C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **NOTICE OF LODGING FEDERAL AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL** Date: January 18, 2011 Time: 8:30 a.m. Location: Dept. 402 Judge: Hon. Jeff Hamilton Date Action Filed: June 17, 2010

NOTICE IS HEREBY GIVEN that PLAINTIFFS are hereby lodging the following Federal Authorities in support of our Motion for Summary Judgment Or in the Alternative for Summary Adjudication / Trial:

1. *U.S. v. Cabaccang,* (9th Cir. 2003) 332 F.3d 622 ..... Exhibit 1
2. *U.S. v. W.R. Grace,* (9th Cir. 2007) 504 F.3d 745 ..... Exhibit 2
3. *Baggett v. Bullitt,* (1964) 377 U.S. 360, 372 ..... Exhibit 3
4. *City of Chicago v. Morales,* (1998) 527 U.S. 41 ..... Exhibit 4
5. *Coluati v. Franklin,* (1979) 439 U.S. 379 ..... Exhibit 5
6. *Connally v. General Const. Co.,* (1926) 269 U.S. 385 ..... Exhibit 6
7. *Grayned v. City of Rockford,* (1972) 408 U.S. 104 ..... Exhibit 7
8. *Hoffman Estates v. Flipside* (1982) 455 U.S. 489 ..... Exhibit 8
9. *Kolender v. Lawson,* (1983) 461 U.S. 352 ..... Exhibit 9
10. *Malat v. Riddell,* (1966) 383 U.S. 569 ..... Exhibit 10
11. *Smith v. Goguen,* (1974) 415 U.S. 566 ..... Exhibit 11
12. *United States v. Harriss,* (1954) 347 U.S. 612 ..... Exhibit 12
13. *United States v. Salerno,* (1987) 481 U.S. 739 ..... Exhibit 13
14. *District of Columbia v. Heller,* (2008) 128 S.Ct. 2783 ..... Exhibit 14
15. *McDonald v. Chicago,* (2010) 130 S.Ct. 3020 ..... Exhibit 15
16. *State ex rel. Martin v. Kansas City,* (1957) 181 Kan. 870 ..... Exhibit 16
17. *Andrews v. State*, 50 Tenn. 165, 178, 8 A. Rep. 8, 13 (1871) ..... Exhibit 17
18. *Schrader v. State,* (1986) 69 Md. App. 377, 390 1146 ..... Exhibit 18

Dated: December 6, 2010

Respectfully Submitted,
MICHEL & ASSOCIATES, P.C.

Clinton Monfort
Attorney for Plaintiffs

EXHIBIT “1”

LEXSEE 332 F.3D 622

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES CABACCANG, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD T. CABACCANG, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROY TOVES CABACCANG, Defendant-Appellant.

No. 98-10159, No. 98-10195, No. 98-10203

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

332 F.3d 622; *2003 U.S. App. LEXIS 11315*; *2003 Cal. Daily Op. Service 4785*; *2003 Daily Journal DAR 6088*

December 9, 2002, Argued and Submitted En Banc, San Francisco, California
June 6, 2003, Filed

SUBSEQUENT HISTORY: Clarified by *United States v. Cabaccang, 341 F.3d 905, 2003 U.S. App. LEXIS 17756 (9th Cir., 2003)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Guam. John S. Unpingco, District Judge, Presiding. D.C. No. CR-97-00095-3-JSU D.C. No. CR-97-00095-2-JSU D.C. No. CR-97-00095-1-JSU.
United States v. Cabaccang, 36 Fed. Appx. 234, 2002 U.S. App. LEXIS 10842 (9th Cir. Guam, 2002)
United States v. Cabaccang, 16 Fed. Appx. 566, 2001 U.S. App. LEXIS 15454 (9th Cir. Guam, 2001)

DISPOSITION: Affirmed in part, reversed in part, and remanded. Panel decisions adopted in part.

COUNSEL: Rory K. Little, San Francisco, California, for the defendants-appellants Cabaccang.

Elizabeth A. Fisher, Honolulu, Hawaii, for the defendant-appellant James Cabaccang.

Arthur E. Ross, Honolulu, Hawaii, for the defendant-appellant Richard T. Cabaccang.

Sarah Courageous, Honolulu, Hawaii, for the defendant-appellant Roy Toves Cabaccang.

Kathleen A. Felton, Assistant United States Attorney, Washington, D.C., for the plaintiff-appellee.

JUDGES: Before: Mary M. Schroeder, Chief Judge, Alex Kozinski, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Michael Daly Hawkins, Susan P. Graber, M. Margaret McKeown, William A. Fletcher, Raymond C. Fisher, Richard A. Paez and Richard C. Tallman, Circuit Judges. Opinion by Judge Fisher; Concurrence by Chief Judge Schroeder; Dissent by Judge Kozinski.

OPINION BY: Raymond C. Fisher

OPINION

[*623] FISHER, Circuit Judge:

Appellants James, Richard and Roy Cabaccang appeal their convictions on a variety of charges relating to their involvement in a drug trafficking [**2] ring that transported large quantities of methamphetamine from California to Guam in the early and mid-1990s. The Cabaccangs' primary contention on appeal is that the transport of drugs on a nonstop flight from one location within the United States to another does not constitute importation within the meaning of *21 U.S.C. § 952(a)*, even though the flight traveled through international airspace. We agree, and therefore we reverse the appellants' convictions on all importation-related counts.

Factual and Procedural Background

In the early 1990s, Roy Cabaccang began selling methamphetamine out of his house in Long Beach, California, to customers introduced to him by his younger brothers Richard and James. The Cabaccangs eventually

expanded their operation to include large-scale shipments of methamphetamine to Guam for local distribution. To transport the drugs to Guam, Roy recruited various people to fly from Los Angeles to Guam with packages of [*624] methamphetamine concealed under their clothing. Richard helped the couriers tape the packages of methamphetamine to their bodies. The Cabaccangs also sent packages of methamphetamine from California to Guam through [**3] the United States mail. After Roy's associates sold the methamphetamine in Guam, they sent the proceeds back to California via courier and wire transfer. Each of the Cabaccang brothers received wire transfers of profits from the drug sales.

After a long investigation, the Cabaccangs were indicted in 1997 on numerous charges relating to their involvement in the methamphetamine ring. A jury convicted all three brothers of conspiracy to import methamphetamine, in violation of *21 U.S.C. §§ 952(a), 960 and 963*; conspiracy to distribute methamphetamine, in violation of *21 U.S.C. §§ 841(a)(1) and 846*; and conspiracy to launder monetary instruments, in violation of *18 U.S.C. § 1956.* [1] The district court sentenced all three brothers to concurrent terms of life in prison on at least one of the importation counts and at least one of the non-importation counts (with concurrent shorter terms on other counts). [2]

1 Richard and Roy were also convicted of importation of methamphetamine, and Roy was convicted of conducting a continuing criminal enterprise, possession of methamphetamine with intent to distribute, attempted importation of methamphetamine and possession and receipt of a firearm by a convicted felon.

[**4]

2 Roy received concurrent life sentences on all of the drug counts. James received concurrent life sentences on the counts of conspiracy to import and conspiracy to distribute. Richard received concurrent life sentences on the counts of conspiracy to import, conspiracy to distribute and conspiracy to launder money.

The Cabaccangs appealed their convictions to this court, claiming that the transport of drugs from California to Guam does not constitute importation merely because the drugs traveled through international airspace en route to Guam. [3] Relying on our decisions in *Guam v. Sugiyama, 846 F.2d 570 (9th Cir. 1988)* (per curiam), and *United States v. Perez, 776 F.2d 797 (9th Cir. 1985)*, a three-judge panel affirmed the convictions in an unpublished disposition, stating that "we have clearly declared that transporting drugs from one point in the United States to another through or over international waters constitutes importation." [4] *United States v. Cabaccang, 16 Fed. Appx. 566, 568 (9th Cir. 2001)* ("*Cabaccang I*"). We granted rehearing [**5] en banc to reexamine the importation statute and determine whether it does prohibit the transport of drugs through international airspace on a nonstop flight from one point within the United States to another.

3 The Cabaccangs asserted numerous other grounds for reversal of their convictions, including insufficient evidence, constructive amendment of the indictment, multiplicitous counts, ineffective assistance of counsel, erroneous jury instructions and erroneous denial of Roy's motion to suppress evidence. The brothers also claimed that their sentences violated the rule announced in *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*, because drug quantity was not charged in the indictment or submitted to the jury.

4 The panel also rejected the Cabaccangs' other challenges to their convictions, *see United States v. Cabaccang, 16 Fed. Appx. 566, 568-70 (9th Cir. 2001)*, and it denied the Cabaccangs' *Apprendi*-based challenges to their sentences in a subsequent memorandum disposition. *See United States v. Cabaccang, 36 Fed. Appx. 234 (9th Cir. 2002)* ("*Cabaccang II*").

[6] Standard of Review**

The construction or interpretation of a statute is a question of law that we [*625] review de novo. *United States v. Carranza, 289 F.3d 634, 642 (9th Cir.), cert. denied, 537 U.S. 1037, 154 L. Ed. 2d 458, 123 S. Ct. 572 (2002).*

Discussion

I.

"We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will." *Bedroc Ltd. v. United States, 314 F.3d 1080, 1083 (9th Cir. 2002)* (internal quotation marks omitted). The starting point of this inquiry is the language of the statute itself. *United States v. Hackett, 311 F.3d 989, 991 (9th Cir. 2002). Section 952(a)* states that "it shall be unlawful [1] to import into the customs territory of the United States from any place outside thereof (but within the United States), or [2] to import into the United States *from any place outside thereof*, any controlled substance." *21 U.S.C. § 952* (emphasis added). *Section 951(a)*, which furnishes the relevant definitions for the terms used in *§ 952*, defines "import" broadly as "any bringing in or introduction of such article into any area (whether [**7] or not such bringing in or introduction

constitutes an importation within the meaning of the tariff laws of the United States)." *Id. § 951(a)(1).* It is the *second clause of § 952(a)* that is at issue here, as it is undisputed that the Cabaccangs did not bring drugs into the customs territory of the United States. [5]

> 5 The Cabaccangs brought drugs into Guam, which is not part of the customs territory of the United States. *See* Harmonized Tariff Schedule of the United States ("HTSUS"), General Note 2, *19 U.S.C. § 1202* (defining the customs territory of the United States as "the States, the District of Columbia and Puerto Rico"), *available at* http://dataweb.usitc.gov/SCRIPTS/tariff/toc.html.

The Cabaccangs argue that they are not guilty of importation because they did not bring drugs into the United States from a "place outside thereof." They contend that the transit of drugs through international airspace en route from one location in the United States (California) to another [**8] (Guam) is insufficient to support a charge of importation under *§ 952.* [6] The government counters that international airspace is itself a "place outside" the United States within the meaning of the statute. Pointing to *§ 951*'s definition of "import" as "any bringing in," the government argues that the entry of contraband into the United States from international airspace is all that the statute requires. That the flight carrying the contraband departed from a domestic location is irrelevant, the government maintains, because *§ 952(a)* is unconcerned with the origin of a shipment of drugs that enters the United States from international airspace.

> 6 The airspace of the United States currently includes that airspace overlying the waters within 12 nautical miles of the land borders of the United States. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (extending the territorial sea of the United States to 12 nautical miles from the baselines of the United States, and defining the territorial sea of the United States as a "maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, *a sovereignty and jurisdiction that extend to the airspace over the territorial sea*, as well as to its bed and subsoil." (emphasis added)).

[**9] The problem with the government's argument is that despite *§ 951*'s broad definition of importation as "any bringing in," *section 952(a)* itself specifies that the bringing in be "*from any place outside*" the United States. (Emphasis added.) This requirement was not an element of *§ 952(a)*'s predecessor statute, 21 U.S.C. § 174, which provided criminal penalties for "fraudulently or knowingly importing [*626] or bringing any narcotic drug *into the United States* or any territory under its control or jurisdiction, contrary to law." (Emphasis added.) [7] In 1970, Congress replaced § 174 with *§ 952*, inserting the phrase "from any place outside thereof" after the words "into the United States" without explanation. [8] If, as the government urges, Congress was concerned only with the destination of the drugs, it would have been sufficient to retain the original language of the importation statute, simply prohibiting the import of drugs "*into* the United States" without reference to the point of origin. The addition of the phrase "*from* any place outside the United States" undercuts the government's contention that Congress intended the origin of a drug shipment [**10] to be irrelevant to a finding of importation under *§ 952(a). See Webster's Third New International Dictionary* 913 (1981) (defining "from" as "used as a function word to indicate a starting point: as (1) a point or place where an actual physical movement . . . has its beginning . . ."); *The American Heritage Dictionary of the English Language* 729 (3rd ed. 1996) (defining "from" as "used to indicate a specified place or time as a starting point: walked home from the station . . . ").

> 7 Section 174 traced its origins to 35 Stat. 614 (1909), which prohibited the importation of opium into the United States. The statute was amended in 1922 to extend the prohibition to the importation of "any narcotic drug." 21 U.S.C. § 174 (1922).
>
> 8 The legislative history is silent as to why Congress made this change.

The question, then, is whether drugs that pass through international airspace on a nonstop flight en route from one U.S. location to another, without touching down on either [**11] land or water, are "from" a "place outside" the United States for the purposes of *§ 952(a).* When Congress has not provided special definitions, we must construe words in a statute "according to their ordinary, contemporary, common meanings." *Hackett, 311 F.3d at 992* (alteration in original) (internal quotation marks and citation omitted). Turning to the word "place," we acknowledge that it can have many meanings, some of which, when viewed in isolation, might seem to apply to international airspace. The critical question, however, is what the term reasonably can be understood to encompass as it is used, not in isolation, but in the phrase "from any place outside [the United States]," and in the larger context of *§ 952*, which is concerned with the importation of drugs into the United States.

In the ordinary sense of the term, drugs do not come from international airspace, although they certainly can move through that space. Unlike, for example, a foreign nation -- which is unquestionably a "place outside" the United States -- international airspace is neither a point of origin nor a destination of a drug shipment; it is merely something through which an aircraft [**12] must pass on its way from one location to another. We do not treat passengers who travel through international airspace on a nonstop flight between two U.S. locations as having crossed our borders (i.e., as having entered the United States from a place outside thereof), and thereby subject to immigration inspections or border searches -- as they would be if the flight had originated in a foreign country. *Cf. United States v. Garcia, 672 F.2d 1349, 1357-58 (11th Cir. 1982)* (doubting the validity of a border search of an airplane that traveled through international airspace en route between known points of origin and destination within the United States, because "there is no more justification for searching the aircraft or passengers who make such flights than there would be for searching those whose domestic flights do [*627] not happen to take them over the ocean on the way"). Moreover, were we to ask anyone familiar with the facts of this case from what place the Cabaccangs brought drugs into Guam, the answer surely would be "California" -- not "international airspace." *See United States v. Ramirez-Ferrer, 82 F.3d 1131, 1137 (1st Cir. 1996)* (en banc) (using [**13] the same reasoning in concluding that the term "place," as it is used in *§ 952(a)*, does not include in-transit international waters).

The dissent rejects this analysis of the plain meaning of the statutory language, arguing that an item in transit is *from* all of the places *through* which it passes en route from its starting point to its destination. We recognize that, like the word "place," the word "from" can have different meanings, depending on the context of the inquiry. We think it is clear, however, that a defendant who has brought drugs on a non-stop flight that lands in the United States can most reasonably be said to have brought drugs *from* the point of the flight's departure -- and not the airspace *through* which the plane traveled on the way. [9]

9 The dissent posits that "[a] person traveling from Place A *to* Place B to Place C arrives at C both *from* A and *from* B." (Italics added.) We find such a reading to be strained and implausible in the context of a nonstop flight. The flights at issue in this case, for example, undeniably flew from Los Angeles ("Place A") to Guam ("Place C"), but *not* "to" international airspace ("Place B," per the dissent).

[**14] Although we conclude that a common-sense reading of the plain language of the statute forecloses its application here, we are also persuaded that our reading is consistent with the statute's structure. "We must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991)*. Under the government's interpretation of the statute, however, any conduct proscribed by the *first clause of § 952(a)* also would have been covered by the statute's broader *second clause* when *§ 952* was enacted in 1970, rendering the *first clause* of the statute superfluous.

The *first clause of § 952(a)* prohibits the importation of drugs "into the customs territory of the United States from any place outside thereof (but within the United States)." *21 U.S.C. § 952(a)*. The customs territory of the United States consists of "the States, the District of Columbia and Puerto Rico." *See* HTSUS at General Note 2. At the time of *§ 952*'s enactment, when the territorial [**15] sea of the United States extended only three miles out from the coast, [10] all of the U.S. territories that were outside the customs territory, e.g., the U.S. Virgin Islands, Guam and American Samoa, were not contiguous with the customs territory. It therefore would have been impossible to bring drugs from the non-customs territory into the customs territory without passing through international airspace (or waters). [11] Under the government's reading of the statute, however, the entry of drugs into the United States from international airspace already would have been [*628] prohibited by the *second clause* of the statute. Therefore, any importation proscribed by the *first clause* also would have been proscribed by the *second clause*, rendering the *first clause* superfluous. We cannot conclude that Congress intended the opening clause of the statute to have no independent force. *See Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002)* ("It is a well-established principle of statutory construction that legislative enactments should not be construed to render their provisions mere surplusage." (internal quotation marks omitted)).

10 *See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441 n.8, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989)* ("The United States has [until 1988] adhered to a territorial sea of 3 nautical miles ....").

[**16]

11 As the dissent notes, this is not entirely the case today: given the current 12-mile limit of the territorial sea, it is possible to travel from St. Thomas (noncustoms territory) to Puerto Rico without leaving United States airspace or waters,

> as the tiny island of Culebra, Puerto Rico (but not the main island of Puerto Rico) is within 24 miles of St. Thomas.

In an attempt to save its interpretation of *§ 952(a)* from superfluousness at the time of the statute's enactment, the dissent argues that Congress did not intend the three-mile limit of the territorial sea to be the relevant boundary. According to the dissent, when Congress defined the "United States" for the purposes of *§ 952* as "all places and waters, continental or insular, subject to the jurisdiction of the United States," *see 21 U.S.C. § 802(28), incorporated by § 951(b)*, it *could have meant* "waters . . . subject to the jurisdiction of the United States" to refer to the limited 12-mile customs interdiction jurisdiction codified at *19 U.S.C. §§ 1401(j), 1581(a)-(b)*, rather [**17] than the three-mile limit of plenary sovereign jurisdiction within the territorial sea. [12]

> 12 This limited customs jurisdiction is also referred to as the "contiguous zone." *See United States v. Rubies, 612 F.2d 397, 403 n.2 (9th Cir. 1979)*; *see also* Convention on the Territorial Sea and the Contiguous Zone, art. 24, 15 U.S.T. 1606 (1964).

It is not enough, however, that Congress "reasonably could have believed" that *§ 952* invoked this 12-mile limited interdiction jurisdiction, rather than the three-mile sovereign jurisdiction. Our role is to determine Congress' actual intent, not its possible intent, and the Supreme Court has instructed that in the absence of a clear statement, we should not assume that Congress intended to include the waters beyond the territorial sea when defining the United States. *See Argentine Republic, 488 U.S. at 440.* In *Argentine Republic*, the respondents argued that under the *Foreign Sovereign Immunities Act* -- which defined [**18] the "United States" as all "territory and waters, continental and insular, subject to the jurisdiction of the United States" -- the term "waters . . . subject to the jurisdiction of the United States" included the high seas, which are within the admiralty jurisdiction of the United States. [13] *Id.* (citing *28 U.S.C. § 1603(c)*). The Supreme Court rejected this attempt to broaden the statute's definition of the United States, holding that

> the term "waters" in *§ 1603(c)* cannot reasonably be read to cover all waters over which the United States courts *might* exercise jurisdiction. When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute. We thus apply "the canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."

Id. (emphasis added) (footnote omitted) (quoting *Foley Bros.v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)).* Because there was no evidence of congressional intent to include the high seas within the definition of the [**19] United States, the Court held that the incident at issue did not occur within the United States, because [*629] it occurred "outside the 3-mile limit then in effect for the territorial waters of the United States." *Id. at 441.*

> 13 The high seas are those waters that are seaward of the territorial sea, and they include the contiguous zone. *Rubies, 612 F.2d at 403 n.2.*

Evidence of congressional intent to incorporate the limited jurisdiction of the contiguous zone, rather than the plenary sovereign jurisdiction of the territorial sea, is similarly lacking here. The dissent points to nothing in the statutory language or the legislative history of *§ 952* to indicate that Congress intended to include the contiguous zone in its definition of the United States. Instead, it relies on the decisions of three circuits that have assumed that *§ 952* incorporated the 12-mile limit of the contiguous zone. *See United States v. Nueva, 979 F.2d 880, 884 (1st Cir. 1992); United States v. Goggin, 853 F.2d 843, 845 (11th Cir. 1988)*; [**20] *United States v. Lueck, 678 F.2d 895, 905 (11th Cir. 1982); United States v. Seni, 662 F.2d 277, 286 (4th Cir. 1981).* But none of these decisions addressed whether that interpretation properly construed Congress' intent to invoke a definition different from the three-mile territorial limit in effect when the statute was enacted. In the absence of some indication that Congress actually intended to include the contiguous zone within its definition of the United States for purposes of *§ 952*, we follow the Supreme Court's interpretive mandate in *Argentine Republic* and conclude instead that Congress intended the operative boundary of the United States to be the three-mile limit that defined the U.S. territorial sea in 1970, until it was extended in 1988. Under this limit, it would have been impossible to travel from the noncustoms territory of the United States to the customs territory without passing through international airspace. *Clause 1 of § 952(a)* thus would have been superfluous if, as the government contends, *clause 2* prohibited the transport of drugs through international airspace on a domestic flight. We decline, as we must, to attribute [**21] to Congress an intent to create such a redundancy.

