing terms for a DIP loan of $30,000,000. (Compl.¶¶ 26–28.) The proposal was made without Bank Midwest or PrivateBank's involvement or consent. (Compl.¶ 27.) Hypo's proposed DIP financing would receive priority and the security interest in the Agreement's credit facility would be subordinated to that of the DIP loan. (Compl.¶¶ 28–29.)

***2** By letter dated September 30, 2009, Bank Midwest informed Hypo that it did not consent. (Compl.¶ 31.) Nevertheless, Hypo advised the Bankruptcy Court that the Lenders were willing to provide a DIP loan to East Berry, as an alternative to the Carmel loan. (Compl.¶¶ 33–34.)

On October 7, 2009, East Berry filed a Motion for Approval of Post–Petition Financing from Hypo Real Estate Capital Corporation with the Bankruptcy Court (Compl.¶ 35.) This loan (the "Hypo Loan") was made pursuant to an agreement between Hypo and East Berry. (Compl.¶ 43.) Under the terms of the Hypo Loan, the Lenders' security interest under the Agreement was subordinated to Hypo's security interest in the same property under the Hypo Loan. (Compl.¶¶ 37, 43.) On October 10, 2009, Bank Midwest again advised Hypo that it did not consent to the proposed subordination and that absent the unanimous consent of all Lenders, subordination of the Lenders' security interest would constitute a breach of the Agreement. (Compl.¶¶ 37, 40.)

On October 29, 2009, the Bankruptcy Court issued a Final Order approving the Hypo Loan and granting Hypo an automatically perfected, first-priority security interest DIP Loan in the amount of $30,000,000. (Compl.¶ 43.) The Bankruptcy Court found that the terms of the new loan adequately protected the Lenders against diminution in the value of their security interest (*See* Compl. 143.)

Bank Midwest alleges that Hypo breached the Agreement by issuing a loan to East Berry that subordinated the Lenders' security interest without their consent. (Compl.¶ 53.) Bank Midwest further avers that the Hypo Loan "halted" East Berry's payment of principal and related fees to the Lenders under the Agreement and jeopardizes payment in full of the Lenders' secured claim. (Compl.¶ 44.) In addition, Bank Midwest alleges that this breach has "compromised and impaired the value of the security interest of the [Agreement]" and forced the Lenders to accept "the additional risk associated with the [Hypo] Loan," effectively "transform[ing] Bank Midwest's fully secured claim against the Borrower into a mere unsecured claim against Hypo." (Compl.¶¶ 45–46, 48.) Bank Midwest seeks to enjoin Hypo to "apply all proceeds ... it receives from [East Berry] ... on account of [the Hypo Loan] to pay the Lenders the amounts they are owed under the original Agreement ... [or] the creation of an escrow account for the receipt of proceeds under the DIP Loan...." (Compl.¶ 63.) Alternatively, Bank Midwest seeks damages for breach of contract and unjust enrichment. (Compl.¶¶ 64–74.)

DISCUSSION

I. *Legal Standard*

On a motion to dismiss, a court must accept all facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. *Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir.1998). Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 540 U.S. 544, 556 (2007) (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [his claim]"). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly,* 555 U.S. at 570). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949 (citation omitted). A court's "consideration [on a motion to dismiss] is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Allen v. WestPoint–Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir.1991).

II. *Breach of Contract*

***3** To state a claim for breach of contract under New York law, a plaintiff must allege "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.,* 375 F.3d 168, 177 (2d Cir.2004). A plaintiff must also establish that the breach caused the damages. *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank,* 392 F.3d 520, 525 (2d Cir.2004). Hypo argues that Bank Midwest has not alleged damages or causation.

a. *Damages*

Failure to plead damages is fatal to a breach of contract action. *LNC Invs., Inc. v. First Fid. Bank, N.A. N.J.,* 173 F.3d 454, 465 (2d Cir.1999). Ordinarily, the purpose of contract damages is to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in the position it would have been in had the contract been performed. *Terwilliger v. Terwilliger,* 206 F.3d 240, 248 (2d Cir.2000). Damages may not be speculative. *Ostano Commerzansalt v. Telewide Sys., Inc.,* 794 F.2d 763, 767 (2d Cir.1986). Bank Midwest alleges that it suffered damages from the subordination of its security interest, the concomitant increase in risk, and the cessation of payments under the Agreement.

Hypo's extension of post-petition financing has placed Bank Midwest in a less secure position. Nevertheless, any potential loss based on increased risk is contingent on future events that may not occur. East Berry could continue to develop the Greenwood Village project and ultimately repay its obligations under both the Hypo DIP Loan and the Agreement. Absent a default, Bank Midwest's claim for damages based on the subordination of its security interest is an "undefined future harm [that] is too speculative to constitute a compensable injury." *Cherny v. Emigrant Bank,* 604 F.Supp.2d 605, 609 (S.D.N.Y.2009).

Bank Midwest also alleges that the Hypo Loan has "halted" East Berry's payment of principal and related fees under the Agreement. Nonpayment is a quintessential form of contract damages. *See, e.g .,* *Graham v. James,* 144 F.3d 229, 235 (2d Cir.1998) (upholding damages award for failing to pay as promised under a contract). The Agreement provided for a repayment schedule, and repayment was ongoing at the time of the alleged breach. After the breach, repayment was replaced with a promise to pay. Accordingly, contract damages are adequately pled.

b. *Causation*

"Causation is an essential element of damages in a breach of contract action ... and a plaintiff must prove that a defendant's breach directly and proximately caused his or her damages." *Nat'l Mkt. Share,* 392 F.3d at 525. A breach is a proximate cause of damages if it is a substantial factor in producing those damages. *Point Prods. A.G. v. Sony Music Entm't, Inc.,* 215 F.Supp.2d 336, 344 (S.D.N.Y.2002). If the damages are the "natural and probable consequence" of the breach, then the defendant's actions are a proximate cause of that injury, even if other factors also contributed. *Point Prods.,* 215 F.Supp.2d at 342–43.

***4** Hypo contends that causation cannot be established because any damages were also proximately caused by the current economic and real estate climate, the failure of East Berry's business, and East Berry's voluntary filing for Chapter 11 relief. This argument fails. The existence of other potential causes does not negate a finding that Hypo's actions were a proximate cause of Bank Midwest's injury. *See Coastal Power Int'l, Ltd. v. Transcon, Capital Corp.,* 10 F.Supp.2d 345, 366 (S.D.N.Y.1998) (defendant's failure to provide information to insurers was a proximate cause of plaintiff's damages, despite the existence of other potential causes). Here, Bank Midwest's damages were the "natural and

probable consequence[ ]" of Hypo's alleged breach. *Point Prods.,* 215 F.Supp.2d at 342–43. While the factors mentioned by Hypo may have contributed to the circumstances surrounding Bank Midwest's injury, Bank Midwest was not injured until Hypo provided a DIP Loan to East Berry, which "halted" loan payments under the Agreement. Thus, Hypo's breach of the Agreement was a proximate cause of those damages, albeit perhaps not the exclusive cause. *See Point Prods.,* 215 F.Supp. at 343.

Bank Midwest has alleged a plausible theory of causation sufficient to withstand a motion to dismiss. And issues of proximate cause are often "fact-laden, requiring a fully developed factual record, and not [a] bare-bones motion to dismiss." *In re Sept. 11 Prop. Damage & Bus. Loss Litig.,* 468 F.Supp.2d 508, 525 (S.D.N.Y.2006). Accordingly, Hypo's motion to dismiss Bank Midwest's breach of contract claim for failure to state a claim is denied.

III. *Unjust Enrichment*

To state a claim for unjust enrichment, a plaintiff must allege that "(1) the defendant was enriched; (2) the enrichment was at the plaintiff's expense; and (3) the circumstances are such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Golden Pac. Bankcorp v. F.D.I.C.,* 273 F.3d 509, 519 (2d Cir.2001). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract [i.e., unjust enrichment] for events arising out of the same subject matter." *McDraw, Inc. v. The CIT Grp. Equip. Fin., Inc.,* 157 F.3d 956, 964 (2d Cir.1998) (brackets in original). However, a plaintiff may proceed on a theory of unjust enrichment despite the existence of a valid contract where "the contract does not cover the dispute in issue." *Mid–Hudson Catskill Migrant Ministry, Inc. v. Fine Hosp. Corp.,* 418 F.3d 168, 175 (2d Cir.2005).

Bank Midwest contends that the Agreement does not cover this dispute because Hypo's breach of its agency duties is separate and distinct from its breach of the Agreement. Specifically, Bank Midwest argues that in proposing a DIP loan, Hypo violated its implied duty to comply with its principals' instructions and acted outside the scope of its actual authority. Bank Midwest draws a fine distinction between proposing a DIP loan, which it argues is outside the scope of the Agreement, and executing a DIP loan.

***5** This argument is unavailing. Apart from requiring the consent of all Lenders prior to executing a loan that subordinated the Agreement's security interest, the Agreement also sets forth the terms of the agency relationship itself. (*See* Agreement § 13 ("Agent shall have no implied duties to Lenders....").) Thus, the Agreement covers a dispute arising from violations of the agency relationship. *See G.K. Alan Assocs. v. Lazzari,* 840 N.Y.S.2d 378, 384 (N.Y.App.Div.2007) ("The duties of an agent are defined by the terms of the agreement that gave rise to the agency."). Accordingly, Bank Midwest's unjust enrichment claim is dismissed.

IV. *Collateral Estoppel*

"Collateral estoppel bars a plaintiff from relitigating an issue that has already been fully and fairly litigated in a prior proceeding." *Bank of N.Y. v. First Millennium, Inc.,* 607 F.3d 905,

918 (2d Cir.2010). Four elements must be met for issue preclusion to apply:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

Bank of N.Y., 607 F.3d at 918 (internal quotations omitted).

Hypo argues that the Bankruptcy Court's determination of (1) adequate protection and (2) priority of distribution precludes this Court from hearing Bank Midwest's breach of contract claim.[1] Because the issues before the Bankruptcy Court were not "identical" to those presented here, this Court disagrees. Nothing in this action requires this Court to revisit the Bankruptcy Court's determination of adequate protection or subordination of the original loan to the Hypo Loan. Those determinations are not relevant to the validity and interpretation of the Agreement, the legality of Hypo's actions under the Agreement, and the damages incurred by Bank Midwest.

A similar claim preclusion argument was addressed in *American Manufacturing Services, Inc. v. The Official Committee of Unsecured Creditors of the Match Electronics Group* No. 05 Civ. 242(TJM), 2006 WL 839550 (N.D.N.Y. Mar. 28, 2006). There, the plaintiff, American Manufacturing Services ("AMS") contracted with the Official Committee of Unsecured Creditors (the "Committee") during the course of a bankruptcy proceeding to enlist its cooperation in AMS's efforts to secure financing. Later, the Committee instituted an adversary proceeding against AMS and a proposed settlement was rejected by the court. AMS then sued the Committee for breach of contract, and the Committee argued that collateral estoppel barred the claim because "the Bankruptcy Court approved of the commencement of the Adversary Proceeding against AMS and ... rejected the proposed settlement agreement." *Am. Mfg.,* 2006 WL 839550, at *7. The district court was not persuaded. Although the bankruptcy court authorized the Committee to commence the adversary proceeding, the district court held that:

> ***6** [i]t did not ... rule on the issue of whether such a proceeding was in contravention of any agreements with the Plaintiff. Similarly, the Bankruptcy Court ... did not address whether the Committee's conduct in opposing the settlement agreement constitute[d] a breach of contract.

Am. Mfg., 2006 WL 839550, at *7. Thus, the district court concluded that the two

proceedings lacked "identity of issues." *Am. Mfg.*, 2006 WL 839550, at *7. That reasoning applies with equal force here. Although the Bankruptcy Court ruled on issues related to the contract, it did not address the questions that this Court must decide in a breach of contract action. Accordingly, Bank Midwest's breach of contract claim is not barred by collateral estoppel.

V. *Plaintiff's Application for a Preliminary Injunction*

Bank Midwest seeks a preliminary injunction (1) directing Hypo to apply all proceeds from the Hypo Loan to pay the Lenders the amounts they are owed under the Agreement, or, in the alternative, (2) creating an escrow account for the receipt of proceeds from East Berry under the Hypo Loan until the rights of the parties can be determined. For purposes of deciding whether Bank Midwest is entitled to a preliminary injunction, this Court considers the declarations and exhibits submitted in connection with the motion.

A preliminary injunction may be granted where the moving party establishes "(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Monserrate v. N.Y. State Senate,* 599 F.3d 148, 154 (2d Cir.2010). Irreparable harm is "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Imp. Sales Co. v. Labatt Brewing Co.,* 339 F.3d 101, 113 (2d Cir.2003). "If an injury can be appropriately compensated by an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief." *Register.com, Inc. v. Verio, Inc.,* 356 F.3d 393, 404 (2d Cir.2004). Furthermore, the injury must not be "remote or speculative." *Reuters Ltd. v. United Press Int'l, Inc .,* 903 F.2d 904, 907 (2d Cir.1990).

Impairment of a security interest or a shift in bargained-for risk may constitute irreparable harm where the lender's only recourse is against the borrower. *See Citibank, N.A. v. Singer Co .,* 684 F.Supp. 382, 385–86 (S.D.N.Y.1988) (irreparable harm found where a credit agreement required provision of security on lender's request, and the borrower refused to provide that security); *E. N.Y. Sav. Bank v. 520 W. 50th St., Inc.,* 611 N.Y.S.2d 459, 462 (N.Y.Sup.Ct.1994) (irreparable harm found where rent decrease would impair the value of a mortgagee's security interest). In this case, Bank Midwest is suing Hypo, not the borrower, East Berry. If Bank Midwest prevails here, it will have recourse against Hypo and cannot assert that its only hope of repayment lies in the collateral under the Agreement. Moreover, Bank Midwest's damages are easily quantifiable as the amount due to Bank Midwest under the Agreement. Accordingly, because Bank Midwest fails to establish that a monetary remedy would be inadequate in this breach of contract action, its motion for a preliminary injunction is denied.

CONCLUSION

***7** For the foregoing reasons, Defendant Hypo Real Estate Capital Corporation's motion to

dismiss Plaintiff Bank Midwest's breach of contract claim is denied, and its motion to dismiss Plaintiff's unjust enrichment claim is granted. Plaintiff's motion for a preliminary injunction is denied.

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2010 WL 4449366

Footnotes

1 While Hypo's arguments confuse claim preclusion and issue preclusion, this Court is satisfied that Hypo asserts a defense of *issue* preclusion:

> The Court: You're asserting claim preclusion here. But isn't it really issue preclusion?
> [Hypo's atty.]: It is, your Honor, it is.

Tr. Oral Arg. Dated May 7, 2010; *see also* Def.'s Reply Memo. 4 (“Hypo does not contest that when, and if, Plaintiff's breach of contract claim is ripe for adjudication and Plaintiff has suffered actual damages, it may pursue that claim in this Court.”).

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United States District Court,
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CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) HEALTH AND WELFARE FUND, Plaintiff,
v.
LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHICAGO TRUCK DRIVERS, HELPER AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, Defendants.

No. 02 C 3115.
|
March 4, 2005.

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MEMORANDUM OPINION AND ORDER

GUZMÁN, J.

***1** Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund ("Health and Welfare Fund") seeks a declaratory judgment against Local 710, International Brotherhood of Teamsters ("Local 710") and Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund ("Pension Fund") that the demutualization compensation for four employee-benefit plans of Principal Financial Group ("Principal") is a plan asset and should revert to the participants of the plans. Before the Court is the Health and Welfare Fund's motion for summary judgment and Local 710's motion for partial summary judgment. For the reasons provided in this Memorandum Opinion and Order, the Court grants in part and denies in part both motions.

FACTS

This controversy stems from Principal's conversion from a mutual insurance company into a public stock company, a process known as a "demutualization." Principal adopted its plan for demutualization on March 31, 2001. (Pl.'s LR 56.1(a)(3) ¶ 27.) When a mutual insurance company undergoes a demutualization, eligible policyholders receive compensation. (*See* Local 710's LR 56.1(a)(3) ¶ 2; Local 710's Ex. 1, Letter from Principal to Policyholders of 10/26/01.) This compensation is given because policyholders lose ownership

interests in the mutual insurance company when it becomes a stock company. (Local 710's Ex. 1, Letter from Principal to Policyholders of 10/26/01.) In the instant case, the Health and Welfare Fund received compensation from Principal for four different employee benefit plans: an in-house pension plan, a severance plan, a life insurance plan, and a 401(k) plan. The Health and Welfare Fund now seeks a declaratory judgment as to whom is entitled to the demutualization compensation. The issues in this case are whether the demutualization compensation is an asset of the plans, and, if so, whether the compensation reverts to the participants of the plan or to the employers.

Local 710 is a local union affiliated with the International Brotherhood of Teamsters. (Pl.'s LR 56.1(a)(3) ¶ 5.) The Chicago Truck Drivers, Helpers and Workers Union Independent (the "CTDU") merged into Local 710 on February 1, 2001. (*Id.* ¶ 7.) The CTDU was an independent labor union representing employees in the trucking, warehousing, and related industries in and around the Chicago area. (*Id.* ¶ 6.) After the merger, the CTDU ceased operation as a labor organization, and Local 710 is a successor to the rights and liabilities of the CTDU. (*Id.* ¶¶ 12-13.) The Health and Welfare Fund and Pension Fund were established by the CTDU for the benefit of CTDU members covered by collective bargaining agreements with participating employers. (*Id.*)

The first of the benefit plans at issue in this case, a retirement plan for their office employees (the "in-house pension plan"), was established by the Health and Welfare Fund, the Pension Fund, and the CTDU in 1961. (*Id.* ¶ 14.) This plan was funded through a group annuity contract with Bankers Life and Casualty and later Principal. (*Id.*) It was funded by contributions from the Health and Welfare Fund, the Pension Fund, and the CTDU on behalf of their employees. (*Id.* ¶ 15.) The plan was terminated in 1987. (*Id.* ¶ 16.) When the plan was terminated, all active employees who would have been eligible for a benefit received a lump sum payment, while former employees who had retired and were receiving benefits continued to receive a defined monthly benefit through a group annuity contract with Principal. (*Id.* ¶¶ 17-18.) This contract was fully funded at the time of the discontinuation of the plan. (Pl.'s Ex. 3, Boudreau Aff. ¶ 20.) The Health and Welfare Fund received a check from Principal in the amount of $1,200,280.00 as demutualization compensation in connection with the in-house pension plan. (Pl.'s LR 56.1(a)(3) ¶ 31.)

***2** The supplemental retirement and security plan ("severance plan") was established in 1969. (*Id.* ¶ 22.) Like the in-house pension plan, the severance plan is funded by an annuity contract with Principal. (*Id.* ¶ 23.) The severance plan is currently in effect for employees of the Health and Welfare Fund and the Pension Fund, but employees of the CTDU left the severance plan and received their benefit payments on or before the CTDU and Local 710 merged. (Pl.'s Ex. 3, Boudreau Aff. ¶¶ 26-27.) The Health and Welfare Fund received a check from Principal in the amount of $78,329.00 as demutualization compensation in connection with the severance plan. (Pl.'s LR 56.1(a)(3) ¶ 30.)