Moreover, even if we were to accept the dissent's contention that Congress intended to invoke the 12-mile

limit, and thus that it would have been possible in 1970, as it is today, to violate *clause 1* (and not *clause 2*) by transporting drugs from St. Thomas to Puerto Rico, we still would be hard pressed to find a plausible legislative purpose for *clause 1*. Under the government's interpretation of the *second clause of § 952(a)*, the *only* conduct that *clause 1* would prohibit that would not be prohibited by *clause 2*, even under the broader 12-mile limit, is the drug trade from the Virgin Islands to Puerto Rico. This lone point of contiguity between the customs territory and the noncustoms territory exists only by virtue of the location of tiny islands that are so obscure that even the First Circuit -- the very Court of Appeals that has jurisdiction over Puerto Rico -- is seemingly unaware of them. *See Ramirez-Ferrer, 82 F.3d at 1138* (stating that "there is no 'place' just outside of the jurisdictional limits of the customs territory of the United States, that is also within the United States. Any place that is just [**22] outside the customs territory . . . is international waters"). So too, apparently, is the government, which has not thought to invoke the Culebra-St. Thomas aberration in support of its construction of the statute. That the government still has not managed to appreciate the relevant geographic nuances only serves to underscore the improbability that Congress was aware of them, let alone motivated by them, as the dissent would have us believe.

Perhaps recognizing the unlikelihood of this scenario, the dissent offers an alternative explanation for the inclusion of *clause 1*: Congress was aware that the boundaries of the customs territory and the noncustoms territory might change [*630] over time, so it "drafted a generic statute that would cover future contingencies." We are unwilling to speculate, however, that Congress included a statutory provision that was inoperative or nearly so at the time of its enactment just in case there might one day be a need for it. [14] Although we recognize that Congress may legislate with an eye towards the future, we hesitate to make the unsupported inference that Congress intended *clause 1* to have little, if any, current application at the time of its enactment, [**23] and only speculative future application, as would be the case if the *second clause of § 952(a)* prohibited the domestic transport of drugs through international airspace. Instead, we consider it far more likely that Congress elected to use the *first clause of § 952(a)* specifically to target the transport of drugs from the noncustoms territory into the customs territory *precisely because* it believed that such transport was not proscribed by the statute's *second clause*.

> 14 Of course, such a need has not yet materialized. Despite the post-1970 changes in the composition of our noncustoms territory and the limits of our territorial sea that the dissent catalogues in bringing us up to date, there still remains only one point of contiguity between the customs territory and the noncustoms territory: Puerto Rico and St. Thomas.

Indeed, Congress' use of the more specific, limited language of *clause 1* presents yet another hurdle for the government's interpretation of *§ 952(a)*: *clause 1* prohibits only the transport [**24] of drugs *from* the noncustoms territory *to* the customs territory -- it does not address the drug trade in the reverse direction. Thus in 1970 when Congress crafted *§ 952(a)*, it made a deliberate choice not to make the *first clause* reciprocal -- banning the importation of drugs from, for example, Guam to California but not from California to Guam. (That one-way ban remains true whether the territorial limit is three or 12 miles.) Under the interpretive maxim of *expressio unius est exclusio alterius*, we "read the enumeration of one case to exclude another [if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co., 537 U.S. 149, 123 S. Ct. 748, 760, 154 L. Ed. 2d 653 (2003)*. That Congress chose to single out only the transport of drugs from the noncustoms territory to the customs territory rather than the transport *between* the two territories is a strong indication that Congress did not intend *§ 952(a)* to address "importation" in the opposite (i.e., "outbound") direction. We are thus justified in inferring that "items not mentioned were excluded by deliberate choice, not inadvertence. [**25] " *Barnhart, 123 S. Ct. at 760*.

It is no answer to suggest that Congress considered it unnecessary to address the drug trade from the customs territory to the noncustoms territory (e.g., California to Guam) because it intended *clause 2* to cover such conduct through the concept of "coming from" international airspace. Under that theory, once again *clause 1* would be redundant because *clause 2* would have sufficed to reach the very conduct *clause 1* was carefully drafted to proscribe. If it is necessary for a drug shipment to travel through international airspace to get from a customs territory to a noncustoms territory, then it is also necessary for that shipment to travel through international airspace to go in the reverse direction, and *clause 2* would apply to both trips. Moreover, even if we indulge the dissent's assumption that Congress was legislating to cover drug shipments between St. Thomas and Puerto Rico, under any interpretation of the statute the transport of drugs from Puerto Rico to St. Thomas is not punishable as importation. This reinforces our [*631] conclusion that in drafting and structuring *§ 952(a)*, Congress was not extending its concept of importation into [**26] the United States to drug shipments from customs territories to noncustoms territories.

Finally, we reject the government's interpretation of *§ 952(a)* because it would sweep within the ambit of the

statute a wide range of conduct that cannot reasonably be characterized as importation. Whenever possible, "we interpret statutes so as to preclude absurd results." *Andreiu v. Ashcroft, 253 F.3d 477, 482 (9th Cir. 2001)* (en banc) (citing *United States v. Wilson, 503 U.S. 329, 334, 117 L. Ed. 2d 593, 112 S. Ct. 1351 (1992)).* Under the government's broad reading of *§ 952(a)*, the transport of drugs on a flight from any U.S. city to another would be punishable as importation so long as the flight passed through international airspace, no matter how briefly. A quick glance at a map of the United States reveals the large number of routes that would be implicated by this reading of the statute. In addition to the obvious example of flights between the 48 contiguous states and Alaska or Hawaii, planes routinely fly through international airspace when they travel from Miami to Baltimore, Tampa to Houston and New York to Detroit, to list only a few examples. The [**27] transport of drugs on these indisputably domestic flights can only be characterized as domestic conduct -- for which rather steep penalties are already available -- rather than importation.

Here in the Ninth Circuit we may encounter even more absurd results under the government's interpretation of *§ 952(a)*. For example, dozens of commercial flights (to say nothing of noncommercial flights) travel daily up and down the California coast between San Francisco and Los Angeles, and between Los Angeles and San Diego. Given the configuration of the coastline, any one of these flights may travel through international airspace off the coast, perhaps entering and reentering United States airspace several times. Yet nothing on the face of *§ 952(a)* even suggests that Congress intended the transport of drugs on one of these 45-minute intrastate flights to constitute importation within the meaning of the statute. [15]

> 15 That the government has refrained, so far as we are aware, from charging the transport of drugs on one of these flights as importation does not affect our analysis. Unlike the dissent, we are unwilling to rely on prosecutorial discretion for assurance that indisputably domestic conduct will not be charged under *§ 952*.

[**28] Moreover, we are unable to conceive of an articulable legislative purpose for punishing the transport of drugs on a domestic flight that passes through international airspace more severely than the identical conduct on a flight that travels entirely within United States airspace. Consider the following example: Under the government's interpretation of *§ 952(a)*, a passenger who carries a bag of marijuana on a flight from Portland to Anchorage has committed the crime of importation, while a drug-carrying traveler who departs from the same terminal at the Portland airport is guilty only of mere possession (or perhaps possession with intent to distribute) if his flight lands in Phoenix rather than Anchorage. But what, exactly, is the additional evil committed by the Alaska-bound traveler? The government does not tell us, and we cannot imagine, why Congress would have wanted to penalize the first traveler more heavily. [16] Our inability to [*632] identify a purpose for differentiating between these two cases of domestic transport leads us to conclude that *§ 952(a)* was not intended to draw such distinctions. Indeed, with the specific exception of the conduct proscribed by the *first clause* of [**29] the statute, it was not intended to reach domestic conduct at all.

> 16 We recognize, as the dissent notes, that both of our hypothetical travelers have engaged in conduct that is not "otherwise innocent" and that may well be "incredibly stupid." However, neither of these observations is relevant to the question of whether the conduct violated *§ 952(a)*.

II.

We find support for our interpretation of *§ 952(a)* in the First Circuit's decision in *Ramirez-Ferrer*, the only Court of Appeals opinion to analyze the statute's text and history with respect to the question at issue here. *United States v. Ramirez Ferrer, 82 F.3d 1131, 1137 (1st Cir. 1996)* (en banc). The defendants in *Ramirez-Ferrer* were convicted of importation under *§ 952(a)* for transporting cocaine from Mona Island, Puerto Rico to the main island of Puerto Rico. [17] In a decision whose reasoning is similar to our own in this case, the First Circuit reversed the convictions, holding that "transport from one part of the United [**30] States to another does not rise to the level of importation simply by involving travel through international waters." *Id. at 1136.*

> 17 Mona Island is located 39 miles off the coast of the main island of Puerto Rico. *See id. at 1132-33.*

Looking first to the statutory text, the First Circuit reached the same conclusions as we do regarding the plain meaning of the phrase "from any place [outside the United States]," including the redundancy between the two clauses that would result from the government's construction of the statute. *Id. at 1137-38.* [18] The court also was influenced by the historical application of the statute, noting that *§ 952(a)* had not been used at all in the manner advocated by the government. *Id. at 1143.* The court interpreted this inaction as a "tacit recognition that such acts [of domestic transport of drugs cannot] reasonably be considered 'importation' within *§ 952(a)*." *Id. at 1141.*

18 The court also rejected the government's reading because it concluded that it would make *clause 1* impossible to violate. The First Circuit explained that under the government's reading of the statute, "the phrase 'any place outside thereof' essentially means the point at which the drugs were located immediately before passing into the United States (i.e., the international space just outside the jurisdictional limit of the United States)." *Id. at 1138*. The court reasoned that such a reading would make the statute impossible to violate because "there is no 'place' just outside of the jurisdictional limits of the customs territory of the United States, that is also within the United States. Any place that is just outside the customs territory . . . is international waters." *Id.* As we noted earlier, the First Circuit apparently was unaware of the proximity of Culebra, Puerto Rico to the U.S. Virgin Islands.

[**31] Finally, the First Circuit considered the future implications of the government's interpretation of the statute. The court reasoned, for example, that under the government's reading of the statute, a sailboat tacking up the coast would commit a separate act of importation every time it entered international waters and then reentered domestic territory. *Id. at 1142*. The court further observed that under a logical extension of the government's reading of the importation statute, the act of leaving domestic territory and entering international waters would have to be considered an illegal exportation under *§ 952(a)*'s companion statute, *21 U.S.C. § 953(a)*, "even though there was no intention or act of visiting a foreign territory or off-loading the exported contraband onto a vessel in international waters." *Id.* Finding these scenarios unreasonable, the First Circuit emphatically rejected the government's effort to transform the domestic [*633] transport of drugs into importation under *§ 952(a)*. [19] *Id. at 1143*.

19 The error in the government's interpretation of *§ 952(a)* is even more apparent in this case, which deals with the domestic transport of drugs through international airspace rather than international waters. Contrary to the dissent's assertion, the distinction between air and water transport of drugs is hardly arbitrary. It is possible for a ship to pick up foreign passengers or cargo while passing through international waters, whereas the same cannot be said of a nonstop flight between two domestic locations. When a nonstop domestic flight lands at its destination, we know for certain that any drugs on board were there when the plane departed and could not have been acquired from a foreign aircraft. *Cf. Garcia, 672 F.2d at 1358* (noting that, unlike ships that travel in international waters, "planes that pass through international airspace do not present any possibility of foreign contacts other than that presented by their actual stopping in a foreign country"). Even the dissent in *Ramirez-Ferrer* conceded that "it is far from clear whether carrying drugs aboard a scheduled nonstop airline flight between two U.S. points could ever be treated as importation under the [statute's *second] clause*; a defendant would certainly argue that for all practical purposes, drugs on such a flight are never outside the country." *82 F.3d at 1146* (Boudin, J., dissenting).

[**32] In an effort to discredit the *Ramirez* opinion, the government treats it as an outlier that conflicts with the great weight of authority on the reach of *§ 952(a)*. As the First Circuit recognized, however, the cases on which the government now relies are inapposite, as they do not directly address the factual scenario presented here: a case where the government's own evidence shows that the drugs at issue were transported from one point within the United States to another. Nor do these decisions carefully analyze the language of *§ 952* or the implications of their broad reading of the statute.

The government directs our attention to *United States v. Peabody, 626 F.2d 1300, 1301 (5th Cir. 1980)*, in which the Fifth Circuit affirmed the importation convictions of defendants who were apprehended with narcotics 35 miles off the coast of Florida. With no reference to the language of *§ 952(a)*, the court rejected the defendants' claim of insufficient evidence of intent to import. The court noted that the defendants were arrested outside the United States, on their way into the country, and simply stated that "had their cargo of contraband originated in, say, Texas, [**33] that would not alter the fact that it was meant to re-enter the United States from international waters. That is enough." [20] *Id.* In stark contrast to this case, however, there was no evidence that the boat on which the *Peabody* defendants were arrested was heading into the United States *from another domestic location*. The court's statement about the hypothetical origin of the cargo is therefore dictum at best. Moreover, the court did not even cite *§ 952(a)*, let alone analyze it. As the First Circuit aptly remarked, "*Peabody* and its progeny constitute flimsy precedent upon which to hang one's hat." *Ramirez-Ferrer, 82 F.3d at 1140*.

20 *But cf. United States v. Cadena, 585 F.2d 1252, 1259 (5th Cir. 1978)* ("Because importation necessarily originates in an act in a foreign country, it is apparent that Congress intended that *21 U.S.C. § 952* and *§ 963* apply to persons who commit acts or a series of acts that at least commenced outside the territorial limits of the United

States."), *overruled on other grounds by United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir. 1983)*.

[**34] The government also cites *United States v. Phillips, 664 F.2d 971, 1033 (5th Cir. 1981)*, in which the Fifth Circuit held that proof of importation from a place outside the United States may be established by circumstantial evidence, including "evidence that a boat from which marijuana was unloaded went outside United States territorial waters or met with any other [*634] vessel that had -- for example, a 'mother ship.'" As was the case in *Peabody*, however, there was no evidence that the drugs in question originated in the United States. The facts of *Phillips* involved drugs that were brought into the United States from Colombia from mother ships off the coast of Florida. *Id. at 987. Phillips* therefore does not provide support for the contention that *§ 952(a)* prohibits the domestic transport of drugs through international airspace.

The Eleventh Circuit cases cited by the government are similarly inapt. In *United States v. Lueck, 678 F.2d 895, 904-05 (11th Cir. 1982)*, the court relied on the dictum from *Peabody* in holding that "any point outside [the] twelve mile limit of airspace and waters constitutes 'a place outside [**35] the United States' for purposes of proving importation under *§ 952(a)* . . . . The fact of crossing the boundary of the United States with contraband suffices to establish importation." The Eleventh Circuit reiterated this point in *United States v. Goggin, 853 F.2d 843 (11th Cir. 1988)*, holding that "the government may prove that a defendant imported cocaine into the United States 'from any place outside thereof' by showing that the defendant brought cocaine into the country from international waters or from airspace in excess of twelve geographical miles outward from the coastline." *Id. at 845* (citing *Lueck, 678 F.2d at 905*). In both *Lueck* and *Goggin*, however, the evidence suggested that the flights in question had originated in the Bahamas -- not in the United States. *Lueck, 678 F.2d at 896-97*; *Goggin, 853 F.2d at 843, 844*. The domestic transport of narcotics was not demonstrated in either case.

In fact, the only cases to adopt the government's proposed interpretation of *§ 952(a)* under factual circumstances similar to those presented here are our decisions in *Perez, 776 F.2d at 801,* [**36] and *Sugiyama, 846 F.2d at 572*. As an en banc court we are not bound by these panel opinions. Upon analysis, given the factual circumstances here, we no longer consider them to have correctly construed the statute.

In *Perez,* the defendant was convicted under *§ 952(a)* of importing drugs on a boat that sailed from Rota, an island in the Commonwealth of the Northern Mariana Islands (a United States territory), to Guam. We affirmed the convictions, holding that all that the government must show for a finding of importation under *§ 952(a)* is that the drugs entered the United States from international waters or airspace. *Perez, 776 F.2d at 801* (citing *Lueck, 678 F.2d 895*). In reaching this conclusion, the opinion did not analyze the statute or the implications of its interpretation. Instead, it rested its holding on the dicta in *Peabody* and *Lueck*, which themselves failed to address the statutory language. *Id.*

Sugiyama likewise adds nothing to our understanding of the scope of *§ 952(a)*, as it relied solely on *Perez* in affirming the conviction of a defendant under *§ 952(a)* for importing drugs on a flight from the [**37] island of Palau (which at the time was part of the United States Trust Territory of the Pacific Islands) to Guam. *Sugiyama, 846 F.2d at 572*. Neither *Sugiyama* nor *Perez* spoke to the concerns we confront today regarding the plain meaning of the statutory language, the statutory structure or the implications of a finding that *§ 952(a)* reaches domestic conduct. To the extent that *Sugiyama* and *Perez* address the transport of drugs through international airspace on a nonstop domestic flight, they [*635] are overruled. [21]

21 Because we confine our holding to the transport of drugs on an aircraft that travels nonstop through international airspace en route between two United States locations, we express no opinion on the continuing vitality of *Perez* with respect to the maritime transport of drugs in international waters. That is an issue for another day.

III.

Our analysis leaves little doubt that the *second clause of § 952(a)* does not proscribe the transport of drugs on a non-stop [**38] flight from one domestic location to another, but to the extent that any doubt remains, the scope of the statute is sufficiently ambiguous to invoke the rule of lenity. "In these circumstances -- where text, structure, and history fail to establish that the Government's position is *unambiguously* correct -- we . . . resolve the ambiguity in [the defendant]'s favor." *United States v. Granderson, 511 U.S. 39, 54, 127 L. Ed. 2d 611, 114 S. Ct. 1259 (1994)* (emphasis added). *See also United States v. Bass, 404 U.S. 336, 347, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)* ("When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.") (internal quotation marks omitted); *People v. Materne, 72 F.3d 103, 106 (9th Cir. 1995)* ("The rule of lenity applies

where a criminal statute is vague enough to deem both the defendant's and the government's interpretations of it as reasonable."). In light of the statutory language and structure and the disagreement among the circuit courts [**39] about the reach of the statute, it is evident that the government's position is far from unambiguously correct. Accordingly, we hold that the transport of drugs through international airspace on a nonstop flight from one United States location to another does not constitute importation within the meaning of *§ 952(a)*. [22]

22 The dissent contends that the rule of lenity is inapplicable here because the Cabaccangs were on notice from our decisions in *Perez* and *Sugiyama* that their conduct was unlawful. However, the purpose of the rule of lenity is not merely to ensure that defendants have notice of the criminality of their actions. The rule is also founded on the principle that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass, 404 U.S. at 348*. If there is any doubt about whether Congress intended *§ 952* to prohibit the conduct in which the Cabaccangs engaged, then "we must choose the interpretation least likely to impose penalties unintended by Congress." *United States v. Arzate-Nunez, 18 F.3d 730, 736 (9th Cir. 1994)*.

[**40] IV.

We are not persuaded by warnings of the government and the dissent that our decision today will cripple the government's efforts -- any more than did the First Circuit's 1996 decision in *Ramirez-Ferrer* -- to fight the ongoing war on drugs. Our holding addresses those cases in which the undisputed evidence shows that the nonstop flight on which the defendant transported drugs departed and landed in the United States. Our interpretation of *§ 952(a)* thus does not preclude the government from proving importation when a drug-laden plane of unknown origin is discovered in international air-space before it has crossed into U.S. territory. In such a situation, the government has found the plane outside the United States and therefore has circumstantial evidence that the air-craft originated *from a place* outside the United States. We need not decide today whether such evidence alone would be sufficient to support a conviction under *§ 952*, [*636] because the government here does not dispute the defendants' contention that the flights in question departed from the United States. [23]

23 Our decision therefore is not inconsistent with the result -- if not the reasoning -- reached by the Fifth Circuit in *Peabody* and *Phillips*. In those cases, there was no evidence of domestic origin to contradict the government's circumstantial evidence that the vessels found entering the United States from international airspace or waters departed from a place outside the United States. *See supra* Part II. Nor is our decision at odds with the outcome in *Goggin, 853 F.2d at 846*, in which the jury rejected the defendant's testimony that his flight departed from Atlanta in favor of the government's evidence that the flight took off from the Bahamas, or with that in *Lueck*, in which the only evidence of domestic origin was the defendant's uncorroborated testimony that he had taken off from the Florida Keys. *Lueck, 678 F.2d at 897*. Because our holding is limited to cases in which the evidence shows beyond dispute that the drugs in question were transported on a nonstop flight between two domestic locations, it does not conflict with the cases applying *§ 952(a)* to the transport of drugs into the United States from an offshore mother ship or from an aircraft or vessel first discovered outside the United States.