The employees' savings plan ("401(k) plan") was established in July, 1983. (*Id.* ¶ 20.) This

plan is a voluntary program for employees and is funded by contributions by the employees. (*Id.* ¶ 21.) The 401(k) plan is in effect for the employees of all three parties in this case-the Health and Welfare Fund, Pension Fund, and Local 710. (Pl.'s Ex. 3, Boudreau Aff. ¶ 32.) The Health and Welfare Fund received a check from Principal in the amount of $85,766.00 as demutualization compensation in connection with the 401(k) plan. (Pl.'s LR 56.1(a)(3) ¶ 31.)

Finally, the member life, accidental death, and dismemberment policy (the "life insurance plan") was established in February 1992. (*Id.* ¶ 24; Pension Fund's Ex. F, U.S. Dep't of Labor's Pension & Welfare Benefits Admin. Office of Regs. & Interpretations Advisory Op. 94-31A.) This plan was funded by contributions from the Health and Welfare Fund, the Pension Fund, and the CTDU on behalf of their respective employees. The benefits of this plan are paid through a group policy with Principal. (Pl.'s LR 56.1(a)(3) ¶ 26.) Employees of the Health and Welfare Fund and the Pension Fund currently participate in the plan, but the CTDU ceased participation in the life insurance plan upon its merger with Local 710. (Pl.'s Ex. 3, Boudreau Aff. ¶ 35.) The Health and Welfare Fund received 541 shares of Principal common stock as demutualization compensation in connection with the life insurance plan. (Pl.'s LR 56.1(a)(3) ¶ 32.)

Local 710 argues that the compensation from the demutualization reverts to the employers-the Health and Welfare Fund, the Pension Fund, and Local 710 as successor to the CTDU, with the exception of the 401(k) plan. (*Id.* ¶ 34.) The Health and Welfare Fund, on the other hand, argues that the demutualization compensation should be used for the benefit of the participants of the various plans. (*Id.* ¶ 35.) The Health and Welfare Fund brought suit, seeking a declaratory judgment of the rights of the parties to the demutualization compensation. (Compl.¶ 32.) Before the Court is the Health and Welfare Fund's motion for summary judgment seeking a declaratory judgment that the demutualization compensation is a plan asset to be used for the benefit of the participants of the plans and Local 710's motion for partial summary judgment, seeking a declaration that the demutualization compensation reverts to the employers.

DISCUSSION

***3** Pursuant to Federal Rule of Civil Procedure 56(c), the court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). When considering the evidence submitted by the parties, the court does not weigh it or determine the truth of asserted matters. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All facts must be viewed and all reasonable inferences drawn in the light most favorable to the non-moving party. *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 234 (7th Cir.1995). "If no reasonable jury could find for the party opposing the motion, it must be granted." *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 931 (7th Cir.1995).

Summary judgment is appropriate in this case because there are no material facts in dispute. Therefore, the movants are entitled to a judgment as a matter of law.

The first issue is whether the demutualization compensation is a plan asset of the various plans. ERISA does not define plan assets. *See Bannistor v. Ullman,* 287 F.3d 394, 402 (5th Cir.2002). The U.S. Department of Labor has issued advisory opinions that address the issue of whether the demutualization compensation is a plan asset. (Pension Fund's Ex. A, U.S. Dep't of Labor's Pension & Welfare Benefits Admin. Office of Regulations & Interpretations Advisory Op. 92-02A (2002); Pl.'s Ex. 5, EBSA Advisory Op.2001-02A n. 1 (2001).) "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Mead Corp. v. B.E. Tilley,* 490 U.S. 714, 722, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989). An agency's advisory opinions are not binding authority, but they are "entitled to deference, such that the interpretation will be upheld so long as it is reasonable." *Reich v. McManus,* 883 F.Supp. 1144, 1153 (N.D.Ill.1995). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

According to the Department of Labor:

> The proceeds of the demutualization will belong to the plan if they would be deemed to be owned by the plan under ordinary notions of property rights.... In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid for out of trust assets, it is the view of the department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets.

(Pl.'s Ex. 5, EBSA Advisory Op.2001-02A n. 1 (2001).) Determining whether the demutualization compensation consists of a plan asset under ordinary notions of property rights requires "consideration of any contract or other legal instrument involving the plan documents. It also requires the consideration of the actions and representations of the parties involved." (Pension Fund's Ex. A, U.S. Dep't of Labor's Pension & Welfare Benefits Admin. Office of Regulations & Interpretations Advisory Op. 92-02A (2002).)

***4** In *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.,* 903 F.2d 1232 (9th Cir.1990), the Ninth Circuit Court of Appeals considered the issue of whether stock issued as demutualization compensation for a long-term disability insurance plan could revert to an employer. This plan was wholly funded by contributions from the participants of the plan. *Id.* at 1238. The court held that allowing the compensation to revert to the employers would give the employers an undeserved

windfall. *Id.* As a result, the "balancing of equities" weighed in favor of allowing the demutualization compensation to revert to the employees. *Id.*

Like the disability plan in *Ruocco,* the contributions to the 401(k) plan in this case were made entirely by the employees, outside of minor administrative costs. Therefore, the demutualization compensation should revert to the employees. This conclusion was undisputed and is now stipulated by the parties. (*See* Pension Fund's Resp. Pl.'s Mot. Summ. J. at 11-12; Local 710 Mem. Opp'n Pl.'s Mot. Summ. J. at 14; Joint Mot. Partial Dismissal & Release of Funds ¶ 4.) Moreover, like the plan in *Ruocco,* the 401(k) plan in this case is an employee pension benefit plan wholly funded by the participants of the plan. Because the plan was fully funded by the employees, they are entitled to the compensation as a result of their loss of ownership in Principal. As in *Ruocco,* awarding this compensation to the employers would give them an undeserved windfall-they would be receiving money as a result of the investment of the participants of the plans, not their own efforts. Accordingly, the demutualization compensation attributable to the 401(k) plan reverts to the employees.

Determining whether the demutualization compensation is a plan asset for the remaining plans is a closer issue. Following the guidelines of the EBSA, this Court will follow ordinary notions of property rights and look to the plan documents and representations by the parties to determine whether the demutualization compensation is a plan asset. There is no evidence that the parties made any representations other than in the plan documents as to whether or not the demutualization compensation is a plan asset. Therefore, this Court will focus on the language of the plans to determine this issue.

After examining the plan documents, this Court holds that the demutualization compensation is a plan asset for the in-house pension plan and the severance plan, but not for the insurance plan. At first blush, the compensation would appear not to be a plan asset for any of the remaining plans because it is undisputed that these plans were funded by the employers. Determining that the compensation reverts to the plans and not the employers could therefore result in an undeserved windfall to the plans. However, both the in-house pension plan and severance plan are "employee pension benefit plans." As a result, the compensation would be presumed to be a plan asset under the EBSA Advisory Opinion unless language in the plan documentation suggests otherwise.

***5** In interpreting the language of a contract, a court's primary purpose is to discern the intent of the parties. *See Volt Info. Scis., Inc. v. Bd. Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 488, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). In this case, however, neither the in-house pension plan nor the severance plan specifically addresses the issue of demutualization compensation. The demutualization compensation would therefore be presumed to be a plan asset under the EBSA Advisory Opinion 2001-02A quoted above. The plans do address the issue of whether any dividends awarded under the plans would revert to the employers or become plan assets. Both plans declare that "[d]ividends declared under the Group Contract and forfeitures

shall be applied to reduce future Employer Contributions." (Pl.'s Ex. B, Health & Welfare Fund & Pension Fund Employees Retirement Plan at 21, Pl.'s Ex. D, Health & Welfare Fund & Pension Fund Employees Restated Supplemental Retirement & Security Plan at 22.) This language suggests that the dividends would become plan assets used to pay for the plans, rather than simply reverting to the employers to be used however they wish. Like dividends, the demutualization compensation at issue in this case comes from Principal. The language in the plans regarding dividends shows that the parties intended future compensation from Principal to become a plan asset. Although the language of the plans with regard to the disposition of dividends alone is not determinative, coupled with the EBSA's view that demutualization compensation ordinarily becomes a plan asset for an employee pension plan, it is sufficient to convince the Court that the demutualization compensation is a plan asset for the in-house pension plan and the severance plan.

Local 710 argues that the language in the plans regarding dividends should not affect the outcome of this case because demutualization compensation is not a dividend. (Local 710's Mem. Opp'n Pl.'s Mot. Summ. J. at 10.) It is true that the demutualization compensation is not a dividend, but it is awarded to policyholders in exchange for loss of ownership interests in the company. Dividends are payments by a company to its stockholders. RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPALS OF CORPORATE FINANCE 64 (5th ed.1996). When a mutual insurance company demutualizes, it compensates policyholders for the loss of their ownership interests, which therefore includes their ability to receive dividends. *See id.* at 417-38.

Local 710 points out that Principal "will continue to pay policy dividends as declared." (Pl.'s Ex. K, Plan of Conversion of Principal Mut. Holding Co. at A-3.) However, this language only means that Principal will continue to pay *declared* dividends. It does not mean that Principal can award new dividends in the future. In addition, there is no evidence that Principal has awarded dividends for any of the plans at issue in this case. Therefore, the fact that demutualization compensation is not a dividend is insufficient to overcome the strong presumption that it is a plan asset given the specific facts of this case.

***6** Although the demutualization compensation is a plan asset for the in-house pension plan and severance plan, this does not necessarily mean that it reverts to the participants of the plans. The plans state: "No part of the plan assets shall be paid to the Employer at any time, except that, after the satisfaction of all liabilities under the Plan, any assets remaining will be paid to the Employer. The payment may not be made if it would contravene any provision of law." (Pl.'s Ex. B, Health & Welfare Fund & Pension Fund Employees Retirement Plan at 47; Pl.'s Ex. D, Health & Welfare Fund & Pension Fund Employees Restated Supplemental Retirement & Security Plan at 56.) Under the terms of the plans, therefore, the demutualization compensation, as a plan asset, may be distributed to the employers if the plan has satisfied all of its liabilities.

Because the in-house pension plan has been terminated, it has satisfied all of its liabilities to the participants and their beneficiaries. The Pension Fund argues that since former employees are continuing to receive benefits under this plan, the plan has not satisfied all of its liabilities. (Pension Fund's Resp. Mot. Summ. J. at 13.) However, it is undisputed that these participants are receiving their benefits under a plan that was fully funded at the time of the termination of the in-house pension plan. Therefore, the in-house pension plan has no "liabilities" and the demutualization compensation reverts to the contributing employers-the Health and Welfare Fund, the Pension Fund, and Local 710 as successor to the CTDU.

The plan provides that residual assets may be distributed to an employer so long as no provision of law is violated. ERISA addresses the issue of whether residual assets may be distributed to an employer:
(d) Distribution of residual assets....

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if -

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

....

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities ... such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries....

29 U.S.C. § 1344 (2003). The in-house pension plan satisfies all of these requirements. As noted above, all liabilities of the plan have been satisfied and the plan provides for a distribution of the assets to the employers. In addition, no provision of law has been violated, and the Health and Welfare Fund does not cite to any law that would be violated by distributing the compensation to the employers. Finally, it is undisputed that the employers were responsible for the contributions to the plans, not the employees. Therefore, no equitable distribution to the participants need be made.

***7** The Health and Welfare Fund argues that the compensation cannot be distributed to three employers, *i.e.,* the Health and Welfare Fund, the Pension Fund, and Local 710, because the language of the statute is in the singular. The statute provides "any residual assets of a single-plan may be distributed to *the* employer...." 29 U.S.C. § 1344(d) (emphasis added). The Court is not persuaded that this language prevents the compensation from being distributed to three employers when all three employers have made contributions to the plan. This is especially true because, as the Health and Welfare Fund points out, the plans at issue in this case are single-employer plans despite the fact that multiple employers fund the plans. (*See* Mem. Supp. Mot. Summ. J. at 7.) The Court therefore holds that the demutualization compensation

for the in-house pension plan reverts to the three employers that are parties in this case-the Health and Welfare Fund, the Pension Fund, and Local 710.

Unlike the in-house pension plan, the severance plan has not been terminated and is currently in full force and effect for employees of the Health and Welfare Fund and the Pension Fund. Because the plan provides that the assets of the plan shall not be distributed to the employers until after satisfaction of all liabilities of the plan, the demutualization compensation does not revert to the employers. The compensation should be used to reduce future contributions by the two remaining employers in the case-the Health and Welfare Fund and the Pension Fund. If at some point the Health and Welfare Fund and the Pension Fund satisfy all of their liabilities under the plan, Local 710 would then be entitled to a share of the demutualization compensation, using the same reasoning as applied to the in-house pension plan.

Unlike the in-house pension plan and the severance plan, the life insurance plan is not an employee pension plan. A "pension plan" is defined by ERISA as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond....

29 U.S.C. § 1002(2)(A). Unlike a pension plan, the life insurance plan fits under the ERISA definition of "an employee welfare benefit plan" because it provides "benefits in the event of ... death...." 29 U.S.C. § 1002(1)(A). The EBSA discussed the disposition of demutualization compensation for an employee welfare benefit plan in the Advisory Opinion 2001-02A, which states:

> [I]n the case of an employee welfare benefit plan ... the appropriate plan fiduciary must treat as plan assets the portion of the demutualization proceeds attributable to participant contributions .... [and] the plan fiduciary should give appropriate consideration to those facts and circumstances that the fiduciary knows or should know are relevant to the determination, including the documents and instruments governing the plan....

***8** (Pl.'s Ex. 5, EBSA Advisory Op.2001-02A at n. 2.)

In this case, it is undisputed that the employers made all of the contributions to the plans. Therefore, there is no reason to treat any portion of the demutualization compensation as a plan asset. In addition, there is nothing in the language of the plan to suggest that the parties intended demutualization compensation

to become a plan asset. Unlike the in-house pension plan and the severance plan, there is no language in the life insurance plan regarding dividends. The plan is silent with respect to possible assets such as dividends or demutualization compensation. As a result, the employers have made no representations suggesting that demutualization compensation would be a plan asset in the language of the plans. Therefore, the Court holds that the demutualization compensation is not a plan asset for the life insurance plan and that it reverts to the Health and Welfare Fund, the Pension Fund, and Local 710.

The Pension Fund argues that Local 710 is not entitled to any of the demutualization compensation for the life insurance plan because Local 710 has not contributed to the plan. (Pension Fund's Resp. Pl.'s Mot Summ. J. at 11.) It is undisputed that the CTDU made contributions to the life insurance plan, however, and it is also undisputed that Local 710 is a successor to all the rights and liabilities of the CTDU. Therefore, Local 710 is entitled to a share of the demutualization compensation attributable to the contributions made by the CTDU.

CONCLUSION

For the reasons provided in this Memorandum, the Court grants in part and denies in part the Health and Welfare Fund's Motion for Summary Judgment [doc. no. 12-1] and Local 710's Motion for Partial Summary Judgment [doc. no. 19-1]. The Court enters a declaratory judgment that: (1) the demutualization compensation attributable to the 401(k) plan reverts to the participants of the plan as stipulated in the Joint Motion for Partial Dismissal and Release of Funds; (2) the demutualization compensation attributable to the severance plan must be used to offset future employer contributions; and (3) the demutualization compensation attributable to the in-house pension plan and life insurance plan reverts to the employers. This case is hereby terminated.

SO ORDERED

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28 N.Y. Prac., Contract Law § 4:21

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Part II. Contract Formation

Chapter 4. Implied Contracts

III. Implied-in-Law

§ 4:21. Unjust enrichment—Limitations on application

References

A claim for unjust enrichment arises when the defendant gets something that rightfully belongs to another. [1] Accordingly, the claim cannot be used to take from a defendant what rightfully belongs to it. [2]

The exercise of a right accorded by a contract cannot give rise to a claim for unjust enrichment. [3] Equity and good conscience do not require a party to give up what it rightfully obtained, or is entitled to, under a contract. [4]

The receipt of bargained-for benefits under a contract does not unjustly enrich the receiving party. [5] Payments made pursuant to the express terms of a contract cannot be recovered via an unjust enrichment theory. [6] Similarly, retaining a deposit as a liquidated damage upon failure to proceed with a contract is not an unjust enrichment. [7]

A claim for unjust enrichment arises when some benefit is bestowed upon the defendant. [8] The claim requires that the defendant actually has been enriched. [9] It cannot rest on hypothetical future events. [10]

An unjust enrichment claim may be pre-empted by federal law. For example, because federal copyright law protects against the unauthorized use of copyrighted material, an unjust enrichment claim based upon such use is pre-empted. [11] Similarly, federal law pre-empted a claim based on unjust enrichment arising from the pricing of airline tickets. [12] An unjust enrichment claim may not impinge upon the patent law and cannot be used to obtain a patent-like royalty for the making, using or selling of a product. [13]

An unjust enrichment claim cannot be used to obtain a recovery that otherwise would be barred on grounds of illegality. [14] The claim also may be untenable when used to seek a recovery when a contract claim that is barred by the Statute of Frauds. [15] Claims for quantum meruit and unjust enrichment cannot be used to circumvent the statute of frauds. [15.50]

A claim for unjust enrichment is not a remedy for recovery of expenses of a failed negotiation that did not result in a contract. [16]

An unjust enrichment claim that is duplicative of a breach of contract [17] or conventional tort [18] claim may be dismissed. This rule applies even though the breach of contract claim is not viable. [19]

If the subject matter of an unjust enrichment claim is addressed in the parties' contract, a claim for unjust enrichment is usually barred.[20] Similarly, a party may not be able to pursue a quantum meruit remedy if the parties have entered into a contract that governs the subject matter of the quantum meruit claim.[21] Where, however, the parties entered into a contract but the amount of compensation due under the contract is unclear, the party seeking compensation may pursue both breach of contract and quasi contract claims.[22] An unjust enrichment claim may be asserted concurrently with a breach of contract claim where the unjust enrichment arises from facts wholly independent of the contract.[23] A plaintiff may proceed with the claim despite the existence of a valid contract where the contract does not cover the dispute that gives rise to the unjust enrichment claim.[24]

An unjust enrichment claim may be dismissed when the complaint fails to explain why it would be unjust for defendant to retain the benefit at issue.[25] An unjust enrichment claim is not a catchall cause of action to be used when others fail; rather, it applies in the unusual situation where, though the defendant has not breached a contract or committed a tort, circumstances create an equitable obligation running from defendant to plaintiff.[26]

Footnotes

1 Mente v. Wenzel, 178 A.D.2d 705, 577 N.Y.S.2d 167 (3d Dep't 1991).

2 See 900 Unlimited, Inc. v. MCI Telecommunications Corp., 215 A.D.2d 227, 227, 626 N.Y.S.2d 188, 188 (1st Dep't 1995) (there can be no unjust enrichment where defendant had the right to retain monies pursuant to contract).

3 Cohen v. Nassau Educators Federal Credit Union, 37 A.D.3d 751, 832 N.Y.S.2d 50 (2d Dep't 2007).

4 Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 767 F. Supp. 1269, 1284 (S.D. N.Y. 1991), judgment aff'd in part, rev'd in part on other grounds, 970 F.2d 1138, 15 Employee Benefits Cas. (BNA) 1993 (2d Cir. 1992), judgment aff'd, 510 U.S. 86, 114 S. Ct. 517, 126 L. Ed. 2d 524, 17 Employee Benefits Cas. (BNA) 1657 (1993) (bargained for benefits cannot be deemed to unjustly enrich a contracting party).

5 Kottler v. Deutsche Bank AG, 607 F. Supp. 2d 447, 467, R.I.C.O. Bus. Disp. Guide (CCH) P 11615 (S.D. N.Y. 2009).

6 Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp. 2d 275, 312, 1998-2 Trade Cas. (CCH) ¶ 72301, 41 Fed. R. Serv. 3d 1345, 36 U.C.C. Rep. Serv. 2d 1238 (S.D. N.Y. 1998) (rejected on other grounds by, Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 354 (S.D. N.Y. 2010)); see also Shilkoff, Inc. v. 885 Third Avenue Corp., 299 A.D.2d 253, 253, 750 N.Y.S.2d 53, 54 (1st Dep't 2002) (plaintiff's cause of action was properly dismissed because it was not unjust for defendant to retain funds obtained pursuant to its clear contractual right).

7 Ittleson v. Barnett, 304 A.D.2d 526, 758 N.Y.S.2d 360 (2d Dep't 2003).

8 M+J Savitt, Inc. v. Savitt, 2009 WL 691278, *10 (S.D. N.Y. 2009).

9 Axel Johnson, Inc. v. Arthur Andersen & Co., 830 F. Supp. 204, 212, Fed. Sec. L. Rep. (CCH) P 97741 (S.D. N.Y. 1993).

10 Axel Johnson, Inc. v. Arthur Andersen & Co., 830 F. Supp. 204, 212, Fed. Sec. L. Rep. (CCH) P 97741 (S.D. N.Y. 1993).

11 Spinelli v. National Football League, 96 F. Supp. 3d 81, 2015-1 Trade Cas. (CCH) ¶ 79121 (S.D. N.Y. 2015); 17 U.S.C.A. § 301(a). See also Netzer v. Continuity Graphic Associates, Inc., 963 F. Supp. 1308, 1322 (S.D. N.Y. 1997); Arden v. Columbia Pictures Industries, Inc., 908 F. Supp. 1248, 1264, 38 U.S.P.Q.2d 1104 (S.D. N.Y. 1995).

12 Lehman v. USAIR Group, Inc., 930 F. Supp. 912, 915 (S.D. N.Y. 1996).

13 Medisim Ltd. v. BestMed LLC, 959 F. Supp. 2d 396 (S.D. N.Y. 2013), aff'd in part, vacated in part on other grounds, remanded, 758 F.3d 1352, 111 U.S.P.Q.2d 1741, 89 Fed. R. Serv. 3d 382 (Fed. Cir. 2014).

14 Hartman v. Harris, 810 F. Supp. 82, 85 n.11 (S.D. N.Y. 1992), aff'd, 996 F.2d 301 (2d Cir. 1993); see also Segrete v. Zimmerman, 67 A.D.2d 999, 413 N.Y.S.2d 732 (2d Dep't 1979); Restatement Second, Contracts § 197.

15 Snyder v. Bronfman, 13 N.Y.3d 504, 893 N.Y.S.2d 800, 921 N.E.2d 567 (2009).

15.50 Foros Advisors LLC v. Digital Globe, Inc., 333 F. Supp. 3d 354 (S.D. N.Y. 2018).

16 Chatterjee Fund Management, L.P. v. Dimensional Media Associates, 260 A.D.2d 159, 687 N.Y.S.2d 364 (1st Dep't 1999); Songbird Jet Ltd., Inc. v. Amax, Inc., 581 F. Supp. 912, 926, 38 U.C.C. Rep. Serv. 431 (S.D. N.Y. 1984).

17 Benham v. eCommission Solutions, LLC, 118 A.D.3d 605, 989 N.Y.S.2d 20 (1st Dep't 2014).

18 Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012).

19 Benham v. eCommission Solutions, LLC, 118 A.D.3d 605, 989 N.Y.S.2d 20 (1st Dep't 2014).

20 Cox v. NAP Const. Co., Inc., 10 N.Y.3d 592, 607, 861 N.Y.S.2d 238, 891 N.E.2d 271, 13 Wage & Hour Cas. 2d (BNA) 1353 (2008).

21 Abcon Associates, Inc. v. Najarian, 166 F. Supp. 3d 266 (E.D. N.Y. 2016) citing Aviv Const., Inc. v. Antiquarium, Ltd., 259 A.D.2d 445, 687 N.Y.S.2d 344 (1st Dep't 1999).

22 Baker v. Robert I. Lappin Charitable Foundation, 415 F. Supp. 2d 473, 485 (S.D. N.Y. 2006).

23 Sebastian Holdings, Inc. v. Deutsche Bank AG, 78 A.D.3d 446, 912 N.Y.S.2d 13 (1st Dep't 2010).

24 Bank Midwest, N.A. v. Hypo Real Estate Capital Corp., 2010 WL 4449366, *4 (S.D. N.Y. 2010).

25 Aquino v. Douglas Elliman Realty, LLC, 155 A.D.3d 472, 65 N.Y.S.3d 130 (1st Dep't 2017); Meregildo v. Diaz, 154 A.D.3d 630, 63 N.Y.S.3d 52 (1st Dep't 2017).

26 American Bio Medica Corporation v. Bailey, 341 F. Supp. 3d 142, 2018 I.E.R. Cas. (BNA) 351941 (N.D. N.Y. 2018).

End of Document

31 Carmody-Wait 2d § 172:76

Carmody-Wait 2d New York Practice with Forms | February 2020 Update

Chapter 172. Criminal Proceedings in General; Jurisdiction and Venue
Kimberly C. Simmons, J.D.

VI. Rules of Decision; Stare Decisis and Law of the Case

B. Stare Decisis Doctrine

1. Stare Decisis Doctrine, in General

§ 172:76. Statement and purpose of stare decisis doctrine

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Courts 88, 89

Legal Encyclopedias

- N.Y. Jur. 2d, Courts and Judges § 207 (Nature of stare decisis, generally)

The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision. [1] The legal doctrine of stare decisis directs courts to adhere to, and abide by previous judicial precedent on a question of law, particularly when that precedent is found in a decision from an appellate court and when that earlier ruling was an integral part of the decision in the earlier case and was not merely incidental, obiter dicta, to it. [2] Stare decisis holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court will generally be followed in subsequent cases presenting the same legal problem. [3] Therefore, the purpose of the doctrine of stare decisis is to promote efficiency and provide guidance and consistency in future cases by recognizing legal questions, once settled, should not be reexamined every time they are presented. [4]

Stare decisis promotes predictability in the law, engenders reliance on decisions of the court of appeals, encourages judicial restraint and reassures the public that decisions of the court of appeals arise from a continuum of legal principle rather than the personal caprice of the members of the court of appeals. [5] The doctrine of stare decisis rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel

of the court changes.[6] Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.[7] Stare decisis does not spring full-grown from a precedent but from precedents which reflect principle and doctrine rationally evolved.[8]

Distinctions in the application and withholding of stare decisis require delicacy and judicial self-restraint, and there must be an assumption that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors.[9]

CUMULATIVE SUPPLEMENT

Cases:

Stare decisis rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes, as well as the humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors. People v. Garvin, 30 N.Y.3d 174, 66 N.Y.S.3d 161, 88 N.E.3d 319 (2017).

[END OF SUPPLEMENT]

Footnotes

1 People v. Octavio, 34 Misc. 3d 790, 932 N.Y.S.2d 803 (N.Y. City Crim. Ct. 2011).

2 People v. LaPage, 25 Misc. 3d 890, 885 N.Y.S.2d 566 (County Ct. 2009).

3 People v. Peque, 22 N.Y.3d 168, 980 N.Y.S.2d 280, 3 N.E.3d 617 (2013).

4 People v. Octavio, 34 Misc. 3d 790, 932 N.Y.S.2d 803 (N.Y. City Crim. Ct. 2011).

5 People v. Peque, 22 N.Y.3d 168, 980 N.Y.S.2d 280, 3 N.E.3d 617 (2013).

6 People v. Taylor, 9 N.Y.3d 129, 848 N.Y.S.2d 554, 878 N.E.2d 969 (2007); People v. Bing, 76 N.Y.2d 331, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990); People v. Octavio, 34 Misc. 3d 790, 932 N.Y.S.2d 803 (N.Y. City Crim. Ct. 2011).

7 People v. Taylor, 9 N.Y.3d 129, 848 N.Y.S.2d 554, 878 N.E.2d 969 (2007).

8 People v. Octavio, 34 Misc. 3d 790, 932 N.Y.S.2d 803 (N.Y. City Crim. Ct. 2011).

9 People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976) (also stating that precedent is entitled to initial respect, however wrong it may seem to the present viewer, if it is the result of a reasoned and painstaking analysis).

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 23
NASSAU COUNTY

LONG ISLAND RADIOLOGY ASSOCIATES, P.C.

Plaintiff,

-against-

MOTION # 02, 04, 05
INDEX # 600195/19
MOTION SUBMITTED:
AUGUST 2, 2019

md, md, mg

X X X

ABEY KOSHY, ALICIA A. CAMBRIA, AMARYLLIS MENDEZ, ANGELA T. LAINO, ANGELA RAMOS, ARON NAFISI, BASIL J. OSABU, BENJAMIN A. GOBIOFF, BIND KEERIKATTE, BRIGITTE M. GEFFKEN-KELLY, CARLOS A. MONTILLA, CARMEN H. SANTOS, CHRISTINA L. WEEDON, CHRISTINA PALMIERO-WILLIAMS, CYNTHIA BRITO, DANIEL E. BEYDA, DEBORAH A. ASDAHL, DENNIS R. ROSSI, ELVIRA E. ERDAIDE, GEORGE H. CONNELL, GERALD SCHULZE, GEORGINA PEACHEY, HADASSAH HOFFMAN-BROWNSTEIN, HAMIDE CENAJ, IGOR CHER, IRINA MURATOVA, JAMIE L. ESPOSITO, JAMES M. LODOLCE, JASON W. SISK, JASON WILSON, JEFFREY JONES, JENNIFER E. D'AMBROSIO, JESSICA A. BOXER, JONATHAN OLIVERI, JOSE F. VALERIANO, KATIE L. O'SULLIVAN, KHALID U. KHAN, KRISTEN PERDICHIZZI, LANCE S. LEFKOWITZ, LISA G. LEE, MARGARET J. USURIELLO, MARILYN MADRID, MARINA TAMARKINA, MARTHA S. MORALES, MELISSA SPENCER, MICHAEL KLUKO, MILAGROS A. TLATOA, MIRA SHPIGELMAN, NILKA E. SANTANA, NORMA Y. ARCE, OLIVER PRATT, PASHA TORKAMANI, RON PANDOLFINI, SAMUEL M. ISSAC-REJIAH, SCOTT A. MCNALLY, STACY HONOVICH, SUZANNE CARLTON, THIERRY DUVIVIER, TINAMARIE P. THADAL, AND VICTORIA L. BEYDA,

Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1, 2
Cross Motion/Answering Affidavits.....3, 4, 5, 6
Reply Affidavits.....7, 8, 9

Pursuant to CPLR 3211 defendant Gerald Schulze moves for summary judgment dismissing the complaint against him and granting the declaratory relief sought in his counterclaims (Motion Seq. # 2); defendants Daniel E. Beyda and Victoria L. Beyda also move for dismissal of the complaint and summary judgment on their counterclaims (Motion Seq. # 4); plaintiff moves for summary judgment granting the relief sought in the complaint and dismissing the counterclaims of Schulze and the Beyda defendants (Motion Seq. # 5]).

Plaintiff owns and operates a radiological medical practice. Schulze is a former physician employee. The Beyda defendants were originally shareholders of plaintiff, but subsequently relinquished their shareholdings and became employees. Plaintiff provided malpractice insurance for each of the moving defendants through Medical Liability Mutual Insurance Company, which was a mutual company. As part of an approved demutualization plan, MLMIC agreed to a dividend payment[1] to policyholders of record, subject to a court determination as to whether that is the party equitably entitled to the proceeds. Plaintiff asserted in the instant action that it is entitled to the dividend distribution, having paid all the premiums and maintained the policies.

Defendant Schulze

At all relevant times Schulze was employed by plaintiff under the terms of an employment contract dated July 1, 2011. The compensation of Schulze was fixed on an annual basis (¶ Third, Schulze Affidavit). In addition to the annual compensation plaintiff agreed to pay certain expenses that Schulze would incur in connection his employment including the cost of malpractice insurance (Exhibit B, ¶ Fourth, Schulze Affidavit). These premium payments were not deducted from the compensation that Schulze received from plaintiff. Essentially they were in lieu of reimbursement

[1]The dividends are calculated based upon the premiums paid (Insurance Law §7307).

to him for expenses he would have otherwise incurred. It is undisputed that plaintiff duly paid the insurance premiums throughout the course of Schulze's employment.

In the *Matter of Schaffer, Schonholz & Drossman, LLP v Title* (171 A.D.3d 465, 96 N.Y.S.3d 526 [1st Dept. 2019]) the court held:

> Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds.

In the case at bar plaintiff paid the premiums at its own expense. Schulze received the benefit of his bargain having been relieved of the obligation to pay those premiums. Like the respondent in *Schaffer* (*supra*) Schulze would be unjustly enriched if he received the dividend based upon premiums that plaintiff paid.

The Beyda Defendants

With respect to their tenure as employees of plaintiff the Beyda defendants would be unjustly enriched in the same fashion as Schulze if allowed to collect the policy dividends. With respect to the period of time that they were shareholders, the Beyda defendants argue that the premiums paid were paid out of corporate funds which would otherwise have been distributed to them (presumably in *pari passu* to the respective ownership interests of all shareholders). Since "their equity interest contributed to the payment of MLMIC premiums" they claim to be entitled to the dividends.

Under general principles of corporate law, a shareholder and the corporation are separate entities. Even if they were not separate entities the position of the Beydas is contrary to reason. If the corporation distributed to shareholders the funds used to pay for the malpractice insurance, the

Beyda defendants would not have had the insurance; unless they paid for it themselves in which event they would not have the distributed funds.

Conclusion

Plaintiff is entitled to the cash proceeds resulting from the demutualization of nonparty MLMIC. The motions of moving defendants (Motion Seq. # 2 and #4) are denied. Plaintiff's motion for summary judgment (Motion Seq. #5) is granted and the counterclaims are dismissed.

ORDERED and decreed, it is hereby declared that plaintiff is entitled to the proceeds of the MLMIC distribution; and it is further

ORDERED that MLMIC shall pay the cash proceeds in escrow together with interest accrued to plaintiff.

ORDERED, that any relief not specifically granted is denied.

Submit judgment.

ENTER

DATED: October 7, 2019

Jack L. Libert

HON. JACK L. LIBERT
J. S. C.

MELL v. ANTHEM, INC.

No. 10-3440.

688 F.3d 280 (2012)

Ronald D. MELL, Sr., Plaintiff, Estate of Frieda M. Wilmes; Robert K. Espel; and James C. Matacia, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs-Appellants, v. ANTHEM, INC., nka WellPoint, Inc.; Anthem Insurance Companies, Inc.; Community Insurance Company, fka Community Mutual Insurance Company; and the City of Cincinnati, Ohio, Defendants-Appellees.

United States Court of Appeals, Sixth Circuit.

Argued: January 20, 2012.

Decided and Filed: July 25, 2012.

Attorney(s) appearing for the Case

ARGUED: Eric H. Zagrans, Zagrans Law Firm, LLC, Elyria, Ohio, for Appellants. Peter R. Bisio, Hogan Lovells US LLP, Washington, D.C., Terrance A. Nestor, City Solicitor's Office, Cincinnati, Ohio, for Appellees. ON BRIEF: Eric H. Zagrans, Zagrans Law Firm, LLC, Elyria, Ohio, Alphonse A. Gerhardstein, Gerhardstein & Branch Co., L.P.A. for Appellants. Peter R. Bisio, Craig A. Hoover, Adam K. Levin, Hogan Lovells US LLP, Washington, D.C., Glenn V. Whitaker, Vorys, Sater, Seymour and Pease LLP, Cincinnati, Ohio, Paul A. Wolfla, Baker & Daniels LLP, Indianapolis, Indiana, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, Terrance A. Nestor, City Solicitor's Office, Cincinnati, Ohio, for Appellees.

Before: SILER, CLAY, and ROGERS, Circuit Judges.

OPINION

CLAY, Circuit Judge.

Plaintiffs, the Estate of Frieda M. Wilmes through its appointed fiduciary, Claudette Schenck, Robert K. Espel, and James C. Matacia (collectively "Plaintiffs"), on behalf of themselves and all other similarly-situated employees and retirees, appeal the district court's order granting summary judgment to Defendants Anthem, Inc., Anthem Insurance Companies, Inc., Community Insurance Company, and the City of Cincinnati (collectively "Defendants") pursuant to Fed.R.Civ.P. 56. Plaintiffs seek to recover funds they alleged were owed to them when Anthem Insurance Companies, Inc. demutualized in 2001 and issued 870,021 shares of stock to the City of Cincinnati, Plaintiffs' employer, instead of to Plaintiffs.

For the reasons set forth below, we AFFIRM the decision of the district court.

[688 F.3d 282]

BACKGROUND

I. Procedural History

On October 15, 2008, Plaintiffs filed a complaint to recover on behalf of themselves and all other similarly-situated employees and retirees of the City of Cincinnati, Ohio (the "City") the current value of the 870,021 shares of Anthem common stock that the City received from the demutualization of Anthem Insurance. [1] In their complaint, Plaintiffs asserted eight claims for breach of contract and four tort claims against Anthem, Inc. n/k/a WellPoint Inc., Anthem Insurance Companies, Inc. ("Anthem Insurance") and Community Insurance Company ("CIC") (collectively, "Anthem"). [2] In addition, Plaintiffs brought three breach of contract claims and four tort claims against the City.

On September 1, 2009, Plaintiffs filed a motion for class certification. The district court granted Plaintiffs' motion and certified the proposed class. The class consists of 2,536 employees and retirees of the City who were named as insured persons, or former members of a group of insured persons, covered under a health care group policy from June 18, 2001 through November 2, 2001. The class includes two subsets: "Class A" members were defined as individuals who had an insurance policy with Anthem prior to the merger between Community Mutual Insurance Company ("CMIC") and Anthem in 1995; and "Class B" members were defined as individuals who received a health insurance group policy after the 1995 merger. The district court designated Schenck, Espel, and Matacia to serve as the class representatives of both classes.

The parties proceeded to discovery, after which they filed cross motions for summary judgment. On March 3, 2010, the district court denied Plaintiffs' motion for summary judgment; granted Anthem's cross-motion for summary judgment; granted in part the City's cross-motion for summary judgment; and dismissed the case. Plaintiffs timely appealed.