[**41] Our holding also leaves undisturbed our well-settled case law establishing that importation occurs when a person reenters the United States from a foreign country carrying drugs that were in her possession when she left the United States. *See, e.g., United States v. Friedman, 501 F.2d 1352, 1353-54 (9th Cir. 1974)* (affirming the conviction of a defendant who reentered the United States from Mexico carrying drugs that were with him when he left the United States). A defendant who drives from San Diego to Mexico with a package of cocaine in her trunk and returns to San Diego still in possession of that package has committed an act of importation, even though the drugs themselves originated in this country, because the defendant thereafter brought them back into the United States from Mexico -- from a "place outside thereof" within the commonsense meaning of *§ 952(a)*.

Moreover, we are not leaving the government without recourse to punish the Cabaccangs and others who bring drugs from one United States location to another through international airspace. As the dissent itself acknowledges, "possession of illegal narcotics is already a serious offense," and any conduct [**42] that would have been chargeable as importation under the government's reading of *§ 952(a)* may be charged under *21 U.S.C. § 841* as possession with intent to distribute. [24] *Section 841* carries steep mandatory minimum penalties that closely track those available for violations of *§ 952(a)*. [25] Indeed, this very case amply demonstrates that our decision will not deplete the government's antidrug

arsenal: Notwithstanding our reversal of their importation-related convictions, each of the Cabaccang brothers will still serve a life sentence for his involvement in the methamphetamine ring. Today's decision does nothing more than prevent the government from charging as importation conduct that can only be characterized as the domestic transport of drugs.

> 24 Where the facts do not support a finding of intent to distribute, such as where the drug quantity at issue is too small, the government may charge the conduct as simple possession under *21 U.S.C. § 844*.
> 25 *See 21 U.S.C. § 960* (listing the penalties for violations of *§ 952(a)*).

[**43] In sum, our analysis of the statutory text and structure leads us to conclude that the *second clause of 21 U.S.C. § 952(a)* does not proscribe -- and was not intended to proscribe -- the transport of drugs on a nonstop flight between two locations within the United States. A decision [*637] to the contrary would contravene the plain meaning of the statute and produce absurd and unreasonable results. Accordingly, we reverse the defendants' convictions for conspiracy to import methamphetamine, importation of methamphetamine and attempted importation of methamphetamine.

V.

The effect of our decision on Roy Cabaccang's conviction for conducting a continuing criminal enterprise (Count I) is not so clear. Count I incorporated the importation charges as predicate offenses, and the jury was instructed that to convict on that count it had to find that "the Defendant committed any one or more of the following federal narcotics trafficking offenses: conspiracy to distribute methamphetamine; conspiracy to distribute methamphetamine; or, conspiracy to import methamphetamine; or, importation of methamphetamine; or, possession of methamphetamine with intent to distribute; or, attempted [**44] importation of methamphetamine." The jury was also instructed that it must find that the offenses were part of a series of three or more offenses committed by the defendant, and that the defendant committed the offenses together with five or more persons. Finally, the jury was instructed that all members of the jury must unanimously agree on which three narcotics offenses the defendant committed and on which five or more persons committed the offenses together with the defendant. The jury's guilty verdict on Count I did not specify which narcotics offenses formed the basis of the jury's finding.

It is not for us to determine whether the jury relied on the importation offenses in reaching a verdict on Count I or whether, if the jury did so rely, there was sufficient additional evidence of a continuing criminal enterprise to support the conviction. These questions are more appropriately considered by the district court. We therefore remand Count I to the district court for a determination of whether Roy's conviction on that count can stand in light of our holding.

Conclusion

Because the transport of drugs on a nonstop flight from California to Guam does not constitute importation [**45] within the meaning of *21 U.S.C. § 952(a)*, we reverse all three defendants' convictions for conspiracy to import methamphetamine (Count III), Richard and Roy's convictions for importation of methamphetamine (Count V) and Roy's convictions for attempted importation of methamphetamine (Counts IX, X and XI). We remand to the district court for a determination of whether Roy's conviction for a continuing criminal enterprise (Count I) can stand in light of our reversal on the importation counts. As to the Cabaccangs' challenges to their convictions and sentences on the counts that are not importation-related, we adopt the panel decisions as our own and therefore affirm the judgment of the district court as to those counts.

AFFIRMED in part, REVERSED in part, REMANDED in part.

CONCUR BY: Mary M. Schroeder

CONCUR

SCHROEDER, Chief Judge, concurring:

I agree with the result. All three defendants were convicted under *21 U.S.C. § 952(a)*, importation of controlled substances. The crime was transporting illicit drugs from California to Guam. This was transportation from the continental United States to a territory of the United States that has its own [**46] customs authority.

The language of the statute provides:

> [*638] It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance . . . or any narcotic drug . . . .

21 U.S.C. § 952(a).

The *first clause* states that it is illegal to take drugs from non-customs territory of the United States to cus-

toms territory of the United States. The defendants did not do this.

The *second clause* bars the taking of drugs from foreign territory into the United States. The defendants did not do this either. Therefore, the statute was not violated.

The concerns reflected in both the dissent and the majority opinion about crossing international waters are not relevant to the interpretation of the plain language of the statute as I read it. Nevertheless, I do concur wholeheartedly in the result reached by the majority.

DISSENT BY: Alex Kozinski, Diarmuid F. O'Scannlain,Susan P. Graber , M. Margaret McKeown Richard C. Tallman

DISSENT

KOZINSKI, Circuit Judge, with whom O'SCANNLAIN, GRABER, McKEOWN and TALLMAN, [**47] Circuit Judges, join, dissenting:

Our job as judges is to apply laws adopted by the political branches of government. As the Supreme Court has told us time and time again, *see, e.g., HUD v. Rucker, 535 U.S. 125, 130-31, 152 L. Ed. 2d 258, 122 S. Ct. 1230 (2002)*; *United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490-93, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001)*, where the statutory text is clear and speaks to the issue before us, we must faithfully enforce it, even if we firmly believe we could rewrite the statute to make it better.

And rewrite the statute is precisely what the majority does. [1] There is no conceivable interpretation of its simple words that could yield one result where drugs are brought into the United States by air and a different one where they are brought in by sea. Instead, the majority has taken a blue pencil and inserted the words "except when the drugs are brought in on a nonstop flight originating in the United States." If this is a sensible exception, it's not one Congress has adopted, and no amount of massaging the word "from" can possibly yield such a specific and finely tuned result. The majority's [**48] statutory revisionism puts us in conflict with other circuits and will immensely complicate law enforcement efforts to protect our borders from the scourge of illegal drugs. It is the triumph of judicial will over innocent words that have no way to fight back.

> 1 I refer to Judge Fisher's opinion throughout as the "majority." Although only four other judges join, his opinion resolves the case on narrower grounds than Chief Judge Schroeder's concurrence and therefore represents the binding rationale of the court under *Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)*.

The Text

1. *Section 952(a)* states:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance . . . .

21 U.S.C. § 952(a). And *section 951(a)(1)* adds:

> The term [**49] "import" means, with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation [*639] within the meaning of the tariff laws of the United States).

21 U.S.C. § 951(a)(1).

It's difficult to imagine what more Congress could have said to keep us from going astray. Congress did not merely use the term "import" and leave it to the courts to flesh out its meaning. Rather, it went to the trouble of defining the term as "any bringing in or introduction of such article into any area." *Id.* It even explicitly foreclosed the notion that tariff-law definitions of "import" are germane. *Id.* Thus, the majority's observation that "we do not treat passengers who travel through international airspace on a nonstop flight between two U.S. locations as . . . subject to immigration inspections or border searches," Maj. op. at 7587, is utterly irrelevant. Nor does it matter that ships only going out to international waters do not clear customs on their return. *See United States v. Ramirez-Ferrer, 82 F.3d 1131, 1136 n.4 (1st Cir. 1996)* (en banc). Congress [**50] specifically rejected traditional notions of importation as a benchmark. The only pertinent question is whether defendants brought drugs into the United States from any place outside thereof.

The Cabaccangs conspired to bring a large quantity of drugs into Guam, a U.S. island surrounded by miles of ocean. It is impossible to get there without first passing through international waters or airspace. Defendants' criminal scheme thus fits perfectly within the statutory definition: Their coconspirators brought drugs into the United States (Guam) from "any place outside thereof" (international airspace surrounding Guam).

The majority does not seriously dispute that international airspace is a "place" in normal English usage. Maj. op. at 7587. A "place," after all, is only a "region; locality; [or] spot" -- a "location," "position" or "site." *Webster's New International Dictionary of the English Language* 1449, 1877, 1925, 2350 (William Allan Neilson et al. eds., 2d ed. 1939). None of these definitions has anything to do with whether the "place" is occupied by air or terra firma, within a country's borders or over the high seas.

What the majority is really arguing is that international [**51] air-space, although a place, is not the place drugs come *from* when they cross back into the United States -- even if the so-called "international" airspace is above another sovereign nation like Canada, Maj. op. at 7596. The majority claims "it is clear . . . that a defendant who has brought drugs on a non-stop flight that lands in the United States can most reasonably be said to have brought drugs *from* the point of the flight's departure -- and not the airspace *through* which the plane traveled on the way." Maj. op. at 7588. It thus reads "from" in *section 952(a)* to mean only "originally from." But nothing in the statute compels or even suggests that limitation.

"From" can imply origin, but it can also mean simply "forth out of," "away out of contact with or proximity to," or merely "out of." *Webster's*, *supra*, at 1012. One need look no further than *Ramirez-Ferrer* to find the word so used. *See 82 F.3d at 1142* (discussing the sailboat that "tacks out *to and from* international waters" (emphasis added)). The airstrip where a defendant takes off is one place he comes from, but certainly not the only one. If I ship an antique Persian rug from [**52] Baltimore to Los Angeles, it comes from Baltimore, but also from Indianapolis, Amarillo and many other places along the way; when it enters California, it does so from Nevada or Arizona. And, of course, it originally comes from the Middle East. A person traveling from Place A to Place B [*640] to Place C arrives at C both *from* A and *from* B. He comes from A originally and from B immediately; B is both the place *through* which he passes on the way from A to C, and *from* which he arrives immediately at C.

The majority would ask a hypothetical bystander "from what place the Cabaccangs brought drugs into Guam." Maj. op. at 7587. That's a trick question because it assumes the point in contention, namely, that there's a single, unique place the drugs came from. The point of departure may be the place that first pops to mind, [2] but that doesn't mean the point of immediate entry into the United States is not *also* a place the drugs came from. The correct question is not, "From what place did these drugs come?," but "Did these drugs enter the United States *from* international airspace?" And any bystander would readily answer *that* question in the affirmative.

2 Though this depends on context. A discriminating buyer who wants to know where the drugs are from might well expect to hear where the weed was grown; an air traffic controller who wants to know whence the plane with the drugs is approaching would no doubt expect coordinates in international airspace.

[**53] The majority's claim that the plain language of the statute supports its interpretation is plainly wrong. Maj. op. at 7588. A statute does not have a plain meaning just because one cherry-picked dictionary definition happens to support it. That eight other decisions -- apparently every one to have addressed the issue save *Ramirez-Ferrer* -- have reached the contrary result undercuts the claim that the statute *plainly* means what the majority says. *See United States v. Nueva, 979 F.2d 880, 884 (1st Cir. 1992)*; *United States v. Goggin, 853 F.2d 843, 845 (11th Cir. 1988)*; *Guam v. Sugiyama, 846 F.2d 570, 572 (9th Cir. 1988)* (per curiam); *United States v. Perez, 776 F.2d 797, 801 (9th Cir. 1985)*; *United States v. Lueck, 678 F.2d 895, 905 (11th Cir. 1982)*; *United States v. Phillips, 664 F.2d 971, 1033 (5th Cir. Unit B 1981), superseded by rule on other grounds as stated in United States v. Huntress, 956 F.2d 1309, 1316 (5th Cir. 1992)*; *United States v. Seni, 662 F.2d 277, 286 (4th Cir. 1981)*; *United States v. Peabody, 626 F.2d 1300, 1301 (5th Cir. 1980)*. [**54]

If the majority had actually picked a definition of "from" and stuck with it, I would still disagree, but our disagreement would at least be about what the word actually means. The majority does nothing of the sort. Instead, it crafts a rule that applies only to "the transport of drugs on an aircraft that travels nonstop through international airspace en route between two United States locations." Maj. op. at 7601 n.21. It thus "leaves undisturbed our well-settled case law establishing that importation occurs when a person reenters the United States from a foreign country carrying drugs that were in her possession when she left the United States." *Id.* at 7603 (citing *United States v. Friedman, 501 F.2d 1352, 1353-54 (9th Cir. 1974)*). And, because it overrules *Perez* and *Sugiyama* only "to the extent that [they] address the transport of drugs through international airspace on a nonstop domestic flight," *id.* at 7601, it also leaves intact our prior law with respect to all maritime transportation. [3]

3 The majority purports to "express no opinion . . . with respect to the maritime transport of drugs in international waters. That is an issue for another day." *Id.* at 7601 n.21. But it cannot so easily escape the consequences of its ruling. Be-

> cause the majority overrules *Perez* and *Sugiyama* only "to the extent that [they] address the transport of drugs through international airspace on a nonstop domestic flight," *id.* at 7601, those decisions remain binding circuit law in all other respects. Maritime transport is an "issue for another day" only in the sense that the en banc court could someday decide to overrule *that* aspect of *Perez* and *Sugiyama* as well; district judges and panels of our court remain bound by the cases to the extent the majority has consciously decided not to overrule them.

[**55] [*641] So the majority isn't fully persuaded by its own argument that "from" means "originally from" in *section 952(a)*. If it were, it would have to overrule *Friedman* (because a person who takes drugs from the United States to Mexico and back is coming originally from the United States) as well as the rest of *Perez* and *Sugiyama* (because a person taking a boat from the United States through international waters and back is also coming originally from the United States). Rather, "from" now means "originally from" when applied to planes, but plain old ordinary "from" for everything else. We're told:

> The distinction between air and water transport of drugs is hardly arbitrary. It is possible for a ship to pick up foreign passengers or cargo while passing through international waters, whereas the same cannot be said of a nonstop flight between two domestic locations.

Maj. op. at 7598 n.19. That's certainly a pretty good policy distinction (and one we would undoubtedly uphold as rational had Congress enacted it), but it has absolutely nothing to do with the meaning of the word "from," which is the fulcrum of the majority's analysis. After today's decision, a ship that [**56] transports a cargo of drugs from Los Angeles to Guam will be deemed to have imported them into Guam, even if it goes there without stopping or picking up anyone or anything along the way. And, a passenger carrying drugs on a nonstop bus trip from Buffalo to Detroit through Canada will be deemed to have imported the drugs, even though a helpful bystander asked where the drugs came from would say "Buffalo, of course." Why does the boat enter the United States *from* international waters and the bus enter the United States *from* Canada, but a plane on a nonstop flight that passes through international airspace or over a foreign country enter the United States only *from* the place it took off? "From" may have many definitions, but none is supple enough to change meanings depending on the mode of transportation employed.

The majority's insuperable problem is that the distinction it draws finds no anchor in the words of the statute it purports to interpret. The statute says nothing about planes, boats, trains or automobiles; it only says "from," an entirely neutral term. To reach the result consistent with the majority's policy preferences, the statute cannot be "interpreted" in [**57] any meaningful sense of the term; it must be rewritten. This is not a case where we must deform the English language to save the statute from unconstitutionality. *See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994)*. Rather, the majority simply rewrites the statute because it likes it better this way. That is a function entrusted by the Constitution to Congress and the President, branches of government whose job it is to make such quintessentially political choices. By usurping it, my unelected colleagues have assumed powers inconsistent with our judicial role.

2. The majority tries hard to defend its reading on statutory history grounds. It notes that Congress added the words "from any place outside thereof" when it amended the statute in 1970, Maj. op. at 7586, and reads this new "any place" phrase as a *limitation* on the statute's scope. Why else, wonders the majority, [*642] would Congress *ever* have added these words?

If the answer to the majority's ingenuous question is not immediately apparent, perhaps the following analogy will help. The *Bald and Golden Eagle Protection Act* makes it illegal, [**58] among other things, to "import, at any time or in any manner, any bald eagle." *16 U.S.C. § 668(a)*. The majority's analysis of this statute might go something like this: "Hmmm. Congress couldn't have intended to ban *all* importation of bald eagles, because then the phrase 'at any time or in any manner' would be superfluous -- Congress could simply have made it illegal to 'import any bald eagle.' It must have added 'at any time or in any manner' to narrow the sweep of the statute to importation at *times* and in *manners*, and exclude importation at *non-times* or in *non-manners*." Absurd as it sounds, this is the majority's logic.

The obvious reason Congress included the words "any place" was to *negate* the very inference the majority draws -- that the statute reaches only importation from *some* places: foreign countries, foreign countries plus hovering drug boats, or foreign countries plus some other limited set of places. "Any place" is like "any time" or "any manner" -- a catchall Congress adds when it wants to emphasize that the statute applies to absolutely everything within a particular genus. *See Rucker, 535 U.S. at 131* [**59] ("'The word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" (quoting *United States v. Gonzales, 520 U.S. 1, 5, 137 L. Ed. 2d 132, 117 S. Ct. 1032 (1997))*). There is

nothing superfluous about such phrases, and the reason is simple: We judges have a habit of coming up with rules like "[A] thing may be within the letter of the statute and yet not within the statute." *Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892)*. "Any place" is Congress's way of telling us "We mean it!" The words have operative effect because they negate the inference that the statute means less than it says -- an inference judges are all too willing to draw, as the majority well demonstrates.

The words are particularly apt here because Congress had good cause to worry that judges might read implicit limitations into the statute. Even when context does not require it, courts have "not unnaturally fallen into the habit of referring to imports as things brought into this country *from a foreign country*." *Hooven & Allison Co. v. Evatt, 324 U.S. 652, 669, 89 L. Ed. 1252, 65 S. Ct. 870 (1945)* [**60] (emphasis added), *overruled on other grounds by Limbach v. Hooven & Allison Co., 466 U.S. 353, 80 L. Ed. 2d 356, 104 S. Ct. 1837 (1984)*; *see, e.g., Leary v. United States, 395 U.S. 6, 46, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)* (assuming importation is equivalent to foreign origin). There is a long line of cases, for example, adopting the following formulation:

> The common ordinary meaning of the word "import" is to bring in. Imported merchandise is merchandise that has been brought within the limits of a port of entry *from a foreign country* with intention to unlade, and the word "importation" as used in tariff statutes, unless otherwise limited, means merchandise to which that condition or status has attached.

United States v. Estate of Boshell, 14 Ct. Cust. 273, 275, Treas. Dec. 41884 (1922) (emphasis added), *quoted in, e.g., Estate of Prichard v. United States, 43 C.C.P.A. 85, 87 (1956)*; *Sherwin-Williams Co. v. United States, 38 C.C.P.A. 13, 18 (1950)*; *United States v. John V. Carr & Son, Inc., 58 Cust. Ct. 809, 266 F. Supp. 175, 178, A.R.D. 219 (Cust. Ct. 1967)*; [**61] *Camera Specialty Co. v. United States, 34 Cust. Ct. 27, 146 F. Supp. 473, 476, C.D. 1672 (Cust. Ct. 1955)*. Congress may well have been concerned that courts would read a foreign origin requirement into the statute and responded by adding the words "any place." [4]

> 4 Congress took similar precautions by defining "import" broadly in *section 951(a)*. That definition does not, however, render the words "any place" in *section 952(a)* redundant. Courts interpreting tariff laws have read other limits into the terms "import" and "bring in" -- for example, that the defendant have "intention to unlade" and enter "within the limits of a port of entry" rather than just passing through territorial waters. *E.g., Boshell, 14 Ct. Cust. at 275*. *Section 951(a)* rejects the technical tariff definition but doesn't specify which elements of the definition Congress views as technical and which it views as inherent in the concept of "bringing in." "Any place" resolves any lingering ambiguity over a foreign origin requirement.

[**62] [*643] The majority hands Congress a catch-22: If it uses simple language, judges will find hidden within it all sorts of implicit limitations, but if it adds language to underscore that a statute should be given a broad, literal compass, judges will point to the redundancy as a justification for a *narrower* reading -- because, after all, the literal meaning would have been implicit in the unadorned text. This judicial three card monte is useful in letting us reach whatever result we please, but I suspect Congress would prefer we take it at its word.

3. The majority also purports to rely on statutory structure. Maj. op. at 7588. It borrows its argument from *Ramirez-Ferrer, 82 F.3d at 1137-39*, which thought that the government's interpretation of the *second clause of section 952(a)* ("into the United States from any place outside thereof") would render the *first clause* ("into the customs territory of the United States from any place outside thereof (but within the United States)") superfluous. It explained:

> The government's broad reading of *clause 2* . . . brings any conduct conceivably addressed under *clause 1* within the coverage of *clause 2*. In other words, [**63] any contraband shipped from a place inside the United States (but not within the customs territory -- e.g., the U.S. Virgin Islands) would first pass through international waters before it entered into the customs territory of the United States. . . . Hence, the government's reading of *clause 2* renders *clause 1* completely superfluous.

Id. at 1138. As the majority admits, Maj. op. at 7589 n.11, this theory is based on a geographical premise that's demonstrably false. The U.S. Virgin Islands -- the very noncustoms territory *Ramirez-Ferrer* singled out as an example -- in fact *is* contiguous with the customs territory, namely, Puerto Rico. *See* Nat'l Oceanic & Atmospheric Admin., *Chart # 25650: Virgin Passage and*

Sonda de Vieques (33d ed. Mar. 9, 2002), attached as an appendix. [5] Flights from St. Thomas, Virgin Islands, to almost *anywhere* in Puerto Rico never leave U.S. airspace, unless they make an enormous detour to the north or south. It's easy to pass from noncustoms territory to customs territory without leaving the United States, and by doing so to violate the *first clause of section 952(a)* without also violating the second.

> 5 St. Thomas and Puerto Rico Island themselves are separated by more than twenty-four miles, but the strait between them is littered with smaller islands, notably the Puerto Rican island of Culebra. And "every island, even those too small for effective occupation, has a territorial sea." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 2-10, at 29 (2d ed. 1994). As the attached nautical chart shows, the distance from the easternmost point of Puerto Rico (Isla Culebrita, off the east coast of Culebra) to the westernmost point of the Virgin Islands (Sail Rock, south-southwest of Savana Island, in turn west of St. Thomas) is a mere seven miles -- nowhere close to twenty-four. All points between Puerto Rico's main island and St. Thomas are well within twelve miles of some smaller island, so the two are contiguous.

[**64] [*644] Thus, when *Ramirez-Ferrer* claimed that "any contraband shipped from a place inside the United States (but not within the customs territory . . .) would first pass through international waters before it entered into the customs territory of the United States," *82 F.3d at 1138*, it was wrong. When it claimed that "any place that is just outside the customs territory of the United States is international waters," *id.*, it was wrong. When it claimed that an individual entering the customs territory "would always be directly shipping from international waters," *id.*, it was wrong. When it spent two pages hammering away at this single point -- the crown jewel of its analysis -- it was actually driving the nails into its own jurisprudential coffin.

In an effort to salvage something from *Ramirez-Ferrer*'s glorious wreckage, the majority offers up two anemic theories. It first argues that, even though *Ramirez-Ferrer*'s premise is wrong today, it was correct in 1970 when Congress passed *section 952(a)* because the United States then claimed a territorial sea of only three miles rather than twelve. Maj. op. at 7589-92. The territorial sea, however, is only the boundary [**65] for general-purpose jurisdiction. Congress long ago established a special, twelve-mile boundary specifically for interdiction. *See* Act of Aug. 5, 1935, ch. 438, §§ 201, 203, 49 Stat. 517, 521-22 (codified in relevant part at *19 U.S.C. §§ 1401(j), 1581(a)-(b)*) (granting customs and Coast Guard officers jurisdiction to board vessels within U.S. customs waters, defined to extend four leagues, i.e. twelve miles, from shore); *see also* Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 516 U.N.T.S. 206, 220; 4 Whiteman *Digest* § 20, at 489 (Dep't of State 1965).

Section 952(a) does not refer to territorial waters, but to the "United States," *21 U.S.C. § 952(a)*, defined as "all places and waters, continental or insular, subject to the jurisdiction of the United States." *Id. § 802(28)*; *incorporated by id. § 951(b)*. Four cases have considered whether this definition invoked the federal twelve-mile interdiction jurisdiction rather than the narrower three-mile one and concluded that it did: "The twelve-mile contiguous zone over which the United States exercises customs authority . . . is included [**66] in the meaning of 'the United States' in *21 U.S.C. § 952(a)*." *Goggin, 853 F.2d at 845*; *accord Nueva, 979 F.2d at 884*; *Lueck, 678 F.2d at 905*; *Seni, 662 F.2d at 286*. *But cf. Perez, 776 F.2d at 802 n.5* (addressing the analogous issue of a *territorial* contiguous zone). [6]

> 6 *Nueva* involved conduct occurring after the 1988 proclamation that extended the territorial sea to twelve miles. But the proclamation itself was non-self-executing, *see* Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777, 777 (Dec. 27, 1988) ("Nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . . ."), and the new boundary was not incorporated into domestic criminal law until 1996, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 901(a), 110 Stat. 1214, 1317. It is highly debatable whether the government could have prosecuted based on the proclamation alone. *Nueva* thus understandably relied on pre-1988 decisions interpreting "United States" to include the contiguous zone rather than the 1988 proclamation. *See 979 F.2d at 884* (citing *Goggin*).

[**67] This mountain of consistent authority is no impediment for the majority: It's two-for-one day at Circuit Split Emporium, as we boldly go where no other circuit has gone before in holding that *section 952(a)* does *not* apply to the contiguous zone. This holding will have tremendous practical significance given the President's recent extension of the contiguous zone from twelve to twenty-four miles. *See* Proclamation [*645] No. 7219, Contiguous Zone of the United States, 64 Fed. Reg. 48,701 (Aug. 2, 1999). But the prospect of forcing the government to follow one boundary in the Ninth

Circuit and a different one everywhere else gives the majority no pause.

The only authority the majority offers is *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989)*, a case that has nothing to do with either drug interdiction or the contiguous zone. *Argentine Republic* invoked the canon against extraterritoriality in holding that the Foreign Sovereign Immunities Act does not apply to the high seas. *Id. at 439-41*. It is one thing to argue, as the respondents did in *Argentine Republic*, that the [**68] United States includes the high seas -- i.e., roughly 70% of the Earth's surface area. It is quite another to say that the term "United States" in a *drug interdiction* statute invokes the twelve-mile *interdiction* boundary rather than the three-mile plenary one. The former is a bona fide extraterritorial application of federal law, clearly implicating the purposes of the canon. The latter just as clearly is not. The twelve-mile interdiction boundary is well-recognized in both international and federal statutory law. Presuming that Congress intends to invoke it when it passes a statute relating to the specific subject matter of drug interdiction does not present the same issues of extraterritoriality as asserting jurisdiction over two-thirds of the planet.

The majority has no good excuse for putting us at odds with every other circuit to have considered this issue. We should not break ranks on an issue that's at best debatable solely to save an otherwise hopeless textual argument. Were it necessary to reach the issue, I would hold that Congress invoked the twelve-mile interdiction boundary rather than the three-mile plenary one when it enacted *section 952(a)*. At the very least, [**69] Congress reasonably could have believed that courts would interpret the statute that way -- as in fact they have -- and that's enough to render the *first clause* non-superfluous. [7]

> 7 The majority misses the boat when it claims that "it is not enough . . . that Congress 'reasonably could have believed' that *§ 952* invoked this 12-mile limited interdiction jurisdiction." Maj. op. at 7590. It's true that when we're interpreting a statute, "our role is to determine Congress' actual intent, not its possible intent." *Id.* In this case, however, the three-mile/twelve-mile issue is not the question of statutory interpretation presented. We're conducting a surplusage analysis, and a provision can be nonsurplus even if it responds only to the possibility that another provision might be interpreted a particular way. *See Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 87, 153 L. Ed. 2d 82, 122 S. Ct. 2045 (2002)* (finding a provision nonsurplus even though it merely "made a conclusion clear that might otherwise have been fought over in litigation"). Congress legislates in the shadow of uncertainty over how its statutes will be construed. *See, e.g.*, Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 422, 111 Stat. 2296, 2380 ("Nothing in this Act . . . shall be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product . . . ."). Our power to resolve those uncertainties doesn't change the fact that Congress can't always predict what we'll do. There are two reasonable explanations for *clause 1* consistent with the government's theory: (1) Congress actually intended to enact the twelve-mile boundary; and (2) Congress wasn't sure whether courts would use the twelve-mile boundary or the three-mile one (maybe even members of Congress couldn't agree), and it passed *clause 1* so that, either way, the Virgin Islands-Puerto Rico border would be covered. Either is a perfectly valid reason to enact *clause 1*, so the canon against surplusage doesn't apply.

[**70] The majority's second effort to glue *Ramirez-Ferrer*'s pieces back together consists of the theory that, even if Puerto Rico and the Virgin Islands were contiguous, Congress didn't know or didn't care. Maj. [*646] op. at 7592. But this stands the canon against surplusage on its head. It's one thing to give a statutory provision a strained construction to avoid what would otherwise be a genuine redundancy. It's another thing altogether to do so after manufacturing a redundancy by assuming Congress either didn't know or didn't care about the real world circumstances that give the language in question independent force. Presuming that Congress must have been confused about the details of American geography just because a bunch of federal judges and government lawyers were ignorant strikes me as very close to the classic definition of chutzpah. *See* Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit, 103 Yale L.J. 463 (1993)*.

That Congress went to the trouble of including the somewhat convoluted phrase "into the customs territory of the United States from any place outside thereof (but within the United States)" shows it was focused on a very specific problem. There aren't [**71] many non-customs territories to begin with; almost all the significant ones (Guam, the Marianas and Samoa) are way out in the Pacific, about 3000 miles from the nearest customs border. After that, we get into some pretty obscure places. *See, e.g., Farrell v. United States, 313 F.3d 1214, 1215 (9th Cir. 2002)* (locating Johnston Island 700 miles west-southwest of Hawaii and providing helpful tax advice to its thousand or so residents). But there is one sig-

nificant exception: the Virgin Islands, situated in the midst of the Caribbean, cheek-to-jowl with Puerto Rico. It is within easy reach of drug manufacturing sources in Central and South America, and an ideal launching pad for smuggling into Puerto Rico, which is only a few minutes away by plane and, at most, a couple of hours by boat. Ignoring this border because it's the "lone point of contiguity," Maj. op. at 7592, is like telling the little Dutch boy he can go home because the dike only has one leak.

Without the *first clause of section 952(a)*, it would be impossible to prosecute as importation drug shipments from St. Thomas to Puerto Rico. Because the two territories are contiguous, any boat or plane carrying [**72] drugs across the Virgin Passage would not be "importing into the United States from any place outside thereof." This is not some well-kept secret; it is obvious from even the most cursory glance at a nautical chart. Coast Guard and customs officers use those charts daily, and if there's a hole in the customs net where drugs slip through, they have every incentive to bring that fact to Congress's attention. The statute's *first clause* is absolutely necessary to render this traffic illegal.

The *first clause* is thus not "superfluous, void, or insignificant," and that is all the canon against surplusage requires. *Duncan v. Walker, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001)* (internal quotation marks omitted). The text of the statute and the indisputable facts of American geography are proof enough that Congress knew what it was doing. It is presumptuous and somewhat insulting to a coordinate branch of government to assume Congress doesn't take its responsibilities seriously when performing its central function of drafting statutes. I, for one, cannot subscribe to that view.

The Virgin Islands-Puerto Rico border kicks the props out from under the majority's [**73] argument that we must ignore the literal terms of the statute in order to avoid redundancy. But no contemporary example is necessary to justify reading the law as written. Congress defined two classes of conduct it meant to prohibit. Whether those classes diverge or overlap depends on geography and politics, which are hardly set in stone. For example, [*647] since 1970, the Northern Mariana Islands have become a commonwealth, and the Marshall Islands, Micronesia and Palau have all become independent states. *See* Proclamation No. 6726, Placing into Full Force and Effect the Compact of Free Association with the Republic of Palau, 59 Fed. Reg. 49,777, 49,777 (Sept. 27, 1994) (summarizing developments). The Canal Zone has reverted to Panama, *see* Panama Canal Treaty, Sept. 7, 1977, 33 U.S.T. 39, and the United States has extended both its territorial sea and its contiguous zone, *see* Proclamation No. 5928, 54 Fed. Reg. at 777; Proclamation No. 7219, 64 Fed. Reg. at 48,701. Many people want Guam to become a commonwealth; others clamor for Puerto Rico to become a state. Congress was no doubt aware that the status and scope of regions [**74] subject to U.S. jurisdiction change over time, and drafted a generic statute that would cover future contingencies. That is neither silly nor implausible. It's precisely what we would expect Congress to do when legislating in an area marked by flux. *Clause 1* would thus not be surplusage even if it were entirely redundant at a particular moment of history. [8]

> 8 The majority thinks the principle of *expressio unius* is "yet another hurdle" to my interpretation. Maj. op. at 7593-94. By banning importation from noncustoms territory to customs territory, Congress implied that shipments from customs territory to noncustoms territory would not be covered. I couldn't agree more. That's why someone who takes drugs from Puerto Rico to St. Thomas doesn't violate *section 952(a)*. (How this "reinforces" the majority's conclusion, Maj. op. at 7594, is a mystery.) Someone who takes drugs from California to Guam, on the other hand, *does* violate *section 952(a)* -- not because he goes from customs territory to noncustoms territory (which we all agree is OK), but because he goes from international airspace to noncustoms territory. The majority doesn't think that counts, but that's precisely the question -- whether bringing drugs from international airspace into noncustoms territory is importation. The majority's *expressio unius* argument is totally circular. At best, it's the exact same "hurdle" as its surplusage theory, just repackaged into a different argument.

[**75] In any case, the customs and noncustoms territories *are* contiguous, as they were in 1970 when Congress enacted the statute. This inescapable geographical fact undercuts not only the majority's only plausible argument, but also *Ramirez-Ferrer*'s value as precedent. That case wasted nearly two pages on this issue, all based on the figment that the customs and noncustoms territories are never contiguous. It was decided by the thinnest of margins (4-3), and the outcome no doubt would have flipped had the First Circuit been aware of the truth.

The Precedents

The effort to reconcile today's decision with cases in the Fifth and Eleventh Circuits does not bear serious scrutiny; the majority would do better to acknowledge the conflict. It claims that those cases "do not directly address the factual scenario presented here," Maj. op. at 7598, because our plane concededly took off from California, while in *Peabody* and *Phillips*, there was "no

evidence" that the drugs had originated in the United States, *id.* at 7599, and in *Lueck* and *Goggin*, the evidence "suggested that the flights in question had originated in the Bahamas," *id.* at 7600. Yes, but so what?

[**76] "From any place outside thereof" is an element of a criminal offense; the government bears the burden of proof. Absence of evidence favoring the government is legally equivalent to irrefutable evidence favoring the defendant -- either way, the defendant goes free. Thus, for example, it does not matter that there was no evidence in *Peabody* the drugs had come from the United States, because there was also no [*648] evidence they had come from elsewhere. *See Peabody, 626 F.2d at 1300-01.* The conviction stuck, so the court must have believed that the point of origin -- even if it *was* the United States -- didn't matter. [9] For all we know, the drugs did originate in the United States; the opinion simply doesn't say.

> 9 This conclusion is not "dictum at best." Maj. op. at 7599. *Peabody* held that the origin of the drugs -- whether Texas or anywhere else -- was irrelevant. The court never determined where the drugs originated, so its disposition was necessarily based on its determination that the possible domestic origin of the drugs was irrelevant.

[**77] *Lueck* and *Goggin* fall to the same axe. The majority asserts that evidence "suggested" the planes in those cases had departed from the Bahamas, but it misreads the opinions. The only pertinent reference in either is that the planes were first *detected on radar* flying near the Bahamas. *Goggin, 853 F.2d at 844*; *Lueck, 678 F.2d at 896-97.* The defendant in *Lueck* claimed he had taken off from the Florida Keys and crossed into international airspace to avoid the controlled zone around the Miami airport. *678 F.2d at 897.* The jury never decided the issue, because the instructions made it sufficient to find entry from international airspace. *Id. at 904-05. Goggin* interpreted a verdict to imply only that the defendant had not departed from the *mainland* United States. *853 F.2d at 847.* It didn't say anything else about origin. For all we know, the plane took off from Puerto Rico (which, after all, lies directly across the Bahamas from Florida). In each of the two cases, the court made no determination of the plane's origin, because it deemed that fact of no legal consequence.

The even bigger [**78] problem with the majority's Sisyphean attempt to avoid a second circuit split is that, even if the cases were reconcilable on their facts, the legal rules they articulate would still be incompatible with the majority's. *Lueck* and *Goggin* both hold that "'the fact of crossing the boundary of the United States with contraband suffices to establish importation.'" *Goggin, 853 F.2d at 845* (quoting *Lueck, 678 F.2d at 905*). And *Peabody* holds that "[the defendants] were apprehended outside the country, heading in . . . . That is enough." *626 F.2d at 1301.* Neither of these rules is compatible with the majority's holding that crossing the boundary of the United States with contraband is not enough to establish importation because the government must also show the flight originated abroad.

Struggle as it may, the majority cannot escape the hard reality that its interpretation of *section 952(a)* conflicts with that of the Fifth and Eleventh Circuits. It also conflicts with that of the Fourth, *see Seni, 662 F.2d at 286* ("The inference that the vessel sailed out from North Carolina, across the 12 mile limit permits, indeed [**79] virtually compels, the further inference that the trawler sailed back . . . . The jury could, therefore, reasonably conclude that the most recent journey . . . was one involving importation."), and until recently the First, *see Nueva, 979 F.2d at 884* ("Importation of a controlled substance into the United States[] requires proof that the 'defendant [conspired to bring] cocaine into the country from international waters or from airspace in excess of twelve geographical miles outward from the coastline.'" (quoting *Goggin, 853 F.2d at 845*)), not to mention our own settled circuit law. If it were necessary to trample our precedents and contort the statute to hold formation with our sister circuits, I might see the need to do so. But the only case going the majority's way is *Ramirez-Ferrer* -- and, now that its grand fallacy [*649] has been exposed, far better to cut the tow rope and let it find its own way home.

The Consequences

1. No one can doubt the devastating impact our holding will have on drug interdiction. Until today, the government could support an importation charge merely by tracking a plane on radar as it entered U.S. airspace. [**80] Now it must prove the trip originated abroad. Every smuggler flying a single-engine prop has a ready-to-serve defense: He took off from a U.S. airfield, strayed into international airspace and was just coming back in when he got caught. The government surely cannot track the movement of every aircraft everywhere on the globe, so it must now prove foreign origin by circumstantial evidence. In some cases it may not be able to do so, and in many others it will have to divert prosecutorial resources that could be put to better use. *See Ramirez-Ferrer, 82 F.3d at 1148* (Boudin, J., dissenting).

The majority claims that its holding only "addresses those cases in which the *undisputed* evidence shows that the non-stop flight . . . departed and landed in the United States." Maj. op. at 7603 (emphasis added); *see also id.* at 7603 n.23. But there are no undisputed facts in criminal cases (unless the defendant finds some advantage in stipulating what he knows the government can prove

anyway). "From any place outside thereof" is an element of the offense, so the government has a constitutional duty to prove it to a jury beyond a reasonable doubt. *See In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).* [**81] [10] If the prosecution fails to present sufficient evidence to do so, it must lose. Because no defense lawyer would be dumb enough to stipulate away this key element of the crime, the government will always have to prove beyond a reasonable doubt that the flight originated abroad. [11] The majority's "undisputed evidence" limitation is a pipe dream.

10 Congress could, of course, make domestic origin an affirmative defense. *See Patterson v. New York, 432 U.S. 197, 210, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).* But it has not done so. If "from any place outside thereof" is a limitation on the statute's scope (as the majority believes), there is no way to read it as anything other than an element of the offense.

11 *Ramirez-Ferrer* committed an equally egregious error when it said that a jury could *presume* foreign origin from the mere arrival of a drug-laden ship. *82 F.3d at 1144.* It relied on *Turner v. United States, 396 U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970). Turner*, however, involved a *statutorily prescribed* presumption. *See id. at 404-05.* Where a statute prescribes a presumption, the government need only show that the "'presumed fact is more likely than not to flow from the proved fact.'" *Id. at 405* (quoting *Leary v. United States, 395 U.S. 6, 36, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)).* For elements of a criminal offense, on the other hand, the standard of proof is not "more likely than not" but "beyond a reasonable doubt." *See Winship, 397 U.S. at 364.* Judges are not free to water down this standard by inventing their own presumptions. *Ramirez-Ferrer* ignored this distinction. It's truly unfortunate that the federal courts, in an effort to save a tiny group of clearly guilty defendants caught red-handed, have diluted a bedrock rule of constitutional law designed to protect the presumption of innocence for all defendants in all criminal cases.