We have jurisdiction pursuant to the Class Action Fairness Act of 2005, which extends the diversity jurisdiction of the federal courts to certain class actions. [3] *See* 28 U.S.C. § 1332(d). We also have appellate jurisdiction under 28 U.S.C. § 1291.

II. Factual Background

A. The City of Cincinnati's Group Health Care Benefits

In 1986, the City of Cincinnati entered into a Master Group Contract for various

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group health care benefits with CMIC, a mutual insurance company licensed by Ohio Blue Cross/Blue Shield ("BC/BS"). The Master Group Contract covered both active and retired employees and included such benefits as medical, hospitalization, and, in the case of firefighters, dental coverage. According to the declaration of Andrea Schell, Regional Vice President of Group Underwriting for CMIC, the Master Group Contract granted the City mutual company membership interests (voting and equity rights) in CMIC. Section 1.01 of the CMIC bylaws defined the members of the group insurance plan and stated in relevant part:

> Every policyholder of the corporation, except the holder of a policy or contract of reinsurance, is a member of the corporation while the policy is in force, and is entitled to one vote, and no more, regardless of the amount of insurance held by such policyholder, the number of policies in force in the name of such policyholder or the amount of premiums paid by such policyholder. Policyholder means the person or group of persons identified

> as the named insured in the declarations page of a policy of insurance of the corporation.... In the case of a master contract for group insurance, the member shall be the holder of the master policy, and the holder of any certificate or contract issued subordinate to such master policy shall not be a member unless it makes specific provision of such membership....

(R.32-2: Ex. B. CMIC Bylaws § 1.01.) Schell stated that the City's group contract was "renewed each year between 1986 and 1999."

B. The Formation of Anthem Insurance

Anthem Insurance's predecessor was Associated Insurance Companies, Inc. ("Associated"), an Indiana mutual insurance company. In the early 1990s, Associated began acquiring BC/BS licenses in Kentucky (1993) and Ohio (1995). The Ohio BC/BS licensee that was acquired on October 1, 1995 was CMIC. At the time of the 1995 merger between CMIC and Associated, CMIC members received the following:

> (A) An assumption certificate from [CIC] ... that shall provide to [CMIC members] the same medical and health benefits in effect immediately prior to the Effective Time under the terms and conditions of the [CMIC's] insurance policy or health care benefits contract, as the case may be; and
>
> (B) A new Associated guaranty insurance policy/membership certificate which shall grant to that [CMIC member] the following rights:
>
> (1) voting rights on all matters that come before the members of an Indiana domestic mutual insurance company under the Indiana Insurance Law ...;
>
> (2) insurance benefits which shall guarantee the benefits granted under the insurance policy or health care benefits contracts assumed by CIC; and
>
> (3) rights in the events of liquidation, merger, consolidation, or demutualization of Associated as set herein, therein and in Associated's Second Amended and Restated Articles of Incorporation, which rights are intended to be equivalent to the rights such [CMIC member] would have had if such [CMIC member] had owned an insurance policy, issued directly by Associated....

(R.31-23: PTX-20, Page ID # 1560.)

CMIC and Associated jointly petitioned the Ohio Department of Insurance ("Ohio DOI") for approval of the merger. Both

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companies disclosed to the Ohio DOI that the employers that previously purchased group policies, and not the employees receiving benefits under those policies, were CMIC members. Associated incorporated into the merger agreement a "grandfather" clause which allowed former CMIC members to maintain their membership rights as long as each "grandfathered group" renewed, amended, or replaced its group policy without a lapse in coverage. New customers or those who entered into the contract after the merger would not become members. The joint petition between CMIC and Associated stated the following:

> Group policyholders of [CMIC] ... are members of [CMIC] and are entitled to one vote on all matters submitted to a vote of the members of CMIC. Group policyholders of [CMIC] also possess certain proprietary rights in CMIC. The holders of certificates of benefits issued under [CMIC's] group polices are not members of [CMIC], are not entitled to vote and do not have proprietary rights in [CMIC].
>
> In order to preserve the existing voting and proprietary rights of [CMIC's] group policyholders, Associated general practice regarding voting and other membership rights relating to group policies will not apply to holders of group polices issued by [CMIC]. Instead, group holders of Guaranty Policies issued as part of the Merger will be treated as members of Associated and will have membership rights in Associated....

(R.31-16: PTX-12, Page ID # 1497) (emphasis added).

According to the terms of the merger agreement, the City received a Group Guaranty Policy, which confirmed that it was a member of Associated, and the policy also indicated that City employees who obtained coverage as enrollees in the City's group policy were not members of nor had equity rights in Associated. The Ohio DOI approved the merger and the agreement became effective on October 1, 1995. After the merger, Associated changed its name to Anthem Insurance Companies, Inc.

C. The Demutualization of Anthem Insurance

In 2001, Anthem developed a Plan of Conversion to convert Anthem Insurance from an Indiana mutual insurance company to an Indiana stock insurance company in accordance with Indiana demutualization law under Indiana Code § 27-15-1-1, *et seq.* Anthem decided to demutualize in order to increase the company's financial flexibility through improved access to capital. Under the Indiana Demutualization Law, Anthem was required to provide consideration, either in the form of cash or stock, to its eligible statutory members in exchange for their membership interests. During this process, Anthem retained both financial and legal advisors as well as other experts to provide assistance in executing the conversion plan.

On May 18, 2001, Anthem notified the Ohio DOI, as required under Ohio Rev. Code § 3941.38, of its plan to convert to an Indiana stock insurance company. Anthem also submitted a Form D Filing to the Ohio DOI, which notified the Ohio DOI of its intent to (1) "discontinue the issuance of any new Guaranty Policies after the effective date of Conversion;" and (2) "cause all issued Guaranty Policies to expire at their anniversary next following the effective date of the Conversion," which would extinguish all membership interests. (R.32-18: Ex. A. Dec. of Marjorie Maginn.) On September 14, 2001, the Ohio DOI approved Anthem's demutualization request.

[688 F.3d 285]

Anthem Insurance's board of directors approved a conversion plan in accordance with Indiana demutualization law on June 18, 2001. *See* Ind.Code Ann. § 27-15-12-2. Anthem submitted its plan for approval to the Indiana Department of Insurance ("Indiana DOI"). The Indiana DOI conducted a full review of Anthem's proposed demutualization, which included a determination of whether particular group policyholders were eligible to retain their membership interests under a "grandfather" clause and therefore become classified as statutory members of Anthem Insurance. Anthem also participated in a public hearing on October 2, 2001 to discuss its conversion plan. Anthem explained at the hearing that individual enrollees in group

polices issued by Anthem's Ohio subsidiary prior to the 1995 merger were not eligible statutory members and therefore were not entitled to Anthem's demutualization proceeds. Article XIII of Anthem's Plan of Conversion defined both Statutory and Eligible Statutory members as follows:

> Statutory Member shall mean as of any specified date any Person who, in accordance with the records, articles of incorporation and by-laws of Anthem Insurance, is the Holder of an In Force Policy.
>
> Eligible Statutory Members shall mean a Person who (a) is a Statutory Member of Anthem Insurance on the Adoption Date and continues to be a Statutory Member of Anthem Insurance on the Effective Date,4 and (b) has had continuous health care benefits coverage with the same company during the period between those two dates under any Policy or Policies without a break of more than one day.

(R.32-11: Plan of Conversion, Page ID# 2676-77.) No objections to Anthem's position were raised at the public hearing.

On October 25, 2001, the Indiana DOI published its Findings of Fact, Conclusions of Law, and Order, which found that Anthem complied with the requirements set forth under the Indiana demutualization law. The Indiana DOI approved Anthem's Plan of Conversion on October 29, 2001. That same day a majority of Anthem's Statutory Members also voted to approve and adopt the conversion plan. Anthem's demutualization became effective on November 2, 2001, and on that day, Anthem issued 870,021 shares of its common stock to the City. Upon receipt of the shares of the stock from the demutualization, the City disposed of its shares on the public market and received $55 million. The City used the proceeds to fund a variety of city projects.

On October 15, 2008, Plaintiffs filed this action claiming that the City was not entitled to the $55 million demutualization proceeds and are now seeking to recover that amount.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo. White v. Baxter Healthcare Corp.*, 533 F.3d 381, 389 (6th Cir.2008). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "[T]he evidence and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party." *Rodgers v. Monumental Life Ins. Co.*, 289 F.3d 442, 448 (6th Cir.2002) (citing

[688 F.3d 286]

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

II. The City was the policyholder of the Group Policy prior to the 1995 merger between CMIC and Associated and possessed grandfather rights as the policyholder after the merger

Plaintiffs argue that the district court erred in concluding that the City obtained rights and interests of the health insurance group policy ("Group Policy") through a "grandfather" clause placed in the pre-merger agreement between CMIC and Associated. Plaintiffs contend that the City was therefore not entitled to receive any proceeds or compensation from the 2001 demutualization of Anthem. Plaintiffs argue that under Ohio insurance law, Ohio Revised Code §§ 3913.22(A) and 3913.20(B), the City was not "named as the insured" or the "policyholder" of the Group Policy because, according to Plaintiffs, "[a] municipality has no health of its own to insure." Plaintiffs assert that only active and retired employees and their dependents may serve as the "named insureds" or "insureds" or policyholder under the Group Policy. We first address the issue of whether the City was the policyholder of CMIC for purposes of obtaining membership rights under the Group Policy.

The district court correctly held that the statutory definition prohibits Plaintiffs from being classified as an owner of the Group Policy. Under Ohio insurance law § 3913.20(B), a policyholder is defined as the "person, group of persons, association, corporation, partnership, or other entity named as the insured under a mutual policy of insurance other than life...." The district court interpreted the statute to mean that policyholders are typically "owners" of the group policy. The district court therefore found that Plaintiffs cannot be the owners of the group policy because as employees and retirees Plaintiffs "had nothing to do with the choice of insurance carrier, nor with its governance, and they received what they bargained with the City to get: insurance coverage." *Mell v. Anthem, Inc.*, No. 1:08-cv-00715, 2010 WL 796751, at *10 (S.D.Ohio Mar. 3, 2010). Moreover, the district court noted that the record provides no evidence that the Group Policy named Plaintiffs as the policyholders of the Group Policy.

Plaintiffs' argument is also incompatible with CMIC's bylaws, which adopted the policyholder definition found under Ohio insurance law. According to CMIC's bylaws, a member was defined as "[e]very policyholder of the corporation" and the "[p]olicyholder means the person or group of persons identified as the named insured in the declarations page of a policy of insurance of the corporation." In the case of the Master Group Contract, the City as the member "shall be the holder of the master policy." CMIC's By-Laws, art I. § 101. The plain language of the bylaws therefore supports the conclusion that even prior to the 1995 merger between CMIC and Associated, the City became a policyholder of the Group Policy by virtue of its contract with CMIC. Under Ohio law, "[t]he words in a policy must be given their plain and ordinary meanings, and only where a contract of insurance is ambiguous and therefore susceptible to more than one meaning must the policy language be liberally construed in favor of the claimant who seeks coverage." *Burris v. Grange Mut. Cos.*, 46 Ohio St.3d 84, 545 N.E.2d 83, 88 (1989), overruled on other grounds by *Savoie v. Grange Mut. Ins. Co.*, 67 Ohio St.3d 500, 620 N.E.2d 809 (1993). No ambiguity exists in the instant case. Based on a straightforward reading

[688 F.3d 287]

of the statutory language and CMIC's bylaws, Plaintiffs did not possess, nor could they have possessed, any membership interests in Anthem.

Plaintiffs attempt to insert themselves into the contract by arguing that as "named insureds" or "insureds" they became the "policyholders." However, the Master Group Contract in effect established a contractual agreement between the City and CMIC, with Plaintiffs as mere beneficiaries. As

beneficiaries, Plaintiffs enjoyed the right to participate in the insurance provided, under the terms and conditions imposed by the Group Policy. Thus, any references to the "named insured" or "insured" simply meant a person covered under a group policy who is entitled to insurance as a benefit of his/her employment. It does not signify the position of policyholder. [5]

To the extent that Plaintiffs argue that an agency relationship exists between CMIC and the employees and retirees, Plaintiffs' argument misconstrues the Ohio statutory language and CMIC's bylaws. Under Ohio law, "[a]n employer's administration of a group insurance plan does not create an agency relationship between the employer and the insurance carrier since the employer is acting only for the benefit of its employees and the employer's own benefit in promoting better relations between itself and its employees." *Kilbourn v. Henderson,* 63 Ohio App.3d 38, 577 N.E.2d 1132, 1136 (1989) (citing *Hroblak v. Metro. Life Ins. Co.,* 79 N.E.2d 360, 364 (Ohio Ct.App.1947)). Here, the language of the statute and the bylaws confers an unambiguous contractual relationship between the City and CMIC, so the employee's participation in the Group Policy does not by itself create an agency relationship such that he becomes the policyholder. Plaintiffs' references to unreported Ohio cases and cases outside this Circuit bear no relevance in our analysis and are not controlling authority. [6] Therefore, we are not bound by those decisions. However, the limited authority available on this issue persuades us that the employer and not the employee is the policyholder of an insurance policy. In *Greathouse v. City of East Liverpool,* the Ohio Court of Appeals determined that since the City of East Liverpool purchased health insurance through Anthem on behalf of its employees and exclusively contracted with Anthem, the City and not its employees was therefore the owner of the

[688 F.3d 288]

policy. 159 Ohio App.3d 251, 823 N.E.2d 539, 544 (2004). The City was therefore the policyholder of the Group Policy prior to the 1995 merger between CMIC and Associated. And since the City was the policyholder of the Master Group Contract prior to and through the 1995 merger, the City also preserved and protected its rights as a policyholder through the grandfather clause issued by CMIC before the merger.

III. Plaintiffs were not entitled to receive the proceeds from Anthem's demutualization

Plaintiffs argue that they should have received the proceeds from Anthem's demutualization in 2001. Plaintiffs identify "two paths" — Class A and Class B — to show that they are entitled to the demutualization proceeds that are governed by the Ohio demutualization statutes. As we previously stated, "Group A" consisted of the City employees who had full insurance coverage from Anthem at the time of the 1995 merger between Associated and CMIC. Under Plaintiffs' argument that the employees are the policyholders, Plaintiffs contend that the employees in Group A had "grandfathered" rights preserved and guaranteed under Ohio law that would allow them to receive the payments from the 2001 demutualization. Plaintiffs argue that Class members in Group B, who obtained full-coverage from Anthem after the 1995 merger, were entitled to demutualization compensation under Ohio law and Anthem's membership rules where the employee and not the employer is the member of the mutual company. Given our finding that employees are not policyholders, Plaintiffs argument with respect to Group A fails. Because Group A members were not policyholders, they accordingly were not covered under the grandfathered clause exception and were not entitled to the demutualization proceeds.

The analysis with respect to Group B members is more complicated. For Group B members — employees who obtained full-coverage from Anthem after the 1995 merger — Plaintiffs claim that the provisions in the 1995 merger agreements and related documents specified that Plaintiffs were entitled to equity rights at the time of the merger, thereby granting them demutualization compensation. Plaintiffs also argue that they are entitled to the stock proceeds by the addition of a fully-insured human organ transplant ("HOT") rider and Certificates of Membership, which triggered a Certificate of Membership from the City that allowed Plaintiffs to receive the demutualization proceeds.

The evidence in the record does not support Plaintiffs' theory. The record indicates that Anthem intended for the City to maintain membership rights. Anthem prepared different documentation for CMIC grandfathered groups than it prepared for group customers that contracted with Anthem for the first time after the merger. Specifically, for CMIC grandfathered groups, Anthem prepared a Guaranty Policy that confirmed that the policyholders had membership rights. Not only did this Guaranty Policy differentiate between the employer "member" and the employee "enrollee" under the employer's policy, it also explained that "[n]o Enrollee or dependent of an Enrollee shall receive any equity rights by virtue of being an Enrollee or dependent of an Enrollee."

In contrast, Anthem did not make a distinction between "members" and "enrollees" in the guaranty policies prepared for Plaintiffs' Group B members. Rather, those guaranty policies defined a "member" as "each person who has enrolled for insurance of health care benefits and who was eligible to enroll for such benefits

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under the Community Contract because of the person's status as an employer of the Policyholder, if the Policyholder is an employer." Post-merger enrollees received a Certificate of Membership for purposes of defining the enrollees whereas the grandfathered groups received a Summary of Benefits. However, the presence or absence of a certificate does not change the underlying facts that dictated the membership determinations made in connection with the CMIC/Associated merger and the Anthem demutualization. The record established that the Certificates of Membership did not by themselves create membership rights and are not relevant for membership determinations. *See, e.g., Talley v. Teamsters, Chauffeurs, Warehousemen, and Helpers, Local No. 377, et al.,* 48 Ohio St.2d 142, 357 N.E.2d 44, 46 (1976) ("It is generally held that the certificate of coverage merely evidences the employee-member's right to participate ... [and] [c]onsequently, the provisions of the group policy are controlling over the provisions of the certificate, and the rights of the parties in a group insurance enterprise are dependent upon the group contract.").

The district court properly concluded that Plaintiffs' interpretation of the merger document for Class B members is incorrect. The district court found that the merger document does not state that new insurance is the "triggering event." *Mell,* 2010 WL 796751, at *10. The merger document states in pertinent part:

> The Associated guaranty insurance policy/membership certificate shall continue in effect as long as (a) the insurance policy or health care benefits contract assumed by CIC pursuant to Clause (A) of this Section 3.1 is in effect, or has been renewed, amended, or replaced, without a lapse in coverage, by any CIC insurance policy or health care benefits contract and (b) the membership fees required ... are paid when due ...

(*Id.*) Accordingly, by virtue of the process of demutualization we are compelled to conclude that Plaintiffs are precluded from recovering any of the proceeds from Anthem's demutualization. Based on the reading of the merger documents, it is clear that Anthem did not create new membership rights

for employees enrolled post-merger. Therefore, the Class B members were not eligible policyholders under the Anthem plan and were thus not entitled to receive Anthem's demutualization proceeds.

IV. Indiana law governs the demutualization of Anthem

Plaintiffs also improperly apply Ohio law when the demutualization process was governed by Indiana law. [7] Anthem was an Indiana mutual insurance company at the time of demutualization in 2001 and conducted the demutualization process in compliance with the provisions of Indiana Code § 27-15, which governs the demutualization of Indiana mutual insurance companies. *See Ormond v. Anthem, Inc.,* 799 F.Supp.2d 910, 912 (S.D.Ind.2011) (stating that Indiana law allows "an Indiana mutual insurance company to convert to a stock company through a plan of conversion"); *see also 3 Russ & Segalla, Couch on Insurance § 39:43 (3d ed.2005).* As required by Indiana law, Anthem submitted documentation of its plan to demutualize and also held a public hearing. Anthem's demutualization process was then approved by the Indiana DOI, which recognized that the City was an "eligible member" to receive

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the proceeds from the demutualization. *See* Ind.Code Ann. § 27-15-2-2.