[**82] Of course, entry from international airspace is circumstantial evidence of foreign origin. Maj. op. at 7603. But it's circumstantial evidence the same way a defendant's presence at the murder scene is circumstantial evidence he's the killer. It's *some* evidence, but hardly sufficient. To convict a defendant, the government must produce evidence excluding every possible innocent explanation for his conduct. [*650] *See United States v. Vasquez-Chan, 978 F.2d 546, 549 (9th Cir. 1992).* The very examples the majority offers to prop up its reading of the statute -- the flights from the lower forty-eight to Alaska or Hawaii, from Miami to Baltimore, from Tampa to Houston, or from Los Angeles to San Francisco, *see* Maj. op. at 7595 -- undercut the claim that entry alone is sufficient proof of guilt. And smugglers will no doubt soon figure out the best places to enter U.S. airspace in order to make it look like a domestic reentry.

Striving once again to duck the logical consequences of its ruling, the majority stays mum as to whether entry alone would support a finding of foreign origin. *See id.* at 7603. It's obvious it would not. *See United States v. Carrion, 457 F.2d 200, 201-02 (9th Cir. 1972)* [**83] (per curiam) (insufficient evidence of foreign origin where a plane landed in Los Angeles with 404 pounds of marijuana in boxes bearing Spanish writing, one defendant was carrying a map of Mexico and a matchbook from a Mexican motel, and the plane had used enough fuel for a round trip to Mexico); *cf. Vasquez-Chan, 978 F.2d at 550-53* (insufficient evidence of possession where cocaine was found in the defendant's bedroom with her fingerprints on the containers). But even if it would, defense lawyers will use the majority's opinion as a hornbook in pointing out to the jury the many ways the government failed to prove that the defendant did not take off from the United States, and conscientious juries will come back with many unjust acquittals.

By rejecting both our own circuit's settled precedent and the overwhelming weight of authority elsewhere, the majority frustrates the government's vital interest in consistent and uniform interpretation of the drug laws. It's certainly our prerogative as an en banc court to overrule circuit law. *See Jeffries v. Wood, 114 F.3d 1484, 1492 (9th Cir. 1997)* (en banc). But that doesn't mean it's a power wisely exercised [**84] every time we disagree with long-settled precedent. *See McKinney v. Pate, 20 F.3d 1550, 1565 n.21 (11th Cir. 1994)* (en banc). The government's interdiction strategies doubtless vary depending on whether it must prove foreign origin or merely entry. Our decision requires it to revamp those strategies and may well derail investigations or prosecutions already underway -- even convictions already obtained. *See Bousley v. United States, 523 U.S. 614, 619-21, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998)* (holding *Teague* v. *Lane* non-retroactivity principles inapplicable to interpretation of substantive rules of criminal law).

Our holding also results in standards that vary from circuit to circuit. The government already faces this prospect from *Ramirez-Ferrer*, but we greatly exacerbate the problem. Our enormous circuit covers not only the entire west coast of the United States, but also Hawaii, Alaska, Guam and the Marianas. If *Ramirez-Ferrer*

threw a wrench into the government's interdiction machine, we throw in the toolbox.

2. Now for the other side of the scale -- the majority's conceit that it achieves greater fairness and [**85] consistency with its tortured interpretation. The majority laments that "a passenger who carries a bag of marijuana on a flight from Portland to Anchorage has committed the crime of importation, while a drug-carrying traveler who departs from the same terminal at the Portland airport is guilty only of mere possession . . . if his flight lands in Phoenix rather than Anchorage." Maj. op. at 7596. We are not dealing here with a statute that criminalizes otherwise innocent conduct; the difference in treatment is at best a sentencing disparity. Possession of illegal narcotics is already a serious offense, [*651] and taking narcotics on a commercial airliner -- where even the wrong pair of toenail clippers means serious trouble -- is not only illegal but incredibly stupid. This may be a form of stupidity that strikes close to home -- the criminals the majority purports to spare today are not the usual inner-city casualties of draconian drug laws, *cf. Bonin v. Calderon, 59 F.3d 815, 851* & n.2 (9th Cir. 1995) (Kozinski, J., concurring), but interstate passengers on commercial flights who look a lot like our own sons and daughters coming home from college. The majority's concern [**86] for criminal defendants we can easily identify with is touching, but should we really be rewriting the nation's drug laws just because a group we happen to favor might be treated too harshly?

Any doubt that the majority misplaces its sympathy is erased by its reliance on -- of all things -- the rule of lenity. Maj. op. at 7601-02. Of course, people should not be thrown in jail if they did not have fair warning that their conduct was illegal. *See United States v. Nguyen, 73 F.3d 887, 891 (9th Cir. 1995).* But relying on the rule of lenity as a justification for overruling settled law makes little sense. After *Perez* and *Sugiyama*, the Cabaccangs couldn't possibly have believed that their conduct wasn't covered by *section 952(a).* Invoking the rule to exonerate conduct clearly illegal when committed isn't lenity; it's a windfall to convicted drug dealers.

Finally, by exempting only nonstop travel through international airspace, the majority resolves one inequity only to create several others. For example, the drug-packing college kid who flies from Portland to Juneau through international airspace now gets off easier than the one who takes a non-stop ferry [**87] through international waters. And the Cessna weaving in and out of international airspace on its way from Los Angeles to San Francisco is better off than the sailboat tacking in and out of U.S. waters. *Cf. Ramirez-Ferrer, 82 F.3d at 1142.* Why is this mode-of-transportation discrimination any less arbitrary than the one the majority finds so repugnant?

And that's just the start. The hemp-toting freshman who flies home directly from Seattle to Fairbanks is now treated more favorably than the one whose plane touches down briefly in Vancouver, even if the latter had the drugs in his suitcase, which was checked through to his destination. Surely there is no equitable difference between the two, yet under the majority's rationale, the latter is worse off than commercial drug dealers like the Cabaccangs. The wayward hiker who strays briefly into Canadian territory (perhaps overcome by one too many handfuls of special "trail mix") is a smuggler, *cf. id. at 1136 n.3*, while the drug courier whose Cessna veers into international airspace to avoid a storm is not. None of these newly created distinctions is any more equitable than the one the majority purports [**88] to eliminate.

Even hard-core judicial policy-seekers should cringe at today's decision. For all their manhandling of statutory text and precedent, my colleagues only manage to replace one arbitrary distinction with many others.

3. This abortive attempt to redraft the statute teaches several lessons, the most important of which is that arbitrarily disparate treatment of closely situated individuals is all but inevitable. It may well be that there is no "articulable legislative purpose for punishing the transport of drugs on a domestic flight that passes through international airspace more severely than the identical conduct on a flight that travels entirely within United States airspace." Maj. op. at 7596. But there is certainly an articulable purpose [*652] for treating border-crossing with drugs *in general* more severely than mere possession. Seemingly arbitrary treatment in a particular case is not a valid reason to disregard a statute's terms; there is no free-floating "narrow tailoring" principle of statutory construction. If Congress enacts a prescription drug benefit for people over sixty-five, a sixty year old can't qualify even if he proves his unique health problems make [**89] him constructively five years older. And if Congress bans drunk driving in national parks, a motorist can't defend himself by showing that his superior skills made up for his inebriation. And if it imposes an age of majority requirement, we don't waive it for precocious seventeen year olds. All these distinctions may seem arbitrary on their particular facts, but they are all consistent with the text of the statutes and their underlying logic.

The majority's interpretive method is to ask whether a defendant poses a greater menace than some hypothetical person not covered by the statute and, if not, to conclude that the defendant must be exempt as well. There are obvious reasons we don't interpret statutes this way. Judges often disagree about what Congress's purposes are and how particular conduct implicates them. Two defendants may seem similarly situated to one judge but night and day to another. Once we discard the statute's

text as the acid test of its coverage, we lose it as a justification for our authority. If the college student who flies to Anchorage gets a few more years than the one who flies to Phoenix and wants to know why, we can point to the text and say, "Because you [**90] entered the United States 'from a place outside thereof,' and Congress made that a more serious crime." But if the one who drives home gets a few more years than the one who flies, what can the majority possibly say to convince him he is not a victim of judicial caprice? That "from" means one thing for planes and something else for cars?

Our political system has mechanisms to deal with harsh applications of unambiguous statutes. The most obvious is prosecutorial discretion. Despite its sympathy for the plight of tourists caught with personal stashes on flights from Los Angeles to San Francisco, the majority can't point to a single instance where the government has prosecuted such an offense as importation. Nor can it identify a case where the government has applied the importation laws to any of its other extreme hypotheticals. (Ours, obviously, is not such a case -- the Cabaccangs masterminded a massive drug distribution network.) *Ramirez-Ferrer* relied on the absence of such prosecutions as a justification for its artificially narrow interpretation. *See 82 F.3d at 1141-42.* But to me, this history shows the effectiveness of prosecutorial discretion as a mechanism [**91] for avoiding the inequities the majority fears. If prosecutors start charging such offenses as importation, public outcry may prompt Congress to rewrite the statute. But statutory amendment, like prosecutorial discretion, is a function reserved to another branch.

Seemingly arbitrary distinctions are an inevitable consequence of the rule of law. The costs of governing prospectively by the written word, however, are more bearable than those of a judiciary of retrospective equity-brokers. In its quest for the holy grail of fairness in the drug laws, the majority cuts a swath of destruction through statutory text and precedent, and makes the government's already hard job of policing our borders much more difficult. Because I view our role as the more limited one of applying statutes as written and leaving questions of fairness to the political -- and politically accountable -- [*653] branches of government, I respectfully dissent.

[SEE APPENDIX MAP "Three Mile Limit/Twelve Mile Limit" IN ORIGINAL]

EXHIBIT “2”

LEXSEE 504 F.3D 745

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. W. R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, Defendants-Appellees. UNITED STATES OF AMERICA, Plaintiff-Appellant, v. W. R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; WILLIAM MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, Defendants-Appellees.

No. 06-30472, No. 06-30524

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

504 F.3d 745; 2007 U.S. App. LEXIS 22435; 74 Fed. R. Evid. Serv. (Callaghan) 849; 37 ELR 20244

June 4, 2007, Argued and Submitted, Seattle, Washington
September 20, 2007, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *W.R. Grace & Co. v. United States, 2008 U.S. LEXIS 5196 (U.S., June 23, 2008)*
US Supreme Court certiorari denied by *Eschenbach v. United States, 2008 U.S. LEXIS 5131 (U.S., June 23, 2008)*

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Montana. D.C. No. CR-05-00007-DWM, D.C. No. CR-05-00007-DWM. Donald W. Molloy, District Judge, Presiding.
United States v. Grace, 455 F. Supp. 2d 1113, 2006 U.S. Dist. LEXIS 56647 (D. Mont., 2006)
United States v. W.R. Grace, 455 F. Supp. 2d 1181, 2006 U.S. Dist. LEXIS 94741 (D. Mont., 2006)
United States v. W.R. Grace, 455 F. Supp. 2d 1172, 2006 U.S. Dist. LEXIS 94742 (D. Mont., 2006)
United States v. Grace, 455 F. Supp. 2d 1122, 2006 U.S. Dist. LEXIS 58285 (D. Mont., 2006)

DISPOSITION: AFFIRMED in part, REVERSED in part, and REMANDED.

COUNSEL: Todd S. Aagaard, Dept. of Justice Environment and Natural Resources Division, Washington, D.C., and Kris A. McLean, Assistant United States Attorney, Missoula, Montana, argued for the government. With them on the briefs were Sue Ellen Wooldridge, Assistant Attorney General; William W. Mercer, United States Attorney; Eric E. Nelson, Linda Kato, Special Assistant United States Attorneys; Kevin M. Cassidy, and Allen M. Brabender, Attorneys, United States Dept. of Justice Environment and Natural Resources Division.

Christopher Landau, Washington, D.C., argued for defendant-appellee W.R. Grace & Co. With him on the brief were Laurence A. Urgenson, Tyler D. Mace, Michael D. Shumsky, Washington, D.C.; Stephen R. Brown, Charles E. McNeil, Kathleen L. DeSoto, Missoula, Montana, for defendant-appellee W.R. Grace & Co.; Angelo J. Calfo, Seattle, Washington; Michael F. Bailey, Missoula, Montana, for defendant-appellee Alan R. Stringer; Ronald F. Waterman, Helena, Montana; David S. [**2] Krakoff, Gary A. Winters, Washington, D.C., for defendant-appellee Henry A. Eschenbach; Mike Milodragovich, W. Adam Duerk, Missoula, Montana; Mark Holscher, Jeremy Maltby, Los Angeles, California, for defendant-appellee Jack W. Wolter; Palmer Hoovestal, Helena, Montana, Elizabeth Van Doren Gray, Columbia, South Carolina, William A. Coates, Greenville, South Carolina, for defendant-appellee William J. McCaig; Brian Gallik, Bozeman, Montana, Thomas C. Frongillo, Boston, Massachusetts, Vernon S. Broderick, New York, New York, for defendant-appellee Robert J. Bettacchi; C.J. Johnson, Missoula, Montana, Stephen A. Jonas, Robert Keefe, Boston, Massachusetts, for defen-

dant-appellee O. Mario Favorito; Catherine A. Laughner, Aimee M. Grmoljez, Helena, Montana, Stephen R. Spivack, Washington, D.C., David E. Roth, Birmingham, Alabama, for defendant-appellee Robert C. Walsh.

JUDGES: Before: Betty B. Fletcher, Harry Pregerson, and Warren J. Ferguson, Circuit Judges. Opinion by Judge B. Fletcher.

OPINION BY: B. FLETCHER

OPINION

[*749] Opinion by Judge B. Fletcher

B. FLETCHER, Circuit Judge:

From 1963 until the early 1990s, W. R. Grace ("W. R. Grace" or "Grace") mined and processed a rich supply of vermiculite ore outside of Libby, Montana. [**3] In response to ongoing serious health problems suffered by Libby residents, the government obtained an indictment charging W. R. Grace and seven of its executives (together "Grace") with criminal conduct arising from Grace's vermiculite operation in Libby. The superseding indictment charges defendants-appellees with (1) conspiring knowingly to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of *42 U.S.C. § 7413(c)(5)(A)* and *(2)* conspiring to defraud the United States in violation of *18 U.S.C. § 371*. In addition to the dual-object conspiracy alleged in Count I, the indictment charged defendants-appellees with three counts of knowing endangerment under the Clean Air Act, *42 U.S.C. § 7413(c)(5)(A)*, and four counts of obstruction of justice in violation of *18 U.S.C. §§ 1505* and *1515(b)*.

This interlocutory appeal brought by the government concerns six orders grouped into four sections: the first order dismissed the knowing endangerment object of Count I's conspiracy charge; the second adopted a particular definition of asbestos and excluded evidence inconsistent with that [**4] definition; the third denied a motion to exclude evidence related to an affirmative defense and relied on an emission standard for asbestos contained in certain Environmental Protection Agency ("EPA") regulations, *see, e.g., 40 C.F.R. §§ 61.142-61.149*; and the fourth through sixth orders excluded certain evidence and expert testimony. In addition, we rule on defendants-appellees' motion to strike documents attached to the government's reply brief. We have jurisdiction to hear this appeal pursuant to *28 U.S.C. § 1331*, and we reverse in part, affirm in part, and remand.

I. Dismissal of the Knowing Endangerment Object

1. Background

In the original indictment, filed February 7, 2005, the government charged defendants with participating in a dual-object conspiracy. According to Count I of the indictment, which details the scope of the conspiracy, defendants conspired (1) to knowingly release asbestos, a hazardous air pollutant, and thus knowingly to endanger [*750] both EPA employees and members of the Libby community in violation of *42 U.S.C. § 7413(c)(5)(A)* ("knowing endangerment object"); and (2) to defraud the United States by impairing, impeding, and frustrating government agency investigations [**5] and cleanup operations in violation of *18 U.S.C. § 371* ("defrauding object"). On March 20, 2006, defendants moved to dismiss the knowing endangerment object of the conspiracy, arguing that the government had failed to allege an overt act in furtherance of the alleged conspiracy within the statute of limitations period. *United States v. W. R. Grace, 434 F. Supp. 2d 879, 883 (D. Mont. 2006)*.

Defendants' argument relied primarily on *Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)* (holding that the statute of limitations must be satisfied as to each object of the conspiracy when the government charges a multi-object conspiracy), *overruled on other grounds by Burks v. United States, 437 U.S. 1, 2, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)*. Because the government supposedly had failed to allege a requisite overt act before the statute of limitations ran on November 3, 2004, defendants asserted that the knowing endangerment object was time-barred.

The government disputed defendants' characterization of the indictment, claiming that certain overt acts alleged in the indictment could support both the fraud object and the knowing endangerment object of Count I's conspiracy charge. Towards this end, the government directed the district [**6] court's attention to paragraphs 143, 149, and 173-184 of the indictment. *W. R. Grace, 434 F. Supp. 2d at 885-87*. The paragraphs cited by the government alleged that defendants had failed to remove asbestos-contaminated material from sites in the Libby community, had misled various individuals regarding current asbestos contamination, and had failed to disclose the existence of numerous asbestos-contaminated sites. What the paragraphs purportedly failed to allege was that defendants released, or conspired to release, asbestos during the relevant time period.

Analyzing both the text of the specified paragraphs and the structure of the indictment, in which the cited paragraphs were listed under the sub-heading "Obstruction of EPA's Superfund Clean-Up," the district court concluded that the indictment "more plausibly suggests a

completed operation than a conspiracy still at work." *Id. at 887*. To the extent that overt acts were alleged, the district court found that they were acts of obstruction, not acts of wrongful endangerment. *Id.* Thus, the district court dismissed as time-barred the knowing endangerment object of the Count I conspiracy. *Id. at 888*.

Two weeks after the district court's [**7] first order, dismissing a portion of the indictment, the government obtained a superseding indictment. The new indictment was substantially similar to the original indictment, amending only paragraphs 173-183, which had been the focus of the district court's previous order. In the superseding indictment, the government changed the section heading under which the disputed paragraphs had been listed from "Obstruction of Superfund Clean-Up" to "Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of the EPA's Superfund Clean-Up." It also changed paragraphs 173, 174, 176-80, 182 and 183, by adding at the end of each original paragraph the phrase, "thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby Community." [1]

1 Paragraph 175 was changed significantly.

[*751] Defendants then moved to dismiss the "knowing endangerment" object of the superseding indictment, arguing that the government had failed to fix the original indictment because the new indictment alleged no new overt acts, was barred by the previous dismissal "with prejudice," and was time-barred because [**8] the statute of limitations had run. The district court rejected the first two arguments, but agreed with defendants that the new indictment was time-barred. Under the district court's reading, the superseding indictment was not protected by the savings clause of *18 U.S.C. § 3288. Order at 17, United States v. W. R. Grace, 9:05-cr-00007-DWM ("Order Dismissing Indictment") 455 F. Supp. 2d 1113, 2006 U.S. Dist. LEXIS 56647 (July 27, 2006)* (Docket # 690). The government now appeals that determination.

2. Standard of Review

We review de novo a district court's decision to dismiss part of an indictment, *United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991)*, as we review, also de novo, the district court's interpretation of *18 U.S.C. § 3288. United States v. Gorman, 314 F.3d 1105, 1110 (9th Cir. 2002)*.

3. Analysis

If a district court dismisses an indictment (or portion thereof), the savings clause of *18 U.S.C. § 3288* permits the government to return a new indictment after the statute of limitations has expired, as long as it is done within six months of the dismissal. The statute reads as follows:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute [**9] of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information . . ., which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

The dispute in the instant case stems from the parties' divergent interpretations of the final sentence of *§ 3288*. This sentence explains that the savings clause does not extend to indictments initially filed outside of the statute of limitations. The government takes the position that this does not bar the return of the new indictment because the original indictment was obtained before the statute of limitations expired. Thus, the government argues, *§ 3288* permits amendment by a superseding indictment. Defendants disagree, arguing that the government failed to allege an overt act for the knowing endangerment object of the conspiracy before the [**10] statute of limitations expired. The district court agreed with defendants and dismissed the knowing endangerment object as time-barred.