To now apply Ohio law would disrupt the entire demutualization process in which the Indiana demutualization law vested exclusive authority in the Indiana DOI to approve the conversion plan. If this Court were to adopt Plaintiffs' argument that Ohio demutualization law applied, Anthem's entire application for conversion would be discredited. It also would undo the 1995 merger agreement. Under the 1995 agreement, Anthem, an Indiana based mutual insurance company, acquired CMIC, which was an Ohio insurance company. At no point did Anthem become subject to Ohio law. As a result of the merger, all of the mutual company members of the Ohio company became mutual company members of the Indiana company with voting and equity interests in the Indiana company. After the merger, what remained in Ohio was an Ohio stock insurance company, not an Ohio mutual insurance company. Under Indiana demutualization law, however, the City, as the eligible statutory member, was entitled to the demutualization proceeds. *See* Ind. Code Ann. § 27-15-1-7.

CONCLUSION

Despite Plaintiffs' multiple theories suggesting that they are entitled to the Anthem demutualization proceeds, Plaintiffs cannot recover any of the demutualization compensation. The evidence in the record indicates that the City was the policyholder prior to the 1995 merger between CMIC and Associated. The documents also clearly establish that the City maintained its policyholder rights post-merger through a grandfather clause, including any rights to the demutualization proceeds. The 2001 demutualization process did not disrupt the City's membership interests nor did it confer any equity rights to Plaintiffs. Thus, Plaintiffs are not entitled to the demutualization proceeds.

For the foregoing reasons we AFFIRM the district court's order granting summary judgment to Defendants.

FootNotes

1. Demutualization refers to the process of converting an insurance company from mutual ownership to stock ownership. *3 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 39:43 (3d ed.2005).* In the case of Anthem, the company demutualized in 2001, converting Anthem Insurance from an Indiana mutual insurance company to an Indiana stock company.

2. In 2004, Anthem, Inc. merged with WellPoint, Inc.

3. Under the Class Action Fairness Act of 2005, a federal district court may have original jurisdiction of:

> any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, and is a class action in which — (A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. Pub.L. No. 109-2, 119 Stat. 4 (2005).

In this case, the amount in controversy exceeds $5,000,000 and the parties are citizens of diverse states. *See* (R.1: Compl. ¶¶ 1-3.)

4. The term "Adoption Date" is defined in the Plan of Conversation as June 18, 2001. The "Effective Date" of the Plan of Conversation was November 2, 2001.

5. Plaintiffs also claim that the Ohio Health Insurance Guide has adopted the logic that an employer may not be a policyholder. Plaintiffs highlight that the guide defines the term "certificate holder" as "[a]n employee or other insured named under a group health insurance policy" to suggest that the policyholders are the covered employees and insured retirees. (R.31-28: PTX-99 ODI Health Insurance Guide, Page ID # 1683.) Plaintiffs misread the guide, which explicitly states that "your employer [i.e., the City] or trade association is the master policyholder; you and your fellow employees [i.e., Plaintiffs] are certificate holders." (*Id.* at Page ID # 1634.)

6. We also find unpersuasive Plaintiffs references to Ohio insurance statutes in support of their determination that employees, rather than the employers, are the policyholders of the Group Policy. For example, Ohio Revised Code § 3923.12 on group sickness and accident insurance states that the "insurer will furnish to the policyholder, for delivery to each employee or member of the insured group, an individual certificate." Under this provision, CMIC as the insurer furnished to the City, the policyholder, an individual certificate for the employer to furnish to the employee (Plaintiffs). The remaining Ohio revised provisions cited by Plaintiffs also do not classify an "insured" as the policyholder of a Group Policy, but rather the "insured" is defined as the person covered under the Group Policy. *See* Ohio Rev.Code §§ 3923.13, 3923.121, 3923.123, 3923.381, 3923.38, 3923.44.

RUOCCO v. BATEMAN, EICHLER, HILL, RICHARDS, INC.

No. 88-6655.

903 F.2d 1232 (1990)

John D. RUOCCO, on behalf of himself and as the representative of a class of persons similarly situated, Plaintiff-Appellee, v. BATEMAN, EICHLER, HILL, RICHARDS, INCORPORATED, John R. Bolin, Theodore Prush, Defendants-Appellants.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 6, 1990.

Decided May 18, 1990.

Attorney(s) appearing for the Case

Craig B. Jorgensen, Jon L. Rewinski, Louis W. Karlin, Kindel & Anderson, Los Angeles, Cal., for defendants-appellants.

J. Michael Hennigan, Richard M. Callahan, Jr., Hennigan & Mercer, Los Angeles, Cal., for plaintiff-appellee.

Before THOMPSON and TROTT, Circuit Judges, and MARSH, District Judge.

MARSH, District Judge:

This action involves claims by John Ruocco, on behalf of himself and current and former Bateman, Eichler, Hill, Richards, Inc., et al., ("BEHR") employees who participated in BEHR's long-term disability plan between January 1, 1982 and December 30, 1984. The plaintiff class claims that BEHR violated its fiduciary duties, the Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982 & Supp. V 1987), section 8315 of the California Commercial Code, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987), when it failed to distribute to the plan participants a surplus dividend received from BEHR's disability insurance carrier. BEHR appeals the district court's grant of partial summary judgment to Ruocco on the non-RICO causes of action awarding to Ruocco $629,423.31 minus administrative costs, and attorney's fees. We affirm the district court's decision with respect to defendant BEHR but reverse the decision holding defendants Bolin and Prush personally liable.

I.

BEHR is a stock brokerage and financial consulting firm with its principal place of business in Los Angeles, California. At all relevant times, John R. Bolin was BEHR's president, chief executive officer and chairman of the board of directors. Theodore W. Prush was BEHR's executive vice president, chief financial officer and a member of the board of directors.

From 1968 to 1986, BEHR offered its employees group long term disability insurance through Union Mutual Insurance Company ("Union Mutual"). The Union Mutual policy was paid for by the employees participating in the plan. BEHR deducted premiums from the pay of participating employees and transmitted these premiums to Union Mutual. While BEHR paid premiums itself from time to time in order to prevent a lapse in coverage, the amount of premiums paid by BEHR was minimal. BEHR paid all administrative costs for the plan. Ruocco, an employee of BEHR until August 1986, elected the long term disability coverage provided by Union Mutual.

The Union Mutual policy provided:

> When proof is received that an insured employee is totally disabled as a result of sickness or injury and requires the regular attendance of a legally qualified physician, the Insurance Company will pay a monthly benefit to the insured employee after completion of the elimination period.

The policy defined "employee" as "a full-time employee, individual, proprietor, or partner who is regularly working at least 30 hours per week during the regular work week of the employer." The policy also provided that

> [a]ll insurance provided under this Policy for an insured employee will cease at 12:00 midnight on the earliest of the following occurrences: ... (2) On the date that the insured employee ceases to be in a class of employees eligible for insurance.

On September 24, 1986, Union Mutual notified BEHR that it intended to convert from a mutual insurance company to a wholly-owned subsidiary of a publicly-owned stock corporation called UNUM. Under Maine law, where Union Mutual was incorporated, such conversion could take place only upon distribution to each policyholder of a pro rata share of the retained surplus which the converting company had acquired while it was operating as a mutual company. Union Mutual determined the BEHR surplus by considering the premiums paid between January 1, 1982 and December 31, 1984. Union Mutual notified BEHR that the returned surplus would take the form of shares of UNUM stock and warrants to purchase additional shares of UNUM stock. The warrants had to be exercised between September 26 and October 28, 1986.

In October 1986, the Executive Committee of BEHR decided to exercise the warrants and paid $609,336 to buy 25,755 shares of UNUM stock. These shares were sold by BEHR in November 1986 for $712,249.30 thereby generating a profit of $104,913.30. In November 1986, BEHR also received the straight distribution of UNUM shares which BEHR sold on November 6, 1988 for $524,510.01. In total, BEHR received $629,423.31 from the profit on the sale of shares purchased on the warrants and the sale of the distributed shares.

On June 29, 1987, Ruocco filed this action, claiming that BEHR's decision to retain the UNUM distribution violated ERISA, California Commercial Code section 8315, and various provisions of RICO. The district court dismissed the RICO claims, but granted summary judgment to Ruocco on both the ERISA and California Commercial Code section 8315 claims. The court found that the BEHR long term disability plan was an "employee welfare benefit plan" as defined by ERISA, 29 U.S.C. § 1002(1), that defendants were "fiduciaries" of the Plan, that Ruocco was a "participant" in the plan, and that the surplus dividend constituted an "asset of the plan" pursuant to 29 U.S.C. section 1101. While the court found that defendants did not breach their fiduciary duty to the plaintiff class, the court held that defendants' decision to keep the UNUM distribution was "arbitrary and capricious." The court found that the balance of equities weighed in favor of the plan participants because "the premiums for the plan were paid for by the participants" and because "the funds would not inure to the benefit of the participants of the plan" if distributed to the defendants. The district court also found that the sale of the UNUM stock constituted a wrongful transfer of securities, in violation of California Commercial Code section 8315. Finally, the court ruled that plaintiffs were entitled to attorney's fees under ERISA pursuant to 29 U.S.C. section 1132(g)(1).

On September 6, 1988, BEHR petitioned this court for permission to pursue an immediate interlocutory appeal. The court granted this petition on December 2, 1988.

II.

A grant of summary judgement is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.,* 872 F.2d 1416, 1421 (9th Cir.1989); *State Farm Fire & Casualty Co. v. Martin,* 872 F.2d 319, 320 (9th Cir.1989). The appellate court's review is governed by the same standard used by the trial court under Fed.R.Civ.P. 56(c). *Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir.1986). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material facts and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.,* 873 F.2d 1338, 1339-40 (9th Cir.1989); *Judie v. Hamilton,* 872 F.2d 919, 920 (9th Cir.1989).

Issues dealing with the interpretation and application of ERISA provisions as well as preemption under ERISA are also subject to de novo review. *Admiral Packing Co. v. Robert F. Kennedy Farm Workers*

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Medical Plan, 874 F.2d 683, 684 (9th Cir.1989); *Chase v. Trustees of W. Conf. of Teamsters Pension Trust Fund,* 753 F.2d 744, 746 (9th Cir.1985); *Trustees of Amalg. Ins. Fund v. Geltman Indus., Inc.,* 784 F.2d 926, 929 (9th Cir.), *cert. denied,* 479 U.S. 822, 107 S.Ct. 90, 93 L.Ed.2d 42 (1986).

III.

BEHR asserts error on nine grounds.

1. *Lack of Jurisdiction*

BEHR argues that the district court erred because it lacked jurisdiction over plaintiff's ERISA claim. BEHR argues that Ruocco was not a "participant" of a welfare benefit plan as defined by ERISA because Ruocco received all the benefits he was entitled to under the disability benefit plan and was no longer employed by BEHR at the time the Union Mutual surplus was distributed.

ERISA defines participant as "any employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). The Supreme Court has interpreted ERISA's definition of participant as including both "employees in or reasonably expected to be in, currently covered employment," *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 957-58, 103 L.Ed.2d 80 (1989) (quoting *Saladino v. ILGWU Nat'l Retirement Fund,* 754 F.2d 473, 476 (2d Cir.1985)), or "former employees who `have a reasonable expectation of returning to covered employment' or who have `a colorable claim' to vested benefits." *Firestone,* 109 S.Ct. at 957-58 (quoting *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir.), *cert. denied,* 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)).

Applying the *Firestone* test to this case, we find that Ruocco presents "a colorable claim" of entitlement to the Union Mutual surplus based on his status as a former plan participant who contributed financially to the plan. This claim to entitlement is not altered by Ruocco's termination of employment with BEHR.

2. *California Insurance Code Section 10270.65*

BEHR argues that the district court erred because under California Insurance Code section 10270.65, BEHR was entitled to retain the Union Mutual surplus.

Section 10270.65 provides:

> If hereafter any dividend is paid or any premium refunded under any policy of group disability insurance heretofore or hereafter issued, the excess, if any, of the aggregate dividends or premium refunds under such policy over the aggregate expenditures for insurance under such policy made from funds contributed by the policyholder, or by an employer of such insured persons or by union or association to which insured persons belong, including expenditures made in connection with the administration of such policy, shall be applied by the policyholder for the benefit of such insured employees generally or their dependents or insured members generally or their dependents. For the purpose of this section and at the option of the policyholder, policy may include all group life and disability insurance policies of the policy holder.

Cal.Ins.Code § 10270.65 (West 1972).

The district court made three findings on this issue: first, that the code is not applicable to the facts of this case "since the UNUM distribution was neither a `premium refund' nor `dividend' as contemplated by the statute;" second, that because section 10270.65 "does not contemplate the offsetting of employer costs from all benefit plans before providing the surplus to the participants of the plan," BEHR could only recoup administrative costs incurred in connection with the BEHR long term disability plan; and third, that section 10270.65 is "preempted by ERISA, as it clearly `relates to' an employee welfare benefit plan, as codified in 29 U.S.C. § 1144(a) [1]."

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BEHR argues that the district court erred in its first holding because the Union Mutual distribution does constitute a "dividend" within the meaning of section 10270.65. BEHR argues that the court erred in its second holding because section 10270.65 allows a policyholder to aggregate the costs incurred in connection with its group life policy. With respect to the third holding, BEHR argues that there is no ERISA preemption because section 10270.65 deals with the regulation of insurance and therefore is covered by the insurance "saving clause" contained in section 1144(b)(2)(A).

While defendants are correct that the distribution of the surplus constitutes a dividend under section 10270.65 on which costs can be aggregated, *see Luksich v. Kaser Steel Corp.,* 245 Cal.App.2d 373, 374-75, 53 Cal.Rptr. 875 (1966), we find that section 10270.65 is preempted under ERISA because it relates to an employee benefit plan within the meaning of 29 U.S.C. section 1144(a).

The "saving clause" of § 1144(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities." In determining whether a state's law regulates insurance and therefore is not preempted under section 1144(a), the Supreme Court set forth the following two-part test in *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987):

> In Metropolitan Life, we were guided by several considerations in determining whether a state law falls under the saving clause. First, we took what guidance was available from a `common-sense view' of the language of the saving clause itself. 471 U.S., [724] at 740 [105 S.Ct. 2380, 2389, 85 L.Ed.2d 728]. Second, we made use of the case law interpreting the phrase `business of insurance' under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., in interpreting the saving clause.

481 U.S. at 48, 107 S.Ct. at 1553. *See also Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). With respect to the second-part of this test, the Court set forth the following three criteria for determining whether a practice falls under the `business of insurance' for purposes of the McCarran-Ferguson Act [2]:

> `[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.'

Pilot Life, 481 U.S. at 48-49, 107 S.Ct. at 1553-54 (quoting *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S.Ct. 3002, 3008, 73 L.Ed.2d 647 (1982)) (emphasis in original).

California Insurance Code section 10270.65 does not regulate insurance within the meaning of either the McCarran-Ferguson Act or ERISA, 29 U.S.C. § 1144(b)(2)(A). This statute fails the first part of the *Metropolitan* test because it does not transfer or spread the policyholder's risk but rather deals merely with the administration of certain policy surplus. The statute fails the second part of the test because it is not an "integral part of the policy relationship" between the insurer and the insured but rather deals with the relationship between the policyholder and the insured. While section 10270.65 is limited to entities within the insurance industry, this alone does not support a finding of insurance regulation within the meaning of section 1144(b)(2)(A). The "saving clause" to ERISA exempts from preemption state regulation of insurance companies and terms of insurance contracts not state regulation of employee benefit plans funded by the insurance industry. [3]

The same conclusion is reached under a "common sense view" of section 10270.65.

3. *Asset of the Insurer*

BEHR claims the retained surplus of a group disability carrier is not an asset of a covered plan pursuant to 29 U.S.C. section 1101 and therefore ERISA does not require BEHR to distribute the Union Mutual surplus to participating employees. Section 1101(b)(2) provides that "[i]n the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by issuance of such policy, be deemed to include any assets of the insurer."

While the premium surplus may have been held as an asset by Union Mutual, this asset was not owned by the insurance company but was part of the interest of the mutually insured in the company. *See* 18 J. Appleman, Insurance Law and Practice § 10059 (1945). As stated, Union Mutual was required to distribute this retained surplus to policyholders prior to its conversion from a mutual insurance company to a wholly-owned subsidiary of a publicly-owned stock corporation. The surplus, therefore, did not constitute an asset of the insurer within the meaning of 29 U.S.C. section 1101(b)(2).

4. *Unexpected and Undeserved Windfall*

BEHR contends that the district court erred in awarding the Union Mutual surplus to former employees because the award constitutes an unexpected and undeserved windfall for the employees. In determining who was entitled to the surplus, the district court relied heavily on the Third Circuit's decision in *Chait v. Bernstein,* 835 F.2d 1017 (3d Cir.1987). In *Chait,* the court held that an employer could amend an ERISA plan to allow surplus assets to revert to the employer despite the plan's prohibition on amendments to the plan to allow the funds to be used for purposes other than for the exclusive benefit of the employees. The court held that the plan could be so amended because the plan contained no additional language limiting the reversion beyond the "exclusive benefit" provision and because the equities of the case favored the employer's creditors rather than the vested employees. *Id.* at 1027. In reaching this conclusion, the court emphasized the fact that the plan was a "defined benefit plan to which the employees never contributed." On this matter, the court held:

> In the context of a defined-benefit plan to which the employer was the sole contributor that does not contain explicit prohibitory language, we see no congressional policy that would prevent allowing the employer to amend the plan to receive excess assets after paying out all the benefits.

Id. See also Wright v. Nimmons, 641 F.Supp. 1391, 1406-07 (S.D.Tex.1986) (noting that where a trust plan is silent as to the distribution of assets, if the employer has "exclusively funded a plan," the "unbargained for distribution of excess assets to participants represents an unintended windfall for employees").

In this case, the district court found that the balancing of equities weighed in favor of the plan participants because the premiums for the plan were paid for by the participants and because "[o]utside of minor administrative costs, BEHR paid nothing." The court also found that if the surplus were distributed to the defendants, the fund would not inure to the benefit of the plan participants, but rather "as a result of BEHR's incentive bonus plan, would fall in large part into the hands of BEHR's Executive Committee which had voted to keep the distribution." We agree with the district court that the balance of equities weighs in favor of the plaintiff class.

5. *Resulting Trust*

Next BEHR argues that it is entitled to retain the Union Mutual surplus under the law of trust because BEHR was the creator or settlor of the plan trust. BEHR argues that, as a result of its status as settlor of the trust, when surplus assets remained in the long term disability fund after the trust's purpose had been fulfilled, a resulting trust arose for its benefit. We reject BEHR's argument. BEHR did not pay the premium costs to fund the plan and therefore was neither a 'creator' nor 'settlor' of the trust. *See, e.g., Lehman v. Commissioner of Internal Revenue,* 109 F.2d 99, 100 (2d Cir.), *cert. denied,* 310 U.S. 637, 60 S.Ct. 1080, 84 L.Ed. 1406 (1940) (defining settlor as one who furnishes the consideration for a trust).