Defendants' argument is premised on a conflation of the terms "time-barred" and "not timely filed." The last sentence of *§ 3288* refers to indictments that were not timely filed, i.e., indictments that were not filed within the statute of limitations. Here, there is no dispute that the government *filed* its indictment within the statute of limitations period. The district court dismissed the knowing endangerment object in the original indictment as "time-barred" because it failed to allege an overt act within the statute of limitations, not because the indictment was untimely filed. [*752] The district court erred. If the indictment is filed within six months of the dismissal order, *§ 3288* does not bar the government from filing a superseding indictment: the savings clause of *§ 3288* permits amendment when the original was

structurally flawed but timely filed. *United States v. Clawson, 104 F.3d 250 (9th Cir. 1996).*

In *Clawson*, the defendant was indicted for mail fraud on June 10, 1993. *Id. at 251.* Defendant immediately moved to dismiss the indictment for failure [**1 1] to allege an overt act within the five-year statute of limitations. *Id.* The indictment alleged overt acts that occurred before the limitation period began on June 10, 1988, or after defendant's withdrawal from the conspiracy on July 5, 1988. *Id.* The district court granted defendant's motion to dismiss the indictment and the government responded by obtaining a First Superseding Indictment, which alleged overt acts occurring in the window between June 10, 1988, and July 5, 1988. *Id.* Defendant then moved to dismiss the new indictment, arguing that the statute had run before the government obtained the First Superseding Indictment and that *§ 3288* did not extend to indictments dismissed for failure to comply with the statute of limitations. *Id.* The district court denied his motion and we affirmed. *Id. at 251-52.*

Clawson noted that when "[r]ead in its entirety, th[e] last sentence [of *§ 3288*] cuts off the six-month grace period only where the defect -- whether it's a limitations problem 'or some other' problem -- is not capable of being cured." *Id. at 252.* In the instant case, the district court held (and defendants now argue) that the defect in the original indictment obtained by the government [**12] is not capable of being cured because the original indictment did not allege an overt act for the knowing endangerment object before the statute of limitations expired. This position, however, is precluded by *Clawson.*

In *Clawson* we distinguished between a timely filed, but flawed, indictment, to which the savings clause of *§ 3288* does apply, and an untimely filed indictment, to which it does not.

> "[I]f the original indictment was brought after the limitations period ran on all the alleged criminal conduct, allowing reindictment under *section 3288* would obliterate the statute of limitations: A defendant could be indicted two years after the statute had run and, when the court dismissed, the prosecution could simply reindict within six months, free from the limitations bar." *Id.*

For obvious reasons, reindictment is prohibited by *§ 3288* in such circumstances. *Id.*

> "The matter is much different where the original indictment is brought within the limitations period, but is dismissed for failure to allege the exact elements of the crime, or some other technical reason. In the latter circumstance, a valid indictment could have been brought in a timely fashion; the six-month grace period merely [**13] allows the government to do what it had a right to do in the first place." *Id.*

The latter circumstance describes the facts of both *Clawson* and the instant case. In both cases, the government timely indicted defendants for a particular crime, but originally failed to allege a valid overt act. The government then obtained superseding indictments charging defendants with the exact same crimes, but adding the necessary overt act allegations. Thus, each defendant was charged "with the exact crime for which he could have been prosecuted had there not been a defect in the indictment. *Section 3288* was designed to apply in this situation." *Id.*; *see also United States v. Charnay, 537 F.2d 341, 354* [*753] *(9th Cir. 1976)* ("[The] underlying concept of *§ 3288* is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment [obtained after the statute has run] . . ., if the earlier indictment runs into legal pitfalls.").

When discussing "timeliness," both *Clawson* and *Charnay* refer to the time of the original filing of the indictment. They do not consider whether the original indictment included all of the relevant acts or elements necessary [**14] to charge defendants with the crime. As long as the original indictment is filed within the statute of limitations and charges the same crime, based upon approximately the same facts charged in the superseding indictment, *§ 3288* allows the government to file a superseding indictment within six months. *See 18 U.S.C. § 3288;Clawson, 104 F.3d at 251-52*; *Charnay, 537 F.2d at 354.* Here, the parties do not dispute that the original indictment was timely filed. The district court's holding that the indictment was time-barred referred only to its failure to allege the necessary overt acts in the original indictment -- a flaw that can be cured through reindictment under *§ 3288.*

The district court attempted to distinguish *Clawson*, stating that in *Clawson* the government alleged overt acts in the original indictment, which was filed within the limitations period. This distinction is irrelevant. While the government did allege overt acts before the limitations period expired in *Clawson*, it failed to allege an overt act sufficient to support the conspiracy charge since the only overt acts alleged occurred outside the

statute of limitations or subsequent to Clawson's withdrawal from the conspiracy. [**15] Thus, the government originally failed to allege any relevant overt acts in *Clawson*, just as in the instant case.

Moreover, *Clawson* did not turn on the distinction advanced by the district court: as we have explained, *§ 3288* applies when an indictment (though defective) is brought within the limitations period, and the superseding indictment charges defendant with the same exact crime with which he was initially charged, based on approximately the same facts. The only addition in the new indictment considered in *Clawson* was the inclusion of new overt acts that the government could have used in the original indictment. The fact that the government had timely alleged inapplicable overt acts was wholly extraneous to the *Clawson* court's decision.

The district court's misapprehension of both *Clawson* and *§ 3288* is also clear from its statement that "[t]o allow the government a six-month grace period in this case would extend the statute of limitations for the improper purpose of affording the prosecution a second opportunity to do what it failed to do in the beginning." *Order Dismissing Indictment at 16.* Yet this is exactly what *§ 3288* does. It extends the statute of limitations by six months [**16] to allow the prosecution a second opportunity to do what it failed to do in the beginning: namely, file an indictment free of legal defects.

This reading of *§ 3288* does not, as the district court suggests, "require a defendant to remain subject to an indefinite threat of prosecution, held open beyond the statute of limitations period, while he and the court wait for the government to finish tinkering with the indictment." *Id.* What *§ 3288* does is twofold: First, it eliminates the incentive for criminal defendants to move for dismissal of an indictment at the end of the statute of limitations, thereby winning dismissal at a time when the government cannot re-indict. And second, it subjects defendants to the threat of prosecution for six months after [*754] the dismissal of the original indictment -- not an indefinite threat of prosecution as the district court suggests -- and only if the government has timely filed an indictment charging the exact same crimes based on approximately the same facts.

For the reasons articulated herein, we reverse the district court's dismissal of the knowing endangerment object of Count I in the superseding indictment and reinstate that portion of the count.

II. [**17] Definition of Asbestos

1. Background

We now turn to the question of whether Congress's use of the term "asbestos" to identify a hazardous air pollutant created ambiguity as to what substance was meant by that term. The parties filed cross motions in limine to exclude evidence that fell outside their respective interpretations of the term. Govt. Mot. in Limine # 2 Re: Definition of Asbestos (Docket # 462); Defs' Mot. in Limine Re: Definition of Asbestos (Docket # 474). The district court held that the term "asbestos" has no inherent meaning and therefore its use in the criminal provisions of the Clean Air Act violated the rule of lenity and the *Due Process Clause of the Fourteenth Amendment.* It interpreted asbestos for purposes of the Clean Air Act's knowing endangerment provision to mean the six minerals covered by EPA's civil regulatory scheme. *Order at 2 & 20, United States v. W. R. Grace, 9:05-cr-00007-DWM, 455 F. Supp. 2d 1122; 2006 U.S. Dist. LEXIS 58285 ("Order Defining Asbestos") (Aug. 8, 2006)* (Docket # 701). That regulation defines the civilly regulated species of asbestos as "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite." Definitions [**18] for National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), *40 C.F.R. § 61.141 (2007).*

The district court imported the civil regulatory definition of "asbestos" into the criminal provisions of the Clean Air Act, and then ruled that evidence of asbestos releases offered at trial would be limited to those relevant to proving releases of the six minerals included in the regulatory definition; evidence of releases of other asbestiform minerals would be excluded. *Order Defining Asbestos at 22.* This ruling eliminated from trial evidence of releases of 95% of the contaminants in the Libby vermiculite -- which are asbestiform minerals but fall outside of the six minerals in the civil regulatory definition -- as well as excluding government data that did not differentiate between the six regulated minerals and unregulated asbestiform minerals. The government appeals, asserting that the definition contained in the criminal portion of the statute is the applicable definition.

2. Standards of Review

We review de novo the district court's construction of the Clean Air Act, as we do rulings on the admissibility of evidence in which issues of law predominate. *See United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000).*

3. [**19] Analysis

The Clean Air Act's knowing endangerment provision prohibits the knowing and dangerous release into the ambient air of "any hazardous air pollutant listed pursuant to *§ 7412*." *42 U.S.C. § 7413(c)(5)(A).* [2] [*755] *Section 7412(b)* lists "asbestos," also identified by its Chemical Abstracts Service ("CAS") [3] Registry number

1332-21-4, as a hazardous air pollutant. *42 U.S.C. § 7412(b)*. Thus, *§ 7412(b)* identifies asbestos by name and defines it through reference to CAS Registry # 1332-21-4.

2 *42 U.S.C. § 7413(c)(5)(A)* reads in relevant part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to *section 7412* of this title . . ., and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $ 1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such [**20] person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

3 The Chemical Abstracts Service Registry, maintained by the American Chemical Society, is an authoritative database of chemical information. The Registry assigns each chemical substance a unique numeric identifier. Searches in the Registry require subscription. However, EPA maintains on its website a free "Substance Registry System" containing CAS Registry information, including the CAS definition of asbestos. http:// www.epa.gov/srs/ (search "asbestos"; follow link associated with 1332-21-4) (last visited Aug. 3, 2007).

The government contends that a statute may have two definitions for one term, one definition civil and one criminal. Further, it argues that the definition of asbestos applicable to the Clean Air Act's criminal knowing endangerment provision covers [**21] the minerals involved in this case. We agree on both points.

The district court found *§ 7412(b)*'s "one-word definition" [4] to be "unsatisfactory" as a matter of law. However, Congress need not define every word in a criminal statute for the statute to pass Constitutional muster. When Congress does not define a term in a statute, we construe that term "according to [its] ordinary, contemporary, common meaning[ ]." *United States v. Cabaccang, 332 F.3d 622, 626 (9th Cir. 2003)* (en banc) (internal quotation marks omitted). It is well known that asbestos has a common meaning; it is a fibrous, noncombustible compound that can be composed of several substances, typically including magnesium. Or, as defined by the CAS Registry, and incorporated by reference into *§ 7412(b)*, it is a "grayish non-combustible material" that "consists primarily of impure magnesium silicates." CAS Registry number 1332-21-4, *available at* http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ID=85282. This definition has been established for decades, as was elucidated in the motions in limine. *See* Defs' Mot. in Limine Re: Definition of Asbestos n.4 (Expert Witness Disclosure of Gregory P. Meeker, Appendix A) (May 31, [**22] 2006) (noting that asbestos was first defined in 1920).

4 I.e., "1332214 Asbestos"

In addition, defendants had actual notice in this case of the risks from the fibrous content of the asbestiform minerals in their products. Defendants are an industrial chemical company and seven of its top executives. They are all familiar with asbestos. Since at least 1976, defendants have known of the health risks posed by the asbestiform minerals in their products. It is clear that defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos into the ambient air. In light of the clear statutory language, including *§ 7412(b)*'s incorporation by reference of the CAS Registry asbestos definition, and [*756] defendants' knowledge of the industrial chemicals field, the district court erred in misdefining "asbestos" as used in the criminal statute and in invoking the rule of lenity. *See Muscarello v. United States, 524 U.S. 125, 138, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998)* ("The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.") (alteration in original) (internal quotation marks [**23]

omitted); *United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)* (The "rule of lenity[ ] ensures fair warning by so resolving ambiguity in a criminal statute as to apply [the statute] only to conduct clearly covered.").

The district court's conclusion that ambiguity exists simply because of the existence of two oversight structures -- a civil regulatory structure and a criminal enforcement provision -- that use different definitions of the term "asbestos" is erroneous. As we determined in *United States v. Hagberg, 207 F.3d 569, 573 (9th Cir. 2000)*, Congress validly may create multiple enforcement mechanisms that each draw on different definitions for the same term or phrase.

In *Hagberg*, defendant was indicted for allegedly dumping sewage along a public road in violation of the Clean Water Act, *33 U.S.C. §§ 1319(c)(2), 1345(e). Hagberg at 570.* Moving to dismiss the indictment, Hagberg argued that his actions did not fit within the statutory definition of the crime because the material he dumped was not "sewage sludge" as defined by the regulations for permitting waste disposal. *Id. at 571.* Accepting Hagberg's argument, the district court dismissed the indictment. The government appealed. *Id.* [**24] We reversed because the district court improperly had conflated the regulatory and direct enforcement provisions of the Clean Water Act, and the relevant definition -- supplied by the direct enforcement provision -- covered the material dumped by defendant. *Id. at 571-72, 575.* We explained that "some terms found in the [direct enforcement provision] are defined differently when used in the context of [the civil permitting] regulations." *Id. at 572.*

Like the Clean Water Act provisions at issue in *Hagberg*, the Clean Air Act creates multiple enforcement mechanisms: a civil regulatory structure and a direct enforcement mechanism. In the instant case, as in *Hagberg*, defendants are charged with violating the directly enforceable provision of the statute that pulls its definitions from a separate provision than does the regulatory provision. The civil regulatory system draws its definition of asbestos from *40 C.F.R. § 61.141*, the knowing endangerment provision from *42 U.S.C. § 7412(b). See 42 U.S.C. §§ 7412(a)(6); 7413(c)(5)(A).* The civil regulatory system regulates major sources of hazardous air pollutants, *42 U.S.C. § 7412(c)-(g)*, and therefore understandably focuses on a subset of asbestiform [**25] minerals deemed to have commercial potential; market forces preclude commercially non-viable species of asbestos from becoming major sources of pollution from asbestos mills and mines and other covered sources. The direct enforcement mechanism created in *42 U.S.C. § 7413* focuses on risks to health. Therefore it provides oversight of release of hazardous pollutants whether or not they come from major sources of pollution. We defer to Congress's decision to create two enforcement structures and hold the district court's conflation of the two to be error.

In sum, the district court improperly limited the term "asbestos" to the six minerals covered by the civil regulations. Asbestos is adequately defined as a term and need not include mineral-by-mineral classifications [*757] to provide notice of its hazardous nature, particularly to these knowledgeable defendants. Accordingly, we reverse the order limiting evidence to that fitting within the civil regulations.

III. Mandamus

1. Background

The knowing endangerment provision of the Clean Air Act establishes an affirmative defense for hazardous air pollutants released "in accordance with" an applicable National Emissions Standards for Hazardous Air [**26] Pollutants ("NESHAP"). *See 42 U.S.C. § 7413(c)(5)(A).* In the proceedings before the district court, the government argued that defendants could not avail themselves of this affirmative defense because no NESHAP applied to W. R. Grace's operations in Libby; thus, compliance with an "applicable" NESHAP was impossible. The district court rejected this argument, finding that the regulations created an emissions standard of "no visible emissions" for asbestos. Accordingly, the district court ruled that it would allow defendants to introduce evidence at trial to try to prove their affirmative defense. Because the district court did not exclude any of the government's emissions evidence as a result of this ruling, the government cannot appeal the district court's decision. Instead, it now seeks a writ of mandamus to overturn the decision.

2. Standard of Review

The writ of mandamus is codified at *28 U.S.C. § 1651(a)*: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This court has developed a five-factor test for determining whether a writ may [**27] issue. We must consider whether:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

Clemens v. U. S. Dist. Ct., 428 F.3d 1175, 1177-78 (9th Cir. 2005) (quoting *Bauman v. United States Dist. Ct., 557 F.2d 650, 654-55 (9th Cir. 1977)).* Not every factor must be present to warrant mandamus relief, *see id. at 1178*, and in this case the only disputed issue is whether the district court made a clear error as a matter of law.

3. Analysis

Where, as here, the district court's order involves issues of statutory interpretation, the order is clearly erroneous as a matter of law if the reviewing court is left with "a definite and firm conviction that the district court's interpretation of the statute was incorrect." *DeGeorge v. United States Dist. Court, 219 F.3d 930, 936 (9th Cir. 2000)* [**28] (citing *In re Cement Antitrust Litig., 688 F.2d 1297, 1306 (9th Cir. 1982))*; *see also United States v. Ye, 436 F.3d 1117, 1123 (9th Cir. 2006).* Here, the plain language of the statute makes clear that the affirmative defense is not applicable to defendants' actions.

In relevant part, *§ 7413(c)(5)(A)* states, "[f]or any air pollutant for which the Administrator has set an emissions standard . . ., a release of such pollutant in accordance with that standard . . . shall [*758] not constitute a violation of this paragraph." The first clause of the affirmative defense makes it inapplicable to Grace's alleged asbestos releases. Quite simply, asbestos is not an "air pollutant for which the Administrator has set *an* emissions standard." *§ 7413(c)(5)(A)* (emphasis added). Rather, the Administrator has set *several* emissions standards, each of which is source dependent. Some asbestos emissions standards make no reference at all to "visible emissions." *See 40 C.F.R. §§ 61.143, 61.145, & 61.148.* Others include additional procedural requirements, above and beyond the "no visible emissions" requirement. *See 40 C.F.R. §§ 61.142, 61.144, 61.146, 61.149, & 61.150.* In short, there is simply no trans-categorical [**29] emissions standard for asbestos; neither is there an emissions standard for asbestos releases from mining operations. [5] Therefore, it is inconceivable that the alleged Grace releases were "in accordance with that standard." *§ 7413(c)(5)(A).* The plain language of the statute makes clear that the affirmative defense simply doesn't apply in this case. The district court's order to the contrary leaves us with a "a definite and firm conviction" that it got the law wrong. *DeGeorge, 219 F.3d at 936.* Consequently, we grant the government's petition for writ of mandamus, and hold that W. R. Grace can not avail itself at trial of the affirmative defense articulated in *42 U.S.C. § 7413(c)(5)(A).*

5 A perusal of the table of contents for 40 C.F.R. § 61 shows that most hazardous pollutants do in fact have a single emissions standard, enumerated in a single code section. *See, e.g., §§ 61.22, 61.32, 61.42, 61.52.* Asbestos, however, does not. *See §§ 61.142-.151.*

IV. Evidentiary Rulings

1. Introduction

As stated above, Counts II-IV of the superseding indictment allege violations of *42 U.S.C. § 7413(c)(5)(A)*, the Clean Air Act's knowing endangerment provision, which creates criminal penalties for a person [**30] who "knowingly releases into the ambient air any hazardous air pollutant listed pursuant to *section 7412* of this title . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury." Defendants filed motions in limine seeking to exclude evidence related to, or testimony based on, certain studies -- EPA indoor air studies ("Indoor Air studies"), Grace's historic testing of its vermiculite products ("Historic Testing"), a report of the Agency for Toxic Substances and Disease Registry based on a medical screening study of residents of Libby, Montana ("ATSDR Report"), and the results of the screening study published as an article in a peer-reviewed journal ("Peipins Publication"). Ruling that these studies were unreliable, irrelevant, or unduly prejudicial, the district court barred government experts from relying on them in forming opinions regarding the knowing endangerment charges, and, as to the indoor air studies, the ATSDR Report, and the Peipins Publication, excluding the studies, report, and publication themselves for most or all purposes. Order, *United States v. W. R. Grace, 9:05-cr-00007-DWM, 455 F. Supp. 2d 1172 (Aug. 21, 2006)* ("Indoor [**31] Air Order"); Order, *United States v. W. R. Grace, 455 F. Supp. 2d 1177 (2006)* ("Historical Testing Order"); Order, *United States v. W. R. Grace, 455 F. Supp. 2d 1181 (2006)* ("ATSDR and Peipins Order"). The government appeals.

2. Standard of Review

This court reviews de novo the district court's interpretation of the Federal Rules of Evidence. *United States v.* [*759] *Sioux, 362 F.3d 1241, 1244 n.5 (9th Cir.*

2004). In general, this court reviews for abuse of discretion a district court's decision to admit or exclude scientific evidence and expert testimony. *United States v. Finley, 301 F.3d 1000, 1007 (9th Cir. 2002)*. "[A] trial court has 'broad discretion' in assessing the relevance and reliability of expert testimony." *Id.* (quoting *United States v. Murillo, 255 F.3d 1169, 1178 (9th Cir. 2001))*.

3. Relevant Rules

Federal Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Rule 402* provides that relevant evidence is admissible, except as limited by the Constitution, statutes, or other rules of [**32] evidence. *Rule 403* provides a balancing test for the exclusion of relevant evidence on the grounds of prejudice: relevant evidence may be excluded if "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." [6]

6 Advisory committee notes from 1972 discuss the meaning of unfair prejudice -- the "undue tendency to suggest decision on an improper basis, commonly . . . an emotional one" -- and observe that the "availability of other means of proof may also be an appropriate factor" of determining when there is unfair prejudice.

Several rules apply specifically to testimony by experts. Under *Rule 702*, an expert witness may provide opinion testimony if "the testimony is based upon sufficient facts or data" and "is the product of reliable principles and methods," which have been "applied . . . reliably to the facts of the case." The rule "affirms the court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Advisory Comm. Notes, *Rule 702* (2000).