6. *Financial Risk*

BEHR argues that the district court erred in ordering BEHR to pay its former employees the profits which it earned by exercising the UNUM warrants because BEHR risked its own money in exercising the warrants and could not have provided its former employees with sufficient notice to exercise these warrants given the large number of employees involved. BEHR's argument as to what would have happened had it given the plan participants notice is speculative and does not support a finding that BEHR is entitled to retain the surplus. Nor does the fact that BEHR used its own money to exercise the warrants justify BEHR's retention of the acquired profit.

7. *California Commercial Code Section 8315*

BEHR argues that the district court erred in finding that the sale of the UNUM stock by defendants constituted a wrongful transfer of securities in violation of California Commercial Code section 8315 which prohibits the wrongful transfer of securities. [4] We disagree. The district court correctly found that section 8315 is a state statute regulating securities and therefore is saved from ERISA preemption under 29 U.S.C. section 1144(b)(2)(A). Contrary to BEHR's contention, we find no inconsistency between the district court's finding that California Insurance Code section 10270.65 is preempted by ERISA because it does *not* regulate insurance and the court's finding that California Commercial Code section 8315 is not preempted because it *does* regulate securities.

8. *Attorney's Fees*

BEHR argues that the district court erred in awarding attorney fees *sua sponte* because it did not discuss the factors set forth in *Hummell v. S.E. Rykoff & Co.,* 634 F.2d 446, 452 (9th Cir.1980) and did not give the parties an adequate opportunity to address this matter. We disagree. The district court provided BEHR with an opportunity to address the matter when it received BEHR's opposition to the proposed statement of undisputed facts. The district court also considered the *Hummell* factors in determining that an award of attorney's fees was reasonable and appropriate. In *Hummell,* the court held that the following five factors must be considered in determining whether to award attorney's fees under 29 U.S.C. section 1132(g):

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and solve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell, 634 F.2d at 453. The district court in this case applied the *Hummell* test

and found that defendants had the ability to satisfy an award of attorney's fees, that the awarding of fees will deter others from acting in an arbitrary and capricious manner, that Ruocco was seeking to benefit all participants of the BEHR Plan and to resolve significant legal questions concerning ERISA, and that Ruocco's position in this litigation was substantiated on both legal and equitable grounds.

9. *Personal Liability of Bolin and Prush*

While the district court did not err in awarding the Union Mutual surplus and attorney's fees to the plaintiff class, the district court did err in its finding that defendants Bolin and Prush were personally liable in light of its additional finding that neither defendant breached his fiduciary duty or otherwise acted in bad faith. While Bolin and Prush may have benefited by their decision to retain the UNUM surplus under BEHR's bonus incentive program for top executives, there is no evidence that Bolin or Prush did anything personally or that the decision to retain the UNUM surplus was not a corporate act. Likewise, while Bolin and Prush were members of the Executive Committee, the decisionmaking body of BEHR, there is no evidence that they controlled this Committee.

CONCLUSION

We affirm the judgment of the district court awarding the plaintiff class $629,423.31 minus administrative costs, and attorney's fees against defendant BEHR. We reverse the court's decision holding defendants Bolin and Prush personally liable. Plaintiff shall recover from defendant BEHR 80 percent of his costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

WRIGHT v. NIMMONS

Civ. A. No. H-83-6906.

641 F.Supp. 1391 (1986)

Lewis A. WRIGHT, et al. v. Donald S. NIMMONS, Trustee.

United States District Court, S.D. Texas, Houston Division.

August 18, 1986.

Attorney(s) appearing for the Case

Roger B. Greenberg and Jane Cooper-Hill, Richie & Greenberg, Houston, Tex., for plaintiffs.

William T. Green, III and Mark Alexander, Green, Downey, Patterson & Schultz, Houston, Tex., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CARL O. BUE, Jr., District Judge.

I. *Introduction*

This is an action for equitable relief and statutory damages arising under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 *et seq.* Following the acquisition of four related closely-held corporations by Defendant, Donald S. Nimmons ("Nimmons"), the Plaintiffs, who are former shareholders, officers, and directors of the corporations, and participants and beneficiaries of the corporations' defined benefit pension plan, commenced suit against Defendant alleging breaches of fiduciary duty and seeking to protect their rights under ERISA. In his capacity as Trustee of the plan, Defendant has filed counterclaims seeking damages for violation of ERISA's prohibited transactions provisions which occurred prior to the change in corporate ownership. The controversy between the parties concerns the validity of two competing pension plans. Specifically, the proponents of the competing plans claim entitlement to the residual assets which are to be distributed as a consequence of the corporations' cessation of business.

This case came on for trial before the Court sitting without a jury. Having heard all of the testimony and reviewed the documentary evidence, this Court concludes that Plaintiffs are entitled to recover statutory damages, and to obtain equitable relief as a consequence of Defendant's breach of his fiduciary duty, and hereby enters its Findings of Fact and Conclusions of Law consistent therewith.

II. *Findings of Fact*

A. *The Formation of the Pension and Profit Sharing Plans*

1. In 1971, Lewis Alvin Wright ("L.A. Wright") and Shelley V. Pate ("S.V. Pate") formed W.P. Constructors, Inc. ("W.P."), a construction company that specialized in the construction of underground water and sewage systems. For many years prior to the formation of the corporation, the business was operated as a partnership. The corporation was formed upon the advice of Nimmons who served as an accountant and financial consultant to the partnership.

2. The principals also incorporated three related companies: Pate Construction Company, Inc. ("Pate Co."), Aldine Construction Company, Inc. ("Aldine") and W.P. Leasing Corporation, Inc. ("Leasing"). Both Pate Co. and Aldine provided contract labor to W.P., while Leasing provided heavy equipment.

3. At about the same time that the businesses were incorporated, Nimmons advised L.A. Wright and S.V. Pate to establish pension and profit sharing plans for the employees of the corporations. Nimmons acted as agent in dealing with the attorney who prepared the initial pension plan for W.P., and the profit sharing plans for Pate Co. and Aldine. On Nimmons' recommendation, the corporations adopted the respective plans in 1971.

4. The original trustees were S.V. Pate and L.A. Wright. The original plan administrative committee consisted of Wright, Pate, and Clarice Cantrell ("C. Cantrell"). None of these individuals had experience, expertise, or knowledge concerning the administration of pension or profit sharing plans. Thus, they relied in all respects on Nimmons, who held himself out as a knowledgeable pension plan advisor.

5. W.P. was a closely-held corporation and essentially a family business. Consequently, the pension plan beneficiaries are primarily family members. However, the instant cause of action was also brought on behalf of the beneficiaries of the profit sharing plan, former employees of Pate Co. and Aldine, who comprised the labor force for the work performed by W.P.

B. *Administration of the Original Pension and Profit Sharing Plans*

6. Although the employer, W.P., assumed certain administrative duties for the plan, Nimmons was consulted regularly regarding plan administration. Nimmons' duties on behalf of the plans included the following: (1) keeping the books; (2) compiling employee data; (3) calculating employer

contributions; (4) preparing required governmental reports and financial statements, and (5) preparing annual reports.

7. In addition to these specific tasks, Nimmons had an informal relationship of longstanding with the principals of the corporations. Due to this informal relationship of trust, Nimmons was provided with keys to the corporate offices so that he would have immediate access to the corporate books and records, including the books of the plans.

8. Nimmons rendered investment advice to the corporations, and served as a paid consultant from 1971 until 1981. The corporate principals, who were also trustees of the pension and profit sharing plans, relied extensively upon Nimmons' expertise and advice regarding the administration of the plans.

C. *The Original Pension and Profit Sharing Plans' Loss of Qualified Tax Status*

9. Nimmons served as the enrolled agent for the pension and profit sharing plans. In this capacity, he was empowered to appear before the Internal Revenue Service ("IRS") on behalf of the plans.

10. The passage of ERISA in 1974 imposed new requirements on employee benefits plans. Plans which did not meet the new requirements were threatened with severe consequences. Contributions made to a plan which loses its qualified status are not tax deductible by the corporation, and are taxable as ordinary income to the beneficiaries.

11. As the enrolled agent for the plans, Nimmons was charged with the duty of cooperating with the IRS on matters of plan qualification. By 1978, the IRS had still not received indication that the plans had been restated to comply with ERISA. Pursuant to an inquiry in December of 1978, Nimmons informed the IRS that the plans had been amended to comply with ERISA, and that an application for a determination letter would be forthcoming. However, the application for determination and amended plans were not sent. In August of 1979, the IRS conducted an investigation of the 1977 and 1978 annual returns. During that investigation, Nimmons provided the IRS with a prototype plan, but the plan had not been executed by the corporate officers or trustees.

12. Despite requests by the IRS for executed copies of a plan conforming to ERISA, and for a copy of the application for determination that had allegedly been filed, these were never received. Finding that the original plan documents were the operative plans, the IRS proceeded to review those plans for compliance with ERISA, but many deficiencies were noted.

13. A request by the IRS for corrective amendments and data sufficient to entitle the plans to ENCEP relief was made on August 20, 1981, but no response was received. The ENCEP program was designed to permit the IRS to qualify a plan retroactively if the plan had been administered in accordance with ERISA, even if plan documents in existence during the period did not conform with ERISA requirements.

14. In an attempt to comply with the requirements of ERISA so that the plans could retain their qualified status, Nimmons hired Hand and Associates in the Spring of 1980 to prepare "Schedule B's" for the plan years ending on May 31, 1977, 1978, and 1979.

15. A "Schedule B" is a computation of actuarial liabilities which must be signed by an enrolled actuary and filed each year with the plan's annual reports. For several years, Nimmons filed annual reports (Form 5500-C) without attaching the required "Schedule B's."

16. Margaret Young, an enrolled actuary employed by Hand and Associates, prepared "Schedule B's" for the years 1977-79. She also requested current information so that she could prepare the "Schedule B" for the plan year ending May 31, 1980. Although Nimmons promised to provide the information, he never sent it to Young. Instead, he once again prepared Form 5500-C without a "Schedule B," erroneously indicating on the form that a "Schedule B" was not required.

17. Throughout the years of investigation, the IRS dealt exclusively with Nimmons on behalf of the plans. Having determined that the original plan documents failed to comply with ERISA, and based upon the lack of response to repeated requests for conforming documents, the IRS assumed that the taxpayer did not desire to comply with ERISA requirements. Consequently, a final revocation letter was sent by the IRS on December 3, 1981, which resulted in the loss of the plans' qualified status.

18. Nimmons did not advise the trustees and plan administrators concerning the repeated requests by the IRS for amendments, even though they were not aware of ERISA or its requirements, and depended exclusively upon him for compliance with governmental regulations.

19. As a consequence of Nimmons' misfeasance, the qualified status of the plans was revoked, and the corporation and participants have incurred tax liability for the years that the plans were unqualified.

D. *The Stark and Frahm Plan*

20. Upon receipt of the final revocation letter from the IRS, dated December 3, 1981, L. Anthony Wright ("A. Wright") called Nimmons to question him about its significance. Nimmons assured him that there was no cause for alarm.

21. Upon the advice of their bonding agent, Roy Simmons, in February of 1982, however, the corporate directors retained the law firm of Stark and Frahm to counsel them with respect to Nimmons' failure to maintain the qualified status of the plan.

22. In February of 1982, A. Wright, then vice-president of the corporations, and Steve Pate ("S. Pate"), secretary/treasurer of the corporations, met with a representative of Stark and Frahm at Simmons' office. They explained the corporate structure and history of the plans, as they understood them, and requested Stark and Frahm to resolve their problems with the IRS.

23. In February of 1982, A. Wright, on behalf of the corporations, executed a power of attorney which authorized Stark and Frahm to draft and execute plan amendments that could be approved by the IRS. Stark and Frahm prepared a plan as directed, and diligently attempted to correct the problems resulting from the revocation letters.

24. On May 27, 1982, the Board of Directors of W.P. adopted by resolution the Third Amendment to The W.P. Pension Plan, renamed The W.P. Constructors, Inc. Defined Benefit Investment Fund Pension Plan (the Stark and Frahm Plan). Also on May 27, 1982, the pension plan amendment with trust agreement was executed on behalf of W.P. by A. Wright. The execution of the plan was attested to by S. Pate, corporate secretary. The executed instrument was acknowledged and delivered to A. Wright and S. Pate, who signed the instrument as the newly appointed trustees of the plan. A copy of the instrument was also delivered to Nimmons. Due to the continued negotiations for acquisition of the corporations, the principals of W.P. kept Nimmons informed regarding activities pertaining to the plans.

25. The Stark and Frahm pension plan follows a form typically used for closely-held corporations. With respect to excess assets, the plan specifically directs a prorata distribution among plan participants upon termination of the plan. [1]

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26. The Stark and Frahm plan provides for payment of benefits following a participant's termination of employment (Section 6.1(a)(3)), and for the lump sum payment of benefits (Section 6.2(b)(1)).

27. The Stark and Frahm plan also provides for the members and beneficiaries to receive a summary annual report, other information as required by ERISA, and an annual statement of benefits (Section 3.3).

28. In the Fall of 1982, Nimmons finally reviewed the Stark and Frahm plan. Since the amendment executed in May of 1982 had never been returned to Stark and Frahm for filing with the IRS, the law firm once again prepared and sent new corporate resolutions and blank signature pages for execution. After Nimmons received these blank documents for review, he noted that they did not accurately reflect his choice of trustees, and he requested that new documents be prepared in accordance with his wishes. Nimmons did not note any problems, however, with the previously executed documents. Nimmons did request Stark and Frahm to destroy the incorrect documents. However, rather than waiting for new documents to be prepared which accurately reflected his choice of trustees, Nimmons, on December 8, 1982, instructed Stark and Frahm to submit the plan, as executed by A. Wright on May 27, 1982, to the IRS for requalification. Pursuant to Nimmons' instructions, Stark and Frahm submitted their plan with an application for determination to the IRS, and notified Nimmons of the submission. (Testimony of Nimmons; S. Pate; Donald Stark; Robert Frahm; Plaintiffs' Exhibit Nos. 12, 15, 16, 17, 18, 38, 39; Defendant's Exhibit Nos. 16, 19, 20, 21, 22, 29, 30 31).

29. On April 14, 1983, Nimmons attempted to remove S. Pate and A. Wright as plan administrators, and S. Pate as trustee, to appoint himself as sole administrator, and to appoint S. Pate, A. Wright, Neil Cantrell, and himself as trustees. However, a trust instrument was not signed by these "trustees" at that time. Nimmons' actions were not properly taken under the Stark and Frahm plan, and on the advice of counsel, he repeated this procedure in January of 1984. On April 14, 1983, Nimmons also attempted to amend the excess asset distribution provisions of the Stark and Frahm plan, and a provision relating to the effect of the company's dissolution or insolvency.

30. On May 31, 1983, Nimmons again attempted to amend the Stark and Frahm plan, but failed to replace it with a properly executed trust instrument.

E. *The Hutcheson and Grundy Plan*

31. In April of 1983, Nimmons executed a power of attorney in favor of the law firm of Hutcheson and Grundy, and instructed them to withdraw the Stark and Frahm plan from IRS consideration. As a result, the IRS notified W.P. that it would give no further consideration to the Stark and Frahm plan. Consequently, the plan retained its unqualified status, and continued to incur the attendant tax liabilities.

32. In May of 1983, Hutcheson and Grundy prepared a plan which permitted the corporation to recapture excess assets. In the interest of getting a plan qualified with the IRS, S. Pate, N. Cantrell, and A. Wright agreed to sign the plan as trustees as long as Nimmons would sign a reservation

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of rights agreement acknowledging their claim to the excess assets. Nimmons agreed to this arrangement upon the advice of counsel, but subsequently refused to sign the agreement. As a result, the plan was not submitted to the IRS and remained unqualified.

33. Nimmons took no further action with respect to requalification until after Plaintiffs filed the instant lawsuit. Following Nimmons' refusal to sign the reservation of rights agreement in July of 1983, an amended plan (Hutcheson and Grundy II) was not executed until May of 1984.

34. The Hutcheson and Grundy II plan was submitted to the IRS with an application for determination which erroneously informed the IRS that the proposed plan was not the subject of litigation. The IRS noted that the plan was deficient in some respects. After corrective amendments, however, the Hutcheson and Grundy II plan was qualified in May of 1985, but only as far back as 1983.

35. Defendant's counsel reached the conclusion that the Stark and Frahm plan had been executed without authority and "back-dated" premised upon explanations and documentation provided by Defendant. However, Nimmons' assertion that concern for governmental regulation and potential liability motivated the withdrawal of the Stark and Frahm plan is inconsistent with his well documented prior conduct with respect to the plans. Accordingly, this Court finds that the "back-dating" theory advanced by Nimmons was fashioned in a last-ditch effort to seize control of excess assets upon termination of the plan.

F. *Funding the Pension and Profit Sharing Plans*

36. In the early 1970's, S.V. Pate inquired into the purchase of a tract of land in Leon and Robertson Counties. Acting upon the advice of Nimmons, the principals of W.P. caused the pension plan, rather than the individuals or the corporation, to purchase the land. Subsequently, the land was platted and recorded as Lake Limestone Coves, a development adjacent to and bordering Lake Limestone. In 1978 and 1979, W.P. gratuitously improved the property by clearing, grading, and constructing roads and culverts. As a result of these improvements and the property's proximity to Lake Limestone, the value of the property appreciated considerably.

37. As a consequence of appreciation in value of the plan's primary asset, the W.P. pension plan became "over-funded." An over-funded plan is one in which plan assets exceed the plan's obligation to pay vested benefits. Since employer contributions were unnecessary as a result of over-funding, there have been no contributions to the pension plan subsequent to Nimmons' acquisition of the corporations.

38. Nimmons, who is intimately familiar with the corporate books and records, was aware of the appreciation of the property. He estimated the increasing value of the property on the Form 5500-C's prepared for filing with the IRS each year.

39. Nimmons understood and appreciated the difference between plan assets and actuarial liabilities. In other words, he knew the significance of an over-funded plan. The principals of the corporation and plan participants, on the other hand, did not understand this significance. Although they knew that there were sufficient assets to make additional employer contributions unnecessary, they believed that all of the assets in the plan belonged to the participants and beneficiaries.

40. The excess plan assets accumulated as a result of the efforts of the former principals of the corporation. Since the corporations were family operated, everyone assumed that assets would accumulate solely for the benefit of the plan participants, and that no conflicting claims would ever be asserted by the corporation.

G. *The Change of Corporate Ownership*

41. In August or September of 1981, Nimmons expressed an interest in acquiring W.P. and the related corporations. At that time, the corporations were owned by S.V. Pate and A. Wright, who negotiated the sale of the companies. The negotiations continued into 1982. An agreement

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was reached, and closing was set for April 15, 1982. The closing was postponed several times and was finally accomplished on July 22, 1982. The purchase terms provided that Nimmons, through his holding company, was to pay Five Hundred Thousand Dollars ($500,000.00) in cash to both S.V. Pate and A. Wright, was to give a $500,000.00 promissory note to A. Wright, and to place $500,000.00 into a certificate of deposit for S.V. Pate, payable in one year. The only money that has been paid is the initial $500,000.00 in cash to each owner. Wright's note and Pate's certificate of deposit have not been paid.

42. The purchase price of the corporations was negotiated after determining the book value of corporate assets, including equipment, real property, receivables, and pending contracts. There was no discussion concerning the plans prior to the sale. The parties did not treat the pension plan as a corporate asset, and the value of excess assets in the plans was not a factor in determining the purchase price of the corporations.

43. No consideration was paid to the principals for the excess assets in the pension plans. S.V. Pate and A. Wright would not have sold the corporations to Nimmons had they known that he would attempt to recapture any of the plan's assets.

44. The corporations had a longstanding attorney-client relationship with a relative of Defendant. Thus, W.P.'s counsel withdrew from legal representation prior to the closing date to avoid a conflict of interests. With full knowledge that the principals were unrepresented by counsel at the time of the closing, Nimmons failed to disclose the information that he had gleaned from many years as a paid plan consultant — that the pension plan was over-funded, and that the sponsoring employer might recapture excess plan assets in certain circumstances.

45. Since all aspects of plan administration had been essentially delegated to Nimmons, the principals did not understand ERISA requirements. As a consequence of this lack of understanding, S.V. Pate executed an agreement at the closing which allowed him to continue acting in a trustee capacity, upon the misunderstanding that he would thereby be able to exert control over plan assets. Moreover, Nimmons was fully aware of the principal's lack of knowledge and dependence upon him regarding matters pertinent to the pension plan, and he was equally aware of S.V. Pate's mistaken impression when signing the trustee agreement at the time of closing.

46. By March of 1983, Nimmons was experiencing severe cash flow problems, and looked to the pension plan as a ready source of cash. He intended to terminate the plans and recapture excess assets to pay the debts of his corporations.

H. *Administration of the Plans Subsequent to the Change In Corporate Ownership*

47. Following Nimmons' acquisition of the corporations, the trustees of the W.P. plan were supposed to be: Nimmons, A. Wright, S.V. Pate, and N. Cantrell. However, Nimmons, as sole shareholder after his acquisition, failed to adopt a resolution effectuating an agreement with S.V. Pate and Neil Cantrell that they could serve as trustees. Accordingly, on July 22, 1982, the trustees were still S. Pate and A. Wright, who had been appointed on May 27, 1982.

48. Although he had not been officially appointed as trustee or administrator, Nimmons assumed exclusive control of the W.P. plan after his acquisition of the corporation. He opened trust bank accounts on his own signature, made unilateral investment decisions, and prevented the trustees or plan administrators from asserting any control over trust matters.

49. On January 20, 1984, Nimmons removed S.V. Pate, N. Cantrell, and A. Wright as trustees of the plans, and purported to appoint his wife and other family members to trustee positions. However, on March 2, 1984, Nimmons removed all trustees except himself, and at the time of trial purported to be the sole administrator and sole trustee of the plans.

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50. During negotiations with InterFirst Bank Houston, N.A. ("InterFirst"), to obtain financing for his acquisition of the subject corporations, Nimmons indicated that the plan's cash assets would be moved to InterFirst if InterFirst financed the acquisition. After the acquisition, Nimmons, in fact, did move the cash deposits to InterFirst.

51. Although service upon Defendant in the instant case was accomplished by mail pursuant to Fed.R.Civ.P. 4, Nimmons did not answer within twenty (20) days. Instead, on December 19, 1983, Nimmons met with officers of InterFirst, and executed a deed of trust in favor of the bank covering the plans' Lake Limestone Coves property. Thereafter, Nimmons was served by personal service on December 22, 1983.

52. On June 28, 1983, Nimmons executed a security agreement in favor of InterFirst, which granted a security interest in all of the pension plan assets that might ultimately be recaptured by the corporate sponsor. The security agreement was given to secure the payment of corporate debt personally guaranteed by Nimmons.

53. During the years that the plans were administered by W.P., the corporate sponsor paid all plan expenses and provided requisite services gratuitously. However, Nimmons has charged the plan a "trustee's fee" of Eighty Dollars ($80.00) per hour during the pendency of the instant lawsuit. This charge has been for menial and clerical tasks, such as driving to the bank to make deposits, driving to the post office to pick up mail, and posting in ledger books. Moreover, Nimmons has charged the plan an Eighty Dollar ($80.00) per hour fee for time spent in efforts to resolve the problems created by his own negligence. For example, Nimmons has charged the same "trustee's fee" for time spent meeting with his attorneys to defend the instant lawsuit, and for time spent with the representatives of InterFirst in an attempt to resolve the problems caused by his execution of the deed of trust on plan property in December of 1983. The total "trustee's fees" charged to the plans between April of 1983 and February of 1985, when this Court's order prevented further payments, were approximately Ninety-Nine Thousand Dollars ($99,000.00).

54. The plan assets consist primarily of cash deposits totalling in excess of Eight Hundred Thousand Dollars ($800,000.00). In addition, the plan owns residential lots at Lake Limestone Coves. In connection with approximately fifty (50) monthly payments on contracts for deeds, it is necessary to compile deposit slips, post receipts of payments, and deposit payments in a trust account. The remaining unsold lots require little attention other than marketing efforts.

55. In 1981, Nimmons signed a contract for deed for two (2) lots at Lake Limestone Coves. Although obligated to make annual payments to the pension plan for these lots, Nimmons has failed to make any payments since he acquired the companies.

56. The record reveals that the pension and profit sharing plans could be administered efficiently for less than Ten Thousand Dollars ($10,000.00) per year. Even if an institutional trustee had been appointed, a reasonably anticipated charge would be less than Fifteen Thousand Dollars ($15,000.00) per year.

57. Since Nimmons' acquisition of the corporations, "administrative expenses" have exceeded Forty Thousand Dollars ($40,000.00) per year. Nevertheless, Nimmons has failed to prepare or file with appropriate government agencies the forms, reports, and returns required to be filed. Specifically, he has failed to prepare and file annual reports (Form 5500-C) and Schedule B's. He did not request, nor did he obtain, an extension of time in which to file such returns. Moreover, the failure to file timely returns and reports subjects the plan to potential penalties, and prevents both the government and plan participants from obtaining an accounting of trust assets. Notice to the Pension Benefit Guaranty Corporation ("PBGC") and to the IRS was not given when all of W.P.'s employees were terminated. Notwithstanding the generous fees charged, annual statements of benefits were not prepared and provided

to participants until after an injunction was obtained from this Court.

I. *The Payment of Benefits to Plan Beneficiaries*

58. The original plan permitted participants to elect optional forms of payment of benefits at retirement, including lump sum payments, provided the option was acceptable to the administrative committee. Since the company was closely held by family members, it was generally understood that each participant's election would be respected.

59. In 1979, for example, the committee approved the election of C. Cantrell to take the lump sum actuarial equivalent of her vested benefit upon departure from the company. Nimmons requested Hand and Associates to calculate the benefits due to C. Cantrell. Although Young advised Nimmons that C. Cantrell's lump sum present value benefit was approximately Ten Thousand Dollars ($10,000.00), and that the reserve necessary for the benefit was nearly Fifty Thousand Dollars ($50,000.00), Nimmons erroneously advised the plan trustees to pay C. Cantrell a lump sum benefit of Forty-Seven Thousand Dollars ($47,000.00).

60. At the time of his retirement from the company in 1975, L.A. Wright sold his stock in equal shares to N. Cantrell, his son-in-law, and to A. Wright, his son. However, L.A. Wright elected to defer receipt of his benefits until his normal retirement age of sixty-five, which occurred in February of 1983.

61. In April of 1983, L.A. Wright requested payment of his lump sum benefits. Nimmons made no response in writing to Wright's request until June 29, 1984. Despite the fact that Hand and Associates had calculated Wright's benefits in 1980, and Nimmons therefore knew that Wright was entitled to the payment of benefits in February of 1983, he requested another actuary to recalculate the benefits. The actuary, William H. Mercer-Meidinger, was not contacted to perform an actuarial valuation until May of 1984, and Nimmons did not provide sufficient employee census information to permit the calculation of vested benefits until July of 1984.

62. Although ordered to pay Wright's benefits on August 22, 1984, Nimmons did not pay the benefits until this Court once again ordered the payment on September 24, 1984, pursuant to a hearing on Plaintiff's show cause motion. When the benefits were finally paid to Wright, the calculations prepared by Hand and Associates in 1980 were used, since Nimmons had discovered that the Meidinger analysis would result in a larger settlement.

63. The employees of Pate Co. and Aldine were terminated in April of 1983. However, they were not offered an election to receive benefits until an agreed injunction was entered on August 22, 1984. Moreover, when benefit checks were finally sent to participants, they contained a "conditional release" of the participants' claims against Nimmons.

64. In addition to refusing to pay benefits that were clearly due, Nimmons has also paid benefits to employees who were not entitled to receive benefits in August of 1984 because they had not been employed by the corporations long enough to have a vested interest. In fact, some of the employees paid by Nimmons had been employed for less than two weeks.

65. On March 12, 1984, the plan participants made written requests for copies of the latest summary plan description, the annual report, and a statement of vested benefits. The participants did not receive a statement of their benefits until August of 1984, after they had filed an application for a preliminary injunction and an agreed injunction had been entered requiring Nimmons to provide the requested information. The requested summary plan description was not provided until July of 1984. The requested annual report has never been provided.

66. Finally, employee benefits have been calculated under the Hutcheson and Grundy plan, which was not in existence at the time that the employees were terminated. The amended plan, Hutcheson and Grundy II, purports to make changes

which adversely affect the rights of the participants. For example, the amended plan does not specify various optional forms of payment, such as lump sum payments, which had been specifically available under prior plans. Thus, the amended plan purports to make forms of payment discretionary which had been expressly available under the plans in effect at the time the employees were terminated. Although Nimmons made a trial offer to pay lump sum benefits, his refusal to pay benefits until the time of trial was apparently motivated by malice rather than a good faith exercise of discretion.

67. By early April of 1983, all jobs had been abandoned, all field workers terminated, and no work was being performed by W.P. Although employees were paid wages through April 15, 1983, all employees of W.P. had been terminated prior to that date. Moreover, W.P. has not conducted business or hired employees since April of 1983. There are no beneficiaries of the pension plan, other than Plaintiffs, whose rights should be determined with reference to the Stark and Frahm plan. There is no indication that W.P. will ever resume business operations, employ personnel or make contributions to the pension plan since the corporations are insolvent.

68. As a direct consequence of Defendant's conduct, Plaintiffs have incurred substantial legal expenses. A reasonable award of attorney's fees to Plaintiffs for having to file this lawsuit to pursue their rights as ERISA participants is Two Hundred Forty Thousand Dollars ($240,000.00).

J. *The Counterclaims Asserted by Nimmons*

69. Until counterclaims were asserted by Nimmons in the case at bar, no claim has ever been asserted or intended to be asserted against the plan on behalf of the corporations for the gratuitous improvements of the plan's real property at Lake Limestone Coves.

70. To prevent contamination of water wells by septic tanks, regulations promulgated by the Brazos River Authority require water wells on the plan's property to be located at a distance of at least three hundred (300) feet from the nearest residential lot. Thus, to ensure that construction did not occur near the water well serving the plan's development, the lots on which the water well was situated were conveyed to Lakemont Construction Company in December of 1982. These lots, which were conveyed by A. Wright and S. Pate, acting in their capacity as trustees, were not capable of being sold by the plan because no septic system could be installed on them. Moreover, Nimmons, who was the owner of W.P. at that time, directed S. Pate and A. Wright to make the conveyance.

71. Lakemont Construction Company, which is owned by S.V. Pate, constructed the water system that services Lake Limestone Coves at no cost to the plan because Nimmons had advised the trustees that the plan could not operate a utility. Lakemont continued to operate the water system that services the development without charging the plan, and thereby enhanced the value of the pension plan's primary asset.

72. S. Pate purchased four (4) lots at Lake Limestone Coves upon the advice of Nimmons that there was no prohibition against the purchase of plan property by corporate officers. After becoming a trustee, in July of 1982, Pate attempted to sell his lots. However, the plan's attorney prepared closing documents that showed the plan rather than Pate as the seller. In order to correct the resulting title problems, the attorney recommended that Pate assign his lots to the plan. Nimmons concurred in this advice. While the documents reflect an assignment to the plan for a cash sales price, the transaction was in reality an attempt to cure problems created by the incorrect preparation of documents. Nimmons did not advise Pate that the transaction might be prohibited by ERISA or that an exemption should be sought. Thus, Pate relied upon the advice of his attorney and on Nimmons in completing the transaction.

73. The counterclaims at issue in the instant case involve transactions which were entered into by the former principals of the corporation upon the advice of Nimmons.

Accordingly, this Court finds that Defendant's counterclaims are without merit.

III. *Conclusions of Law*

1. The participants and beneficiaries of the W.P. pension plan have commenced this action pursuant to 29 U.S.C. § 1132(a)(1)(B) to clarify their rights to benefits under the terms of the plan. A central issue in this case is whether the pension plan has been effectively amended to provide for the distribution of assets to the corporate sponsor after all liabilities to beneficiaries and participants have been satisfied. Specifically, this Court must determine who is the lawful claimant to approximately One Million Dollars ($1,000,000.00) of surplus assets in the plan. Although corporate sponsors are generally permitted to amend a plan to provide for the recapture of excess assets if certain conditions are met, the attempt to recapture excess assets upon the termination of a plan maintained by a close corporation raises issues of first impression under ERISA. In traversing uncharted territory, the source of the law to be applied to the facts in this case must be the underlying policies of the statutory scheme. This Court has jurisdiction of this cause of action pursuant to 29 U.S.C. § 1132(e), and 28 U.S.C. § 1331, and venue is proper in this district.

A. *The ERISA Fiduciary: The Duty of Loyalty and the Duty of Due Care*

2. Courts have consistently characterized the duty of pension plan administrators and trustees as fiduciary in nature. *See, e.g., Donovan v. Mercer,* 747 F.2d 304 (5th Cir.1984). However, to state that a person is a fiduciary only begins the analysis; it gives direction to further inquiry. *SEC v. Chenery Corp.,* 318 U.S. 80, 85-86, 63 S.Ct. 454, 458-59, 87 L.Ed. 626 (1943). To whom, and what obligations do individuals owe as ERISA fiduciaries? What are the consequences of their failure to discharge fiduciary obligations?

3. The Fifth Circuit has established that the concept of fiduciary duty is to be broadly construed within the ERISA context. *See Donovan,* 747 F.2d at 308. Thus, as an individual with authority and responsibility with respect to plan matters, Nimmons must be characterized as an ERISA fiduciary since the inception of the original W.P. plans.

4. In general, the duty of loyalty and the duty of due care are subsumed in the concept of fiduciary duty. The duty of loyalty, on the one hand, is rooted in intentional tort law. Thus, this aspect of fiduciary duty is commonly expressed in the form of a prohibitive rule. In short, a fiduciary *must not* treat the trust *res* as if it were his own property; the fiduciary must not abuse his position of trust in order to advance his own selfish interests. On the other hand, the duty of due care is rooted in negligence principles, and is commonly expressed affirmatively. The fiduciary, therefore, must exercise at least that degree of care that a reasonably prudent person would devote to his own affairs under like circumstances. In short, a fiduciary *must* treat the trust *res* as if it were his own property; the fiduciary must exercise his position of trust so that the beneficiary of the trust is not harmed as a consequence of his failure to exercise reasonable care.

5. These two principles, theoretically, exist in conflict. In practice, however, it is ordinarily not difficult to discern the governing principle in a given set of circumstances. The facts of the instant case do not raise close questions. As an enrolled agent and paid consultant, Defendant repeatedly breached his duty of due care. Defendant has also blatantly disregarded his duty of loyalty by consistently treating the trust assets as if they were his own property subsequent to his acquisition of the corporations.

6. These two seminal principles, the duty of due care and the duty of loyalty, pervade the statutory scheme enacted by Congress in ERISA. *See, e.g.,* 29 U.S.C. § 1104(a)(1). [2] Consequently, an ERISA fiduciary

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must discharge his duties with respect to a plan solely in the best interest of plan participants and beneficiaries, while meeting an objective standard of reasonable prudence.

7. Defendant has willfully violated the prudent person standard imposed by Section 1104(a)(1) of ERISA. Defendant's grossly negligent conduct in failing to respond to IRS requests, and in failing to bring the plans into compliance with ERISA requirements directly caused the plans' loss of qualified status in December of 1981.

8. Following his acquisition of the corporations in 1982, Nimmons has directed the preparation of three (3) plans, yet failed to obtain qualification until 1985. Qualification of the Stark and Frahm plan would have minimized the damages caused by Nimmons' prior negligence. However, Defendant's withdrawal of the Stark and Frahm plan from IRS consideration, and his refusal to take action concerning requalification until after the commencement of this lawsuit, exacerbated the potential damages arising from disqualification and represents a blatant attempt to discredit a plan whose distribution provisions Defendant hoped to avoid.

9. Since Nimmons' acquisition of the corporations, the plans have not been administered for the exclusive purpose of providing benefits to participants and beneficiaries. The lengthy delay and refusal to pay benefits to L.A. Wright constitute a violation of § 1104(a)(1)(A) and (D). The fact that there was no dispute concerning Wright's entitlement to benefits underscores the malice that permeates Nimmons' conduct with respect to plan participants. Retaliatory motivation is simply impermissible under ERISA. *Jiminez v. Pioneer Diecasters,* 549 F.Supp. 677 (C.D.Cal.1982).

10. The Stark and Frahm plan provides for participants to receive lump sum payments (§ 6.2(b)(1)), and for participants to be eligible for benefits upon termination of service with the company (§ 6.1(a)(3)) or at the end of the plan year in which a participant experiences a break in service (§ 6.1(f)). A fiduciary is obligated to administer the plans in accordance with the documents and instruments governing the plan, 29 U.S.C. § 1104(a)(1)(D), and may not amend the plan to impose different entitlement requirements after participants have brought suit to enforce their rights under the plan. Thus, Nimmons' continued refusal to pay undisputed vested benefits constitutes a breach of duty, and his offer to pay benefits under the Hutcheson and Grundy plan constitutes an additional breach since the participants' rights are to be determined by the plan in effect at the time of termination. The method of payment under the Stark and Frahm plan may be subject to amendment if it is in the best interest of plan participants. However, a trustee's exercise of discretion may not be motivated by self-interest, malice or retaliation. *See Frary v. Shorr Paper Products, Inc.,* 494 F.Supp. 565 (N.D.Ill.1980).

11. Nimmons' failure to pay the trust for his lakefront lots is a manipulation of plan assets to his own benefit in violation of 29 U.S.C. § 1106(b)(1). Similarly, the transfer of plan assets to InterFirst in exchange for the bank's agreement to finance his acquisition of the companies violates ERISA standards. *Freund v. Marshall & Ilsley Bank,* 485 F.Supp. 629 (W.D.Wis.1979). Furthermore, execution

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of the deed of trust in favor of InterFirst clouded title to trust assets, and is a conflict of interest transaction which is prohibited under Section 1106(b)(1).