Under *Rule 703*, the "facts or data . . . upon which an expert bases [**33] an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." However, if the expert relies on facts or data that are otherwise inadmissible, then those facts "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." [7]

7 To the extent that inadmissible evidence is reasonably relied upon by an expert, a limiting instruction typically is needed -- i.e., the evidence is admitted only to help the jury evaluate the expert's evidence. *E.g., United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir. 1997)* (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). There is a presumption against disclosure to the jury of inadmissible information used as the basis for expert's opinion. *See* Advisory [**34] Comm. Notes, *Rule 703* (2000).

4. Analysis

A. Indoor Air Releases

i. Background

On May 31, 2006, Defendants filed a motion in limine to exclude evidence of or derived from indoor asbestos releases. Defendants sought to exclude documents and studies, including EPA's Phase II air sampling charts, as well as expert testimony that relied upon these studies. *See* [*760] Defs' Mot. in Limine Re: Indoor Air Releases at 4-6 (Docket # 473).

On August 28, 2006, the district court granted defendants' motion "with respect to evidence of or derived from indoor releases offered for the purpose of proving an 'ambient air' release in violation of *42 U.S.C. § 7413(c)(5)(A)*." *Indoor Air Order at 11*. The district court held that "[i]ndoor sampling performed by EPA in the course of its CERCLA activities, and testimony based upon this sampling, is not relevant [under *Fed. R. Evid. 402*] to whether Defendants committed a release in violation of the Clean Air Act, and is not admissible for the purpose of proving such a release." *Id. at 8*. The court stated that, under *Federal Rules of Evidence 403*, "[e]vidence derived from EPA testing and sample collection performed as part of its CERCLA analysis has the potential to be [**35] highly confusing and prejudicial," *id. at 10*, and barred the evidence for most purposes related to the Clean Air Act counts. However, the court held that the evidence had probative value with respect to defendants' "knowledge of the dangerousness of the asbestos contaminated vermiculite," *id. at 8*, relevant to the government's argument that defendants knowingly "place[d] another person in imminent danger of death or serious bodily injury," *42 U.S.C. § 7413(c)(5)(A)*, by releasing vermiculite into the community. In addition, the district court held the evidence relevant to the defrauding object of Count I's conspiracy charge and to the four counts of obstruction of justice in the superseding indictment. The district court thus denied the motion with respect to establishing knowledge of risk for the Clean Air Act charges and with respect to proving

the obstruction and conspiracy counts. The government appeals the exclusion of the Indoor Air studies and expert testimony based upon them with regard to the knowing endangerment counts.

ii. Analysis

The government argues that EPA's Phase II tests show the propensity of the Libby asbestos to release fibers whenever it was disturbed and regardless [**36] of the form the vermiculite took and therefore should be admitted to form the basis of expert testimony. The government also makes an argument that the Indoor Air studies should themselves be admitted as relevant. However, although the government makes a valid argument about the friability of Libby asbestos being the same whether indoors or outdoors, the probative value of the EPA studies is possibly outweighed by the danger of unfair prejudice. First, the studies' overall probative value is low because they largely concern the asbestos releases at various indoor locations in Grace's Libby mining and milling operation. There is some information in the studies regarding the friable character of Libby asbestos, but not much. There is a risk of unfair prejudice because the indoor releases may not reflect the level of releases into the ambient air, and there is some language in the studies regarding asbestos-related diseases in Libby that may mislead or confuse the jury into believing that releases into indoor air proves releases into ambient air. Finally, even if this court disagreed with the district court's *Rule 403* balancing, "[a]n appellate court will not reengage in a balancing of [**37] the probative value and prejudicial effect." *Rogers v. Raymark Industries, Inc., 922 F.2d 1426, 1430 (9th Cir. 1991)*. The district court's decision to bar the use of documents and studies derived from indoor air releases for the purpose of proving a release into the ambient air was within its discretion.

It is a separate question, however, whether the district court abused its discretion [*761] in excluding expert testimony based on documents and studies derived from indoor air releases. The district court did not conduct an inquiry under *Rule 702* [8] or *703* [9] in its August 28th order. *Rule 703* provides, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible* in evidence in order for the opinion or inference to be admitted." (Emphasis added.) The government persuasively argues that the proper remedy for the problems associated with the indoor air studies is to prevent an expert from disclosing the prejudicial facts instead of preventing the expert from relying on them altogether. Allowing expert testimony based on the EPA studies "will assist the trier of fact to understand the evidence [**38] or to determine a fact in issue" under *Rule 702* because the studies may show the propensity of the asbestos-contaminated vermiculite to release asbestos fibers into the ambient air. While the specific asbestos concentration levels discussed in the studies are not relevant because the studies largely measured indoor air releases and gathered data under conditions different from the ambient air releases relevant to the statute, the government's experts should be permitted to opine generally about the friability of Libby asbestos based in part on the data in the studies. The data from the indoor sampling is relevant to the propensity of Libby asbestos to release fibers upon disturbance. Based on these data, an expert could testify about friability and whether a release of asbestos would occur if asbestos-contaminated vermiculite were exposed or disturbed. Because the district court did not inquire into whether the data provided by the indoor air tests is of the type reasonably relied upon by experts in the field, *see Fed. R. Evid. 703*, or whether the data fits under *Rule 702*, we remand so that the district court can conduct these inquiries in the first instance.

8 *Fed. R. Evid. 702* provides, [**39] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

9 *Fed. R. Evid. 703* provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

B. W.R. Grace's Historic Product Testing

i. Background

On May 31, 2006, defendants filed a motion in limine to exclude expert opinions regarding Grace's historical, nonambient air product [**40] and commercial testing. Defendants sought to exclude the testimony of Dr. Richard Lemen, [10] Dr. Vernon Rose, [11] Paul Peronard, [12] Dr. Aubrey Miller, [13] Dr. Chris Weis, [14] and other government witnesses who might "attempt to [*762] draw unsupportable correlations between Grace's historical

product and commercial tests and expected ambient air exposures from disturbances of vermiculite materials found in the town of Libby." Defs' Mot. in Limine Re: Historic Testing at 4 (Docket # 496). On August 29, 2006, the district court granted defendants' motion to exclude expert testimony based on historic testing offered to prove a release in violation of *42 U.S.C. § 7413(c)(5)(A)*. Historic Testing Order *455 F. Supp. 2d at 1181*. The district court denied defendants' motion with respect to expert testimony based on historic testing offered for the purpose of showing defendants' knowledge of the dangerousness of the asbestos contaminated vermiculite. *Id.*

10 Docket # 287.
11 Docket # 283.
12 Docket # 281.
13 Docket # 279.
14 Docket # 286.

ii. Analysis

Rule 702 authorizes expert testimony that "will assist the trier of fact" when the testimony "is based upon sufficient facts or data," the testimony is produced through "reliable principles [**41] and methods," and the expert witness "has applied the principles and methods reliably to the facts of the case." Generally, an inquiry under *Rule 702* examines the expert's testimony as a whole. The *702* inquiry typically does not examine the reliability or relevance of particular data sets that underlie the expert testimony, although this approach does no harm where the expert testifies on only one study or where no combination or addition of data could make the data in question a proper, reliable basis for making a given claim. In contrast to *Rule 702*'s holistic focus on an expert's testimony, *Rule 703* governs the inquiry into the reliability of particular data underlying expert testimony. *Fed. R. Evid. 703*; *see also Claar v. Burlington Northern R. Co., 29 F.3d 499, 501 (9th Cir. 1994)*.

Here, the district court excluded the historic testing data under *Rule 702*. This document-based approach creates the problem that one cannot know fully whether or in what ways other information sources are meant to, in combination with the challenged data sources, form the premise for the expert testimony. Each document must be dispositive under the district court's approach, a requirement we do not [**42] impose under *Rule 702*. On remand, the district court shall conduct the *Rule 702* analysis in light of the expert's reasoning and methodology as a whole.

Faced with this new *702* analysis, defendants presumably will argue, as they do on appeal, that the historic testing evidence fails the "fit" test under *Daubert v. Merrell Dow Pharms.., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. [15] In response, the government argues that its experts do not plan to rely on the historic testing data to estimate the fiber concentrations from the charged releases, but only to opine generally on the hazardous characteristics [16] of Libby asbestos contaminated vermiculite. This limited use of the study to inform experts' opinions is permissible, because the propensity of Libby asbestos to release fibers fits the release element of the knowing endangerment provision. The district court did not consider this propensity-to-release inquiry, thus abusing its discretion by excluding this evidence under *702*.

15 This phrasing of the argument improperly focuses the *702* inquiry on a document-by-document approach that we disapproved *supra*.
16 I.e., the propensity of Libby asbestos to break down and release fibers into the ambient air.

Defendants [**43] make two additional, ultimately unsupportable arguments. First, they argue that the testimony's exclusion under *Rule 702* was proper because the [*763] government's experts "do not need" the evidence on historic air releases to testify about the friability of Libby asbestos. This argument misconceives *Rule 702*'s inquiry, which focuses on fitness, relevance, and reliability, not on whether an expert potentially has other evidence on which to base an opinion. Second, defendants argue that the district court properly excluded the testimony under *Rule 403* in addition to *Rule 702*. Contrary to defendants' assertion, however, the district court did not rely on *Rule 403* in its historic testing order but discussed the admissibility of expert testimony only under *Rule 702*. Moreover, an expert reasonably may rely on inadmissible evidence in forming an opinion or delivering testimony. *See Fed. R. Evid. 703*.

The question remains whether data concerning indoor air quality are of the type reasonably relied on by other experts in the field. *See Fed. R. Evid. 703*. Although it appears that the district court never conducted this *703* inquiry, the second step of the *Rule 702* analysis -- that the study was "the [**44] product of reliable principles and methods" -- presumably answers this question in the affirmative. *See Rule 702*; *see also Claar, 29 F.3d at 501* ("*Rule 703* merely relaxes, for experts, the requirement that witnesses have personal knowledge of the matter to which they testify," not whether the requirements of *702* are properly met). Although not stated explicitly, the order implicitly found the historic testing reliable in finding it admissible under *702* to show knowledge. Historic Testing Order *455 F. Supp. 2d at 1179*. Thus, the historic testing is admissible for purposes of expert opinion formation and testimony regarding

the propensity of Libby vermiculite to release asbestos as relevant to *42 U.S.C. § 7413(c)(5)(A)*. Accordingly, we reverse the district court order excluding such testimony.

C. Medical Screening Study: ATSDR and Peipins Publication

i. Background

In 2000-2001, the Agency for Toxic Substances and Disease Registry ("ATSDR") conducted a medical screening study in Libby (the "ATSDR Report") to detect pleural abnormalities in Libby residents and to inform priority-setting in EPA's asbestos clean-up operation. The study entailed interviewing and medically testing individuals who had lived, worked, [**45] attended school, or participated in other activities in Libby for at least six months before 1990. Questions were asked to identify individuals who had accessed potential "exposure pathways" to asbestos and vermiculite prior to December 31, 1990. For example, "pathways" included employment at W. R. Grace, living with W. R. Grace workers, using vermiculite for gardening, and engaging in recreational activities in certain locations known to contain vermiculite. Information about other basic demographic variables and risk factors was also gathered, e.g., age, sex, smoking status, history of pulmonary disease and various other self-reported health conditions.

ATSDR published an initial report of the study's findings in February 2001. The complete results of the study (the "Peipins Publication") were published in November 2003 in *Environmental Medicine*, a peer-reviewed journal. The Peipins Publication analysis used regression modeling to estimate the risk of respiratory abnormalities for each of the exposure pathways while controlling for all other pathways and other established and suggested risk factors.

The study showed that certain factors -- including exposure to particular pathways [**46] -- were associated with respiratory illness and abnormalities. The factors most strongly associated with abnormalities [*764] were: being a former W. R. Grace employee, being older, having had household contact with a former W. R. Grace worker, and being male. (The study also demonstrated "a statistically significant increase in the prevalence of pleural abnormalities with an increasing number of exposure pathways." While "participants reporting more pathways might be expected to have more cumulative exposure than would those reporting fewer pathways," this was not data gathered by the study; the study identified avenues for exposure but did not quantify the duration or intensity of individuals' exposures.

Both the interim ATSDR Report and the final Peipins Publication noted that the study had no control group and "no directly comparable Montana or U.S. population studies [were] available." The researchers were able to compare the data gathered with studies of other groups with substantive work-related asbestos exposure. The levels of pleural abnormalities were higher in Libby than in studies of other groups, but the study did not engage in any direct quantitative comparison. [17]

> 17 The results [**47] of the ATSDR Report were also compared with "control groups or general populations found in other studies." That comparison showed that the levels of pleural abnormalities were also higher in Libby for those who claimed "no apparent exposure" to particular pathways than subjects in other studies. This supported the study's conclusion that it was unlikely that there were individuals in Libby who had not been exposed to some degree.

On May 31, 2006, defendants filed a motion in limine "to exclude expert evidence relating to the ATSDR Medical Testing Program." Defs' Mot. in Limine Re: ATSDR (Docket # 500, 502). The district court characterized the motion as one to exclude "any evidence or expert testimony relating to" the medical screening study conducted in Libby by the Agency for Toxic Substances and Disease Registry. ATSDR Order *455 F. Supp. 2d 1181 at 1183*. The government did not object to the court's characterization of defendants' motion. On August 31, 2006, the district court granted defendants' motion. The court ruled that the ATSDR Report and Peipins Publication, and any expert testimony based thereon, were excluded under *Rules 403* and *702* for any purpose relating to the Clean Air Act knowing endangerment [**48] counts. *Id. at 1195*.

ii. Analysis

The district court acted within its discretion in excluding the ATSDR Report and Peipins Publication themselves under *Rule 403* for purposes of the knowing endangerment counts. There are limits to the probative value [18] of the particular correlations the ATSDR Report revealed and potentially prejudicial aspects to the data. Moreover, the government failed to contest the district court's undue prejudice conclusion. Because *Rule 403* requires the district court to balance the probative value and the prejudicial effects of a piece of evidence, failure to raise and argue prejudice [*765] generally waives the argument. *See United States v. Wilson, 966 F.2d 243, 245-46 (7th Cir. 1992)*.

> 18 The study demonstrated an association between negative health outcomes and an individual's unquantified exposure to vermiculite via particular "pathways" prior to the statutory period. The existence of association -- and not causation -- goes to the probative value of the evidence.

> The reported findings did not indicate that all exposure pathways were significantly associated with lung abnormalities (for example, gardening with vermiculite is not one of the factors mentioned as one being [**49] associated with such abnormalities). Because the data were gathered before the statutory period, it is questionable how reliable a basis they provide for drawing conclusions about the extent of the dangers posed by ambient releases during the statutory period, i.e., concentration or duration of releases. However, this is more an issue for the expert than the court.

However, in excluding this evidence from informing expert opinion and testimony, the district court erred. The expert is, in the first instance, the judge of what resources would help him to form an opinion, and he can filter out as irrelevant prejudicial information. The trial judge is to assure the reliability of evidence by vetting under *Rule 703* the bases underlying the expert's testimony and by examining under *Rule 702* the expert's methodology. Here, however, the trial judge misapplied *Rule 702* and replaced inappropriately the *Rule 703* analysis with one under *Rule 403*.

To begin, the district court concluded that the ATSDR medical screening program and resulting analyses did not establish a causal link between exposure to Libby's vermiculite and the development of asbestos-related disease. The ATSDR Report acknowledged [**50] repeatedly that the testing program was not designed as an epidemiological study to show causality. Notably, there was no internal control group and the participants were self-selected, rather than randomly selected. In light of this, the district court concluded that the data could not provide experts with a reliable basis for opining as to causality (i.e., the danger posed by the releases from Libby vermiculite).

Nonetheless, one of the main objectives of the ATSDR Report was to examine the association between pleural and interstitial abnormalities and participants' exposure histories -- measured in broad terms by the participants' overall contact with exposure pathways. As the district court acknowledged, the government's experts did not claim that they intended to use the study to show causation, but rather indicated that they would rely on the evidence to show that there were some associations or correlations between exposure to vermiculite in Libby and pleural abnormalities.

The district court took the view that the jury would be unlikely to distinguish between evidence of an association and evidence of causation and therefore would likely be misled, and would place undue reliance [**51] on the evidence. In this respect, the court substantially underestimated the capacity of jury instructions to distinguish these relationships, and the potential efficacy of a limiting instruction.

Further, the fact that a study is associational -- rather than an epidemiological study intended to show causation -- does not bar it from being used to inform an expert's opinion about the dangers of asbestos releases, assuming the study is "of the type typically relied upon" by experts in the field. *Fed. R. Evid. 703*. Of course, the expert's opinion testimony must satisfy the requirements of *Rule 702*--but that requires consideration of the *overall* sufficiency of the underlying facts and data, and the reliability of the methods, as well as the fit of the methods to the facts of the case. *Fed. R. Evid. 702*.

Here, the district court failed to consider the *Rule 702* requirements with regard to causation. Instead, as with the historical testing, the court conducted a document-by-document *Rule 702* analysis that deconstructed the experts' testimony in a manner not contemplated by *Rule 702*. Moreover, the study, which was published in a peer-reviewed journal and relevant to association, is adequate [**52] under *702*. The study's failure to establish causation goes to the weight it should be accorded, but does not mean that an expert could not rely on it in forming an opinion.

Nor did the district court consider the possibility of expert reliance on the ATSDR Report without disclosure of the [*766] study itself to the jury, as provided for by *Rule 703* ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."). In fact, the district court generally failed to conduct a *703* analysis, such as considering whether this study was "of the type" relied upon by experts in the field, or whether the ATSDR Report's "probative value . . . substantially outweighs [its] prejudicial effect." *Fed. R. Evid. 703*.

Instead, the district court excluded expert testimony regarding the ATSDR Report under *Rule 403*. This ruling improperly replaced *703* balancing with *403* balancing, *cf. Fed. R. Evid. 703* (providing balancing test applicable to expert testimony), and the exclusion of the ATSDR Report and Peipins Publication as bases for expert testimony [**53] or opinion formation was error. While *Rule 403* supplies a basis for holding the underlying ATSDR Report inadmissible, it does not contemplate barring an expert from relying on it. *Cf. Fed. R. Evid. 403*. The exclusion of the ATSDR Report and the Peipins Publication from expert consideration and testimony was error, and thus we reverse that part of the ATSDR Order.

V. Motion to Strike

In its reply brief to this court, the government submitted six documents not included in the record below--two excerpts of the federal register (addenda 1 and 3), a report of the National Research Council (addendum 2), published scientific articles (addenda 5 and 6), and search results presumably from the CAS Registry (addendum 4). Defendants moved to strike four of the documents (addenda 2, 4, 5, and 6) on the grounds that they were not part of the record below, were misleading, and, by virtue of their submission in the reply brief, were presented without giving defendants an opportunity to respond.

In general, we consider only the record that was before the district court. We have made exceptions to this general rule in three situations: (1) to "correct inadvertent omissions from the record," (2) to "take [**54] judicial notice," and (3) to "exercise inherent authority . . . in extraordinary cases." *Lowry v. Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003)*. Considerations of institutional expertise and notice support our limitation of these exceptions to "unusual circumstances." *Id.*

The search results in addendum item 4 fit none of these exceptions. Addendum items 2, 5, and 6 fit within the second exception--we have discretion to take judicial notice under *Rule 201* of the existence and content of published articles. *See Bell Atlantic Corp. v. Twombly, U.S. , n.13, 127 S. Ct. 1955, 1973 n.13, 167 L. Ed. 2d 929 (2007)*; *United States v. Rutgard, 116 F.3d 1270, 1278 (9th Cir. 1997)*. However, as we have stated before, the appropriate manner to supplement the record on appeal is "by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question." *Lowry, 329 F.3d at 1025*. The [**55] government failed to so move, and thus we grant defendants' motion to strike. However, due to the reversal and remand on certain issues, our ruling here does not preclude application to the district court for inclusion in the district court's record for whatever use is appropriate.

CONCLUSION

We reverse the order dismissing the knowing endangerment object of Count I of the superseding indictment. We reverse [*767] the order adopting the regulatory definition of asbestos used for civil regulation and direct that the definition in the criminal statute, i.e., the definition provided in *42 U.S.C. § 7412(b)*, applies. We grant the government's request for a writ of mandate. We affirm the exclusion of the indoor air studies, the ATSDR Report, and the Peipins Publication themselves. However we reverse their exclusion -- and the exclusion of the historic testing -- as bases underlying an expert's opinion or testimony. Finally, we grant defendants' motion to strike the documents included with the government's reply brief to this court.

AFFIRMED in part, **REVERSED** in part, and **REMANDED.**

WRIT OF MANDAMUS GRANTED on one issue.

EXHIBIT "3"

LEXSEE 377 U.S. 360

BAGGETT ET AL. v. BULLITT ET AL.

No. 220

SUPREME COURT OF THE UNITED STATES

377 U.S. 360; *84 S. Ct. 1316*; *12 L. Ed. 2d 377*; *1964 U.S. LEXIS 1140*

March 24, 1964, Argued
June 1, 1964, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

DISPOSITION: *215 F.Supp. 439*, reversed.