12. Nimmons' payment to himself of over Ninety-Nine Thousand Dollars ($99,000.00) in trustee's fees is impermissible under ERISA. While a reasonable trustee's fee may be paid to one who is not a full-time paid employee of the sponsoring company, 29 U.S.C. § 1108(c)(2), the payments in this case were excessive, unwarranted, and unrelated to any services rendered as a trustee. Defendant is not permitted to pay himself at an exorbitant rate for time spent correcting his past mistakes.

13. In addition to the general obligations imposed by Section 1104, an ERISA fiduciary is subject to specific statutory obligations including reporting and disclosure requirements. Nimmons' failure to respond to requests for information and to prepare and file proper disclosure reports are further breaches of fiduciary duty. Defendant has willfully failed to comply with the requirements of 29 U.S.C. § 1021(a) and (b), and with the provisions of Section 1024(b)(3). By failing to respond to Plaintiffs' letters of March 12, 1984, Nimmons has also violated his obligation which arises under 29 U.S.C. § 1025.

14. All counterclaims are dismissed. The transactions complained of by Nimmons are not prohibited in substance, caused no injury to the plan, and were conducted with Nimmons' full knowledge and upon his advice. The assertion that the plan owes over Nine Hundred Thousand Dollars ($900,000.00) to the corporations is invalid, and was made in an attempt to manipulate the plan's assets for Defendant's own purposes.

B. *The Distribution Provisions of the Stark and Frahm Plan*

15. The initial pension plan adopted by W.P. provided that the employer could amend the plan by delivering a written instrument to the trustee after execution by the Board of Directors. Since the amendment became effective upon endorsement of the trustee's receipt (§ 6.1 of the original plan), the original plan was properly amended by the Stark and Frahm plan.

16. In detailed and explicit distribution provisions, the Stark and Frahm plan provides that if excess assets exist in the plan after vested benefits have been calculated, the excess assets must be apportioned pro rata and distributed to participants. [3] The irrevocable nature of this distribution provision is underscored by multiple references. Section 1.2 stresses that no portion of the trust shall ever revert to the company except as specifically provided. However, the plan provided for the entire trust to be distributed to participants upon termination. Furthermore, Section 7.9 stresses that the plan should never be construed to vest any rights in the corporation other than the rights which are expressly provided by the plan. In light of the elaborate distribution provisions for the benefit of participants, Section 7.9 limits the rights of the corporation to those specifically stated in the plan, notwithstanding any contary amendment provision. In sum, the distribution provisions of the Stark and Frahm plan are so explicit that the intent of the grantors may not be avoided by Nimmons' subsequent attempts to amend the operative plan to allow recapture of excess plan assets.

17. Although Nimmons argues that his resolution of April 14, 1983, and the Hutcheson and Grundy II plan executed

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in May of 1984 are amendments that would permit the corporation to recapture excess assets, this Court concludes that the amendments are not valid with respect to the distribution of excess assets. The Court notes that the Stark and Frahm plan permitted amendment only to the extent that no amendment shall:

> (i) have the effect of vesting in the company any interest in any property held subject to the terms of this trust;
>
> (ii) cause or permit any property held subject to the terms of this trust to be diverted to purposes other than the exclusive benefit of the present or future members and their beneficiaries ... [or]
>
> (iii) reduce the beneficial interest of a member in any of the assets of the trust at the time of such amendment ...

Thus, this amendment provision includes more than the obligatory "exclusive benefit" language which has been construed to permit amendment allowing recapture of excess assets. The "exclusive benefit" requirement imposed by ERISA is met here by Subsection (ii) of § 13.1. Subsection (i) should not, therefore, be construed as a superfluous repetition of the exclusive benefit rule. Consequently, Nimmons' amendment permitting recapture of excess assets violates Subsection (i) of the Stark and Frahm amendment provision, and is void. *See Bryant v. International Fruit Products Co.,* 793 F.2d 118 (6th Cir.1986) (Reversing the district court's interpretation of 29 U.S.C. § 1344(d) premised upon similar language as is contained in § 13.1 of the Stark and Frahm plan, and holding that employer's amendment to recapture excess assets was impermissible).

18. Furthermore, the Stark and Frahm plan provides that the plan is to terminate as to any group of employees which is discharged as a group. Since all of W.P.'s employees were discharged prior to April 14, 1983, the date of Nimmons' purported amendment, the discharge of all employees resulted in a constructive termination of the entire plan. At *that time,* the participants were entitled to a distribution of excess plan assets in accordance with the distribution formula set forth in Section 13.3 of the Stark and Frahm plan.

19. The W.P. pension plan ceased to operate as a bona fide plan in April of 1983, and there has been no subsequent indication of corporate intent or capacity to resume operations. The circumstances involved in the instant case clearly support the conclusion that the plan has not been continued for the exclusive benefit of participants. Rather, the unnatural and abusive prolongation of the plan solely for the purpose of supporting the Defendant's attempted amendments to permit the recapture of plan assets violates the broad remedial protections afforded by ERISA. In sum, the plan's continued existence since April of 1983 has been a sham.

20. In any event, Nimmons' attempted revocation of the Stark and Frahm plan on May 31, 1983 must be considered an *actual* plan termination since a written plan had not been effectively executed to replace the revoked plan and trust.

21. The Stark and Frahm plan was adopted by the Board of Directors on May 27, 1982 to redress the problems resulting from the IRS disqualification. Accordingly, equity does not now permit Defendant to complain about the effect of distribution provisions which are consistent with the intention of the grantors, and which were ratified by Nimmons when he instructed Stark and Frahm to submit their plan for IRS consideration.

C. *The Recapture of Excess Plan Assets*

22. Although this Court concludes that the contemplated amendments of the W.P. pension plan are barred by the operational plan itself, and that the plan's unnatural prolongation constitutes a violation of the spirit, if not the letter of Section 1106, which requires a fiduciary to guard the interests of the plan's participants, rather than those of the corporate sponsor, the statutory exception to the exclusive benefit rule will be examined as an alternative basis for the decision reached in this case. *See* 29 U.S.C. § 1344(d).

23. Corporate sponsors have the right to amend employee welfare plans to

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provide for the recapture of excess plan assets *if* the plans can be amended consistently with the requirements imposed by ERISA. The statutory exception to the exclusive benefit rule provides that any residual assets of a defined benefit pension plan funded solely by employer contributions may be distributed to the employer upon plan termination provided that the following three conditions are met:

> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

29 U.S.C. § 1344(d)(1). *See Washington-Baltimore Newspaper Guild,* 555 F.Supp. at 259.

24. In construing Section 1344(d)(1), courts have generally permitted corporate sponsors to recapture excess assets through plan amendment providing that all benefits under the existing plans are not thereby reduced. *See, e.g., In re C.D. Moyer Company Trust Fund,* 441 F.Supp. 1128 (E.D.Pa.1977), *aff'd,* 582 F.2d 1273 (3rd Cir.1978); *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Company,* 555 F.Supp. 257 (D.D.C. 1983), *aff'd,* 729 F.2d 863 (D.C.Cir.1984); *Walsh v. Great Atlantic & Pacific Tea Company, Inc.,* 96 F.R.D. 632 (D.N.J.1983), *aff'd,* 726 F.2d 956 (3rd Cir.1983); *Pollock v.*

Castrovinci, 476 F.Supp. 606 (S.D.N.Y. 1979), *aff'd,* 622 F.2d 575 (2d Cir.1980); *Audio Fidelity Corp. v. Pension Benefit Guaranty Corp.,* 624 F.2d 513 (4th Cir. 1980); *Eagar v. Savannah Foods & Industries, Inc.,* 605 F.Supp. 415 (N.D.Ala.1984); *Bryant v. International Fruit Products Company, Inc.,* 604 F.Supp. 890 (S.D.Ohio 1985).

25. While there is a minority position to the effect that the exclusive benefit language required by ERISA precludes the recapture of excess assets, *see, e.g., F.D. I.C. v. Marine Nat'l Exchange Bank of Milwaukee,* 500 F.Supp. 108 (E.D.Wis. 1980); *Calhoun v. Falstaff Brewing Corp.,* 478 F.Supp. 357 (E.D.Mo.1979), the better reasoned position is that the "exclusive benefit" rule *standing alone* does not preclude an amendment which specifically directs the distribution of excess assets to the corporation in appropriate circumstances.

26. A controlling factor in the cases which have permitted recapture has been the absence of an excess asset distribution provision in the plan sought to be amended. In other words, to the extent that ERISA provisions do not expressly preclude a contemplated distribution, judicial interpretation is bottomed upon the application of general contractual principles. Thus, courts which have permitted a recapture amendment have been influenced by the fact that the plans did not provide for the distribution of excess assets to participants. *Washington-Baltimore Newspaper,* 555 F.Supp. at 257; *Pollack v. Castrovinci,* 476 F.Supp. at 606; *In re C.D. Moyer Co. Trust Fund,* 441 F.Supp. at 1128.

27. A fundamental legislative purpose was to assure that plan participants "actually receive benefits and do not lose benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to retain sufficient funds to meet its obligations." 1974 U.S. Code Cong. & Ad. News 4676-77. To these ends, Congressional intent is embodied in the "exclusive benefit rule" requiring that plan assets be held for the exclusive benefit of participants. *See* 29 U.S.C. § 1103(c)(1). At the same time, residual assets that have been exclusively contributed by an employer may be recovered in certain situations. *See* 29 U.S.C. § 1344(d)(1).

28. Judicial interpretation of the interaction of Sections 1103 and 1344 suggests that a recapture amendment should be permitted in two situations. First, where a trust plan is silent regarding the distribution of excess assets, courts must ascertain the probable intent of the plan originators premised upon a factual inquiry. If an employer has exclusively funded a plan, the courts reason, the unbargained for distribution of excess assets to participants represents an unintended

windfall for employees. Secondly, and more significantly, where excess assets have accumulated as a consequence of actuarial error, courts have been reluctant to penalize employers for overfunding their plans.

29. The judicial outcome permitting an employer to recapture in these two situations is consistent with the policies underlying the enactment of ERISA. Common sense dictates that employers which fund plans under ERISA guidelines should not be penalized for overfunding in an abundance of caution or as a result of miscalculation by the actuary. The contrary judicial outcome would contravene congressional purpose by creating a disincentive for employers to adequately fund employee welfare plans.

30. The policy considerations which underlie the permissible recapture of excess assets are conspicuously absent from the case at bar. In contrast to the courts which have permitted recapture, the Fourth Circuit in *Audio Fidelity Corp.,* 624 F.2d at 516-17 announced a rule that is more applicable to the present, analagous circumstances. The Fourth Circuit concluded that a recapture amendment is impermissible when a plan expressly provides for the distribution of excess assets to participants, particularly when an attempted amendment occurs subsequent to termination. Concluding that the right to benefits under a plan is earned, delayed compensation, and not gratuities, the Fourth Circuit rejected "Audio's claim that its employees would be unjustly enriched by receiving their equitable share of the fund's assets." *Id.* at 518, *quoting, Rochester Corp. v. Rochester,* 450 F.2d 118, 121 (4th Cir.1971). Reasoning that the plan fixed the rights of participants at the time of termination, the court held that the employer's post-termination attempt to divert surplus assets was prohibited by ERISA. Furthermore, an impermissible attempt to amend a distribution provision may itself constitute a breach of fiduciary duty. *See Delgrosso v. Spang & Co.,* 769 F.2d 928 (3d Cir.1985).

31. In contrast to the cases relied upon by Defendant, the relevant equitable factors in the present case overwhelmingly favor the plan participants and beneficiaries. Accordingly, this Court concludes that Defendant's purported amendment to permit recapture violates the express provisions and the spirit of ERISA, and would work a fraud upon the participants.

32. This Court concludes that the pension plan assets were not "sold" to Nimmons when he acquired the companies. *See Foster Medical Corp. Employee's Pension Plan v. Healthco, Inc.,* 753 F.2d 194 (1st Cir.1985). The excess assets were not subject to the bargaining and negotiation that led to the stock purchase agreement. The purchase price of the corporations was arrived at through an evaluation of equipment values, pending work, value of real property, and other traditional indices of a corporation's value. As a consequence of his superior knowledge and experience gained from serving as a paid plan consultant, Nimmons knew of the existence and the amount of excess plan assets. Yet, he failed to disclose his intention to control the excess plan assets through acquisition of the corporations. While the fiduciary relationship is consensual, and may be terminated at any time, there is a continuing obligation, under the circumstances involved in the instant case, to disclose material facts gained from years of experience as an ERISA fiduciary. To the extent that plan assets in excess of One Million Dollars ($1,000,000.00) were overlooked in the acquisition of the corporations, their recapture by the employer, particularly in light of the Stark and Frahm distribution provisions, would constitute an unwarranted and unintended windfall to the Defendant, the corporations' sole shareholder, who neither made any contribution to the assets which have accumulated nor forthrightly bargained for them.

D. *Remedies*

33. Since the Court concludes that Defendant's failure to respond to written requests for information was malicious, and without justification, the Court holds Defendant liable for statutory damages in

the amount of One Hundred Dollars ($100.00) per day from April 13, 1984 until the date of trial. 29 U.S.C. § 1132(c).

34. Bearing in mind the admonition of the concurring Justices in *Massachusetts Mutual Life Ins. Co. v. Russell,* ____ U.S. ____, 105 S.Ct. 3085, 3099, 87 L.Ed.2d 96 (1985), [4] in accordance with the underlying statutory purposes of ERISA, this Court deems it appropriate for Defendant to repay to the W.P.

pension plan all fees paid to himself after July of 1982. Although an agent is generally entitled to reasonable compensation for services, Defendant's obvious conflict of interest subsequent to his acquisition of the corporations and during the pendency of the present lawsuit rendered it wholly impossible for him to perform impartial service on the behalf of plan beneficiaries. Instead, Defendant's performance has been characterized by malice and by intentional disregard of his fiduciary duty. The unnatural prolongation of the life of the pension plan appears to have been motivated solely by Defendant's self-interest. Under the circumstances, the payment to himself of exorbitant fees, particularly when the plan has been charged for time spent by the Defendant in undoing the results of his own prior malfeasance and negligence, conflicts with Defendant's statutory duties. Defendant is further ordered to pay to the plan those payments on lakefront lots for which he is in default. *See* 29 U.S.C. §§ 1109(a), 1132.

35. Reasonable attorneys' fees in the sum of Two Hundred Forty Thousand Dollars ($240,000.00) are jointly and severally assessed against Defendant, individually, who has acted in bad faith and in intentional disregard of his fiduciary obligations to Plaintiffs, and against the W.P. pension plan, in accordance with the principles established by the Fifth Circuit. *See, e.g., Donovan v. Cunningham,* 716 F.2d 1455, 1475 (5th Cir.1983); *Ironworkers Local No. 272 v. Bowen,* 624 F.2d 1255 (5th Cir. 1980). *See also Free v. Gilbert-Hodgman, Inc.,* No. 80-C-4492, slip op. (D.Ill. March 5, 1985) (president of employer corporation and trustee held jointly and severally liable for attorneys' fees and costs); *Donovan v. Schmoutey,* 592 F.Supp. 1361, 1406 (D.Nev.1984) (award of costs and fees jointly and severally against defendants who participated in breach of duty by trustee); *Teamsters Pension Trust Fund v. Philadelphia Fruit Exchange,* 603 F.Supp. 877, 881 (E.D.Pa.1985) (pension fund, corporation and employer individually held jointly and severally liable for costs and attorneys' fees).

36. A trustee must serve solely in the best interest of a plan's participants. Since Defendant's conflicts of interest have impaired his ability to serve as a trustee, *see Donovan v. Bierwirth,* 680 F.2d 263 (2d Cir.1982), this Court concludes that he should be removed, and a substitute trustee shall be appointed. *See Marshall v. Snyder,* 572 F.2d 894, 901 (2d Cir.1978).

37. Plaintiffs shall submit to the Court within twenty (20) days a list of three (3) proposed substitute trustees. From this list, the Court will appoint a substitute trustee and plan administrator who shall call a meeting of the members pursuant to § 13.6 of the Stark and Frahm plan, for the purpose of selecting a controlling committee to terminate the plan.

38. The controlling committee together with the substitute trustee shall proceed to terminate the plan in accordance with PBGC requirements and in accordance with the distribution provisions of the Stark and Frahm plan. Since termination at this time of the Stark and Frahm plan may present tax disadvantages to the Plaintiffs, the controlling committee may, upon advice of the substitute trustee, elect to proceed with termination of the Hutcheson and Grundy plan which must be reformed in accordance with these Findings and Conclusions to contain

Sections 13.3 and 13.6 of the Stark and Frahm plan.

39. In the event that the above Findings of Fact also constitute Conclusions of Law, they are adopted as such. In the event that the foregoing Conclusions of Law also constitute Findings of Fact, they are adopted as such.

IV. *Conclusion*

In accordance with law and equity, this Court concludes that the relevant provisions of the Stark and Frahm plan, as originally presented for IRS consideration, must control the final disposition of assets which have accumulated in the W.P. pension plan. In light of Defendant's intentional and continuous breach of his duties as an ERISA fiduciary, this Court further concludes that a substitute trustee must be appointed to terminate the plan. Moreover, Defendant is to be held personally liable for the damages proximately caused by his misfeasance and deliberate violations of ERISA standards. This Court will retain continuing jurisdiction over this cause of action until assets have been distributed to the beneficiaries and participants of the plan. Accordingly, counsel for Plaintiff is directed to file a report with this Court every ninety (90) days until further notice.

FootNotes

1. The termination provision of the Stark and Frahm plan, Section 13.3, provides as follows:

> In the event the plan is terminated for any reason, the vesting provisions contained herein shall be inapplicable and each member's accrued benefit shall become 100% vested. As of the date of termination, the present value of the accrued benefits of all members shall be adjusted to equal the net worth of the investment fund.... In the event the plan is terminated and the provisions of paragraph 13.4, which limit the benefit available to a member, cause the plan investment fund to exceed the sum of such member's unrestricted benefit plus the present value of the accrued benefits of all other members, the amount of such excess shall be used to increase each member's benefit, including the benefit of a restricted member, by allocating a portion of such excess to each member in the ratio that the present value of each such member's accrued benefit bears to the total present value of all member's accrued benefits. In allocating such excess, the present value of a restricted Member's Accrued Benefit shall be the full present value of his Accrued Benefit without regard to the limitation set forth in Paragraph 13.4. The Plan Administrator shall notify the Internal Revenue Service of such termination for a determination of the effect such termination shall have on the qualification of the Plan and the tax exempt status of the Trust, and shall make no distributions until such determination has been received. Unless the Company is a professional service company having 25 or fewer Members of the Plan, the Plan Administrator shall also notify the Pension Benefit Guaranty Corporation and shall make no distributions until receipt of Notice of Sufficiency from the Pension Benefit Guaranty Corporation. Upon receipt of a favorable determination letter from the Internal Revenue and Notice of Sufficiency from the Pension Benefit Guaranty Corporation, the Plan Administrator shall make settlement of the Members' Accrued Benefits in the accordance with Article VI.

2. The prudent person standard imposed by ERISA provides that the fiduciary shall discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and —

> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and