SUMMARY:

The present class action was instituted in the United States District Court for the Western District of Washington by personnel of the University of Washington for a declaration that (1) a 1931 Washington statute requiring teachers to swear a loyalty oath as a condition of their employment, and (2) a 1955 Washington statute containing oath requirements applicable to all state employees, were invalid. A three-judge District Court denied relief, ruling (1) as to the 1955 oath and underlying statutory provisions, that there was no infringement upon any *First* and *Fourteenth Amendment* freedoms and that the statutes were not unduly vague, and (2) as to the 1931 oath, that adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue. (*215 F Supp 439.*)

On direct appeal, the United States Supreme Court reversed. In an opinion by White, J., expressing the views of seven members of the Court, it was held that all the Washington statutes attacked in the complaint were invalid on the ground of vagueness, and that there were no circumstances supporting the lower court's abstention from decision.

Clark, J., joined by Harlan, J., dissented, expressing the view that the 1955 Act was not invalid on the ground of vagueness, and that as regards the 1931 Act, the state courts should have been afforded an opportunity to interpret the state law.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATUTES §17

vagueness --

Headnote:[1]

A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

[***LEdHN2]

STATUTES §17

vagueness -- requirement of loyalty oath. --

Headnote:[2]

Unconstitutional vagueness invalidates a state statute which, as a condition of employment, requires every teacher and other state employee to swear that he is not a subversive person--such person being not only one who himself commits specified acts but also one who abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government --and that he will not knowingly become or remain a member of a subversive organization, such organization being defined as one which engages in or assists activities intended to alter or overthrow the government by force or violence or which has as a purpose the commission of such acts.

[***LEdHN3]

APPEAL §727

construction of state statute -- binding on United States Supreme Court --

Headnote:[3]

The United States Supreme Court will accept the construction given by the highest state court to a statute requiring state employees to sign a loyalty oath, that the affiant's knowledge of activities of others is to be read into every provision of the statute.

[***LEdHN4]

STATUTES §17

vagueness -- loyalty oath --

Headnote:[4]

The *due process clause of the Fourteenth Amendment* is offended, because of vagueness, by a statute which requires every teacher to swear an oath exacting a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and the state, and promote undivided allegiance to the Government of the United States.

[***LEdHN5]

STATUTES §17

vagueness -- constitutional rights --

Headnote:[5]

The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the Federal Constitution.

[***LEdHN6]

CONSTITUTIOINAL LAW §927

freedom of speech -- loyalty oath --

Headnote:[6]

Freedom of speech is violated by a state statute which requires every teacher to swear a loyalty oath, where he, with a conscientious regard for the solemnity of an oath and sensitive to the perils posed by the oath's indefinite language, can avoid the risk of loss of employment, and perhaps profession, only by restricting his conduct to that which is unquestionably safe.

[***LEdHN7]

STATUTES §18

penal -- vagueness --

Headnote:[7]

The invalidity, on the ground of vagueness, of state statutes requiring, subject to perjury penalties, public servants to swear a loyalty oath, is not cured (1) by the expectation that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions, and (2) by the fact that the vagaries of the statute are contained in a promise of future conduct, the breach of which would not support a conviction for perjury.

[***LEdHN8]

STATUTES §18

penal -- vagueness --

Headnote:[8]

A state may not require a public servant to choose between subscribing to an unduly vague and broad loyalty oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where the free dissemination of ideas may be endangered; it is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.

[***LEdHN9]

COURTS §757

abstention doctrine --

Headnote:[9]

The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law, but rather involves a discretionary exercise of a court's equity powers; ascertainment of whether there exists the special circumstances prerequisite to application of the doctrine must be made on a case-to-case basis.

[***LEdHN10]

COURTS §757.5

federal -- duty to await state court decision --

Headnote:[10]

Special circumstances prerequisite to a federal court's submitting to the state courts questions of construing a state loyalty oath statute attacked as unconstitutional on the ground of vagueness do not exist where (1)

a construction of the oath provisions, in the light of the vagueness challenge, would not avoid or fundamentally alter the constitutional issue raised in the litigation, (2) the challenged oath is open not to one or a few interpretations but to an indefinite number, (3) construction of the oath requirements in the state courts, without reference to particularized situations, would very likely pose other constitutional issues for decision, and (4) remitting the litigants to the state courts would further protract proceedings already pending for almost two years.

[***LEdHN11]

SEDITION AND SUBVERSIVE ACTIVITIES §1

state power --

Headnote:[11]

A state has the power to take proper measures safeguarding the public service from disloyal conduct.

[***LEdHN12]

OFFICERS §5

qualification --

Headnote:[12]

The fact that a person is not compelled to hold public office cannot be an excuse for barring him from office by state-imposed criteria forbidden by the Federal Constitution.

SYLLABUS

This class action was brought by members of the faculty, staff, and students of the University of Washington for a judgment declaring unconstitutional 1931 and 1955 state statutes requiring the taking of oaths, one for teachers and the other for all state employees, including teachers, as a condition of employment. The 1931 oath requires teachers to swear, by precept and example, to promote respect for the flag and the institutions of the United States and the State of Washington, reverence for law and order and undivided allegiance to the Government of the United States. The 1955 oath for state employees, which incorporates provisions of the state Subversive Activities Act, requires the affiant to swear that he is not a "subversive person": that he does not commit, or advise, teach, abet or advocate another to commit or aid in the commission of any act intended to overthrow or alter, or assist in the overthrow or alteration, of the constitutional form of government by revolution, force or violence. "Subversive organization" and "foreign subversive organization" are defined in similar terms and the Communist Party is declared a subversive organization. A three-judge District Court held that the 1955 statute and oath were not unduly vague and did not violate the *First* and *Fourteenth Amendments*, and it abstained from ruling on the 1931 oath until it was considered by the state courts. *Held*:

1. The provisions of the 1955 statute and the 1931 Act violate due process since they, as well as the oaths based thereon, are unduly vague, uncertain and broad. *Cramp v. Board of Public Instruction, 368 U.S. 278*, followed. Pp. 361-372.

2. A State cannot require an employee to take an unduly vague oath containing a promise of future conduct at the risk of prosecution for perjury or loss of employment, particularly where the exercise of *First Amendment* freedoms may thereby be deterred. Pp. 373-374.

3. Federal courts do not automatically abstain when faced with a doubtful issue of state law, since abstention involves a discretionary exercise of equity power. Pp. 375-379.

(a) There are no special circumstances warranting application of the doctrine here. P. 375.

(b) Construction of the 1931 oath cannot eliminate the vagueness from its terms, and would probably raise other constitutional issues. P. 378.

(c) Abstention leads to piecemeal adjudication and protracted delays, a costly result where *First Amendment* freedoms may be inhibited. Pp. 378-379.

COUNSEL: Arval A. Morris and Kenneth A. MacDonald argued the cause and filed a brief for appellants.

Herbert H. Fuller, Deputy Attorney General of Washington, argued the cause for appellees. With him on the brief were John J. O'Connell, Attorney General of Washington, and Dean A. Floyd, Assistant Attorney General.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

OPINION BY: WHITE

OPINION

[*361] [***379] [**1317] MR. JUSTICE WHITE delivered the opinion of the Court.

Appellants, approximately 64 in number, are members of the faculty, staff and student body of the University of Washington who brought this class action asking for a judgment declaring unconstitutional two Washington statutes requiring the execution of two different oaths by state employees and for an injunction against the enforcement of these statutes by appellees, the President of

the University, members of the Washington State Board of Regents and the State Attorney General.

The statutes under attack are Chapter 377, Laws of 1955, and Chapter 103, Laws of 1931, both of which require employees of the State of Washington to take the oaths prescribed in the statutes as a condition of their employment. The 1931 legislation applies only to teachers, who, upon applying for a license to teach or renewing an existing contract, are required to subscribe to the following:

"I solemnly swear (or affirm) that I will support the constitution and laws of the United States of [*362] America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, c. 103.

The oath requirements of the [***380] 1955 Act, Wash. Laws 1955, c. 377, applicable to all state employees, incorporate various provisions of the Washington Subversive Activities Act of 1951, which provides generally that "no subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." *Wash. Rev. Code § 9.81.060.* The term "subversive person" is defined as follows:

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state [**1318] of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." *Wash. Rev. Code § 9.81.010 (5).*

The Act goes on to define at similar length and in similar terms "subversive organization" and "foreign subversive organization" and to declare the Communist Party a subversive [*363] organization and membership therein a subversive activity. [1]

> 1 "'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence." *Wash. Rev. Code § 9.81.010 (2).*
>
> "'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." *Wash. Rev. Code § 9.81.010 (3).*
>
> "COMMUNIST PARTY DECLARED A SUBVERSIVE ORGANIZATION.
>
> "The communist party is a subversive organization within the purview of chapter 9.81 and membership in the communist party is a subversive activity thereunder." *Wash. Rev. Code § 9.81.083.*

On May 28, 1962, some four months after this Court's dismissal of the appeal in *Nostrand v. Little, 368 U.S. 436*, also a challenge to the 1955 oath, [2] the University [*364] President, acting pursuant to directions of the [***381] Board of Regents, issued a memorandum to all University employees notifying them that they would be required to take an oath. Oath Form A [3] requires all teaching personnel [*365] to swear [**1319] to the oath of allegiance set out above, to aver that they have read, are familiar with and understand the provisions defining "subversive person" in the Subversive Activities Act of 1951 and to disclaim being a subversive person and membership in the Communist Party or any other subversive or foreign subversive organization. Oath Form B [4] requires other state employees to subscribe to all of the [***382] above provisions except the 1931 oath. Both forms provide that the oath and [*366] statements pertinent thereto are made subject to the penalties of perjury.

> 2 Although the 1931 Act has not been the subject of previous challenge, an attack upon the 1955 loyalty statute was instituted by two of the

appellants in the present case, Professors Howard Nostrand and Max Savelle, who brought a declaratory judgment action in the Superior Court of the State of Washington asking that Chapter 377, Laws of 1955, be declared unconstitutional and that its enforcement be enjoined. The Washington Supreme Court held that one section was unconstitutional but severable from the rest of the Act, whose validity was upheld. *Nostrand v. Balmer, 53 Wash. 2d 460, 335 P. 2d 10.* On appeal to this Court the decision of the Washington court was vacated and the case remanded for a determination of whether employees who refused to sign the oath would be afforded a hearing at which they could explain or defend the reasons for their refusal. *Nostrand v. Little, 362 U.S. 474.* The Washington Supreme Court held upon remand that since Professors Nostrand and Savelle were tenured professors the terms of their contracts and rules promulgated by the Board of Regents entitled them to a hearing. *Nostrand v. Little, 58 Wash. 2d 111, 361 P. 2d 551.* This Court dismissed a further appeal, *Nostrand v. Little, 368 U.S. 436.* The issue we find dispositive of the case at bar was not presented to this Court in the above proceedings.

3 "Oath Form A

"STATE OF WASHINGTON

"*Statement and Oath for Teaching Faculty*

of the University of Washington

"I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"I further certify that I have read the provisions of *RCW 9.81.010 (2), (3),* and *(5); RCW 9.81.060; RCW 9.81.070;* and *RCW 9.81.083,* which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury.

.....

(SIGNATURE)

.....?.....

(TITLE AND DEPARTMENT)

"Subscribed and sworn (or affirmed) to before me this ..... day of ....., 19....

.....

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON,

RESIDING AT .....

"(To be executed in duplicate, one copy to be retained by individual.)

"NOTE: Those desiring to affirm may strike the words 'swear' and 'sworn to' and substitute 'affirm' and 'affirmed,' respectively."

4 "Oath Form B

"STATE OF WASHINGTON

"*Statement and Oath for Staff of the University of WashingtonOther Than Teaching Faculty*

"I certify that I have read the provisions of *RCW 9.81.010 (2), (3),* and *(5); RCW 9.81.060; RCW 9.81.070;* and *RCW 9.81.083* which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury.

.....

(SIGNATURE)

.....

(TITLE AND DEPARTMENT OR OFFICE)

"Subscribed and sworn (or affirmed) to before me this ..... day of ....., 19....

.....

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON,

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Pursuant to *28 U. S. C. §§ 2281, 2284*, a three-judge District Court was convened and a trial was had. That court determined that the 1955 oath and underlying statutory provisions did not infringe upon any *First* and *Fourteenth Amendment* freedoms and were not unduly vague. In respect to the claim that the 1931 oath was unconstitutionally vague on its face, the court held that although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue. The action was dismissed. *215 F.Supp. 439*. We noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents. *375 U.S. 808*. We reverse.

I.

Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this [**1320] contention and therefore, without reaching the numerous other contentions pressed upon us, confine our considerations to that particular question. [5]

5 Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.

[***LEdHR1] [1]In *Cramp v. Board of Public Instruction, 368 U.S. 278*, the Court invalidated an oath requiring teachers and other employees of the State to swear that they had never lent their "aid, support, advice, counsel or influence to the Communist Party" because the oath was lacking in [*367] "terms susceptible of objective measurement" and failed to inform as to what the State commanded or forbade. The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. *Connally v. General Construction Co., 269 U.S. 385*; *Lanzetta v. New Jersey, 306 U.S. 451*; *Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495*; *United States v. Cardiff, 344 U.S. 174*;*Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma, 286 U.S. 210*.

[***LEdHR2] [2]The oath required by the 1955 statute suffers from similar infirmities. A teacher must swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence. A subversive organization is defined as one which [***383] engages in or assists activities intended to alter or overthrow the Government by force or violence or which has as a purpose the commission of such acts. The Communist Party is declared in the statute to be a subversive organization, that is, it is presumed that the Party does and will engage in activities intended to overthrow the Government. [6] Persons required to swear they understand [*368] this oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or advice may now or at some future date aid the activities of the Party. Teaching and advising are clearly acts, and one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the Communist Party or its members does not aid the Party in its activities, activities which the statute tells us are all in furtherance of the stated purpose of overthrowing the Government by revolution, force, or violence. The questions put by the Court in *Cramp* may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist [**1321] Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party? The susceptibility of the statutory language to require forswearing of an undefined variety of "guiltless knowing behavior" is what the Court condemned in *Cramp*. This statute, like the one at issue in *Cramp*, is unconstitutionally vague. [7]

6 The drafters of the 1951 Subversive Activities Act stated to the Washington Legislature that "the [Communist Party] dovetailed, nation-wide program is designed to . . . create unrest and civil strife, and impede the normal processes of state and national government, all to the end of weakening and ultimately destroying the United States as a constitutional republic and thereby facilitating the avowed Soviet purpose of substitut-

ing here a totalitarian dictatorship." First Report of the Joint Legislative Fact-Finding Committee on Un-American Activities in Washington State, 1948, p. IV.

7 The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in *Gerende v. Board of Supervisors, 341 U.S. 56*, is without merit. It was forcefully argued in *Gerende* that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged "'in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt." *Id., at 56-57* (emphasis in original). The Court said: "At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is *Affirmed.*" *Id., at 57.*

[*369] [***LEdHR3] [3]The Washington statute suffers from additional difficulties on vagueness grounds. A person is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government. The Washington [***384] Supreme Court has said that knowledge is to be read into every provision and we accept this construction. *Nostrand v. Balmer, 53 Wash. 2d 460, 483-484, 335 P. 2d 10, 24*; *Nostrand v. Little, 58 Wash. 2d 111, 123-124, 361 P. 2d 551, 559.* But what is it that the Washington professor must "know"? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he know that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government? Is it subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors and advising, teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists, or regardless of their affiliations, regularly teach students [*370] who are members of the Communist Party, which by statutory definition is subversive and dedicated to the overthrow of the Government?

The Washington oath goes beyond overthrow or alteration by force or violence. It extends to alteration by "revolution" which, unless wholly redundant and its ordinary meaning distorted, includes any rapid or fundamental change. Would, therefore, any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments be engaged in subversive activity? Could one support the repeal of the *Twenty-second Amendment* or participation by this country in a world government? [8]

8 It is also argued that § 2 of the Smith Act, *18 U. S. C. § 2385*, upheld over a vagueness challenge in *Dennis v. United States, 341 U.S. 494*, proscribes the same activity in the same language as the Washington statute. This argument is founded on a misreading of § 2 and *Dennis v. United States, supra.*

That section provides:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State . . . by force or violence . . . ."

The convictions under this provision were sustained in *Dennis, supra*, on the construction that the statute means "teaching and advocacy of action for the accomplishment of [overthrowing or destroying organized government] by language reasonably and ordinarily calculated to incite persons to such action . . . as speedily as circumstances would permit." *Id., at 511-512.* In connection with the vagueness attack, it was noted that "this is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. . . ." *Id., at 502.*

In reversing convictions under this section in *Yates v. United States, 354 U.S. 298*, the Court made quite clear exactly what all the above terms do and do not proscribe: "The Smith Act reaches only advocacy of action for the overthrow of government by force and violence." *Id., at 324.*

[*371] II.

[**1322] [***LEdHR4] [4]We also conclude that the 1931 oath offends due process because of vagueness. The oath exacts a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and the State of Washington. The range of activities which are or might be deemed [***385] inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise. Cf. *West Virginia State Board of Education v. Barnette, 319 U.S. 624.* Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath. And what are "institutions" for the purposes of this oath? Is it every "practice, law, custom, etc., which is a material and persistent element in the life or culture of an organized social group" or every "established society or corporation," every "establishment, esp[ecially] one of a public character"? [9] The oath may prevent a professor from criticizing his state judicial system or the Supreme Court or the institution of judicial review. Or it might be deemed to proscribe advocating the abolition, for example, of the Civil Rights Commission, the House Committee on Un-American Activities, or foreign aid.

9 Webster's New Int. Dictionary (2d ed.), at 1288.

It is likewise difficult to ascertain what might be done without transgressing the promise to "promote . . . undivided allegiance to the government of the United States." It would not be unreasonable for the serious-minded oathtaker to conclude that he should dispense with lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United [*372] States. He could find it questionable under this language to ally himself with any interest group dedicated to opposing any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States.

Indulging every presumption of a narrow construction of the provisions of the 1931 oath, consistent, however, with a proper respect for the English language, we cannot say that this oath provides an ascertainable standard of conduct or that it does not require more than a State may command under the guarantees [**1323] of the *First* and *Fourteenth Amendments.*

[***LEdHR5] [5] [***LEdHR6] [6]As in *Cramp* v. *Board of Public Instruction*, "the vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *368 U.S. 278, 287.* We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic *First Amendment* freedoms. The uncertain meanings of the oaths require the oath-taker -- teachers and public servants -- to "steer far wider of the unlawful zone," *Speiser v. Randall, 357 U.S. 513, 526*, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not [***386] be so inhibited. [10] [*373] *Smith v. California, 361 U.S. 147*; *Stromberg v. California, 283 U.S. 359, 369.* See also *Herndon v. Lowry, 301 U.S. 242*; *Thornhill v. Alabama, 310 U.S. 88*; and *Winters v. New York, 333 U.S. 507.*

10 "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the *Fourteenth Amendment.*" *Stromberg v. California, 283 U.S. 359, 369.* "Statutes restrictive of or purporting to place limits to those [*First Amendment*] freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb . . . and . . . the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *United States v. Congress of Industrial Organizations, 335 U.S. 106, 141-142* (Rutledge, J., concurring).

III.

The State labels as wholly fanciful the suggested possible coverage of the two oaths. It may well be correct, but the contention only emphasizes the difficulties

with the two statutes; for if the oaths do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?

[***LEdHR7] [7]It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human." *Cramp, supra, at 286-287.* Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment [*374] of those with a conscientious and scrupulous regard for such undertakings.

[***LEdHR8] [8]It is further argued, however, that, notwithstanding the uncertainties [**1324] of the 1931 oath and the statute on which it is based, the oath does not offend due process because the vagaries are contained in a promise of future conduct, the breach of which would not support a conviction for perjury. Without the criminal sanctions, it is said, one need not fear taking this oath, regardless of whether he understands it and can comply with its mandate, however understood. This contention ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says. Oath Form A contains both oaths, and expressly requires that the signer [***387] "understand that this statement and oath are made subject to the penalties of perjury." Moreover, Wash. Rev. Code § 9.72.030 provides that "every person who, whether orally or in writing . . . shall knowingly swear falsely concerning any matter whatsoever" commits perjury in the second degree. Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of a prosecution cannot be gainsaid. The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where "the free dissemination of ideas may be the loser." *Smith v. California, 361 U.S. 147, 151.* "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refg. Co.* v. *Corporation Comm'n of Oklahoma, 286 U.S. 210, 243*; cf. *Small Co.* v. *American Refg. Co., 267 U.S. 233.*

[*375] IV.

We are asked not to examine the 1931 oath statute because, although on the books for over three decades, it has never been interpreted by the Washington courts. The argument is that ever since *Railroad Comm'n v. Pullman Co., 312 U.S. 496*, the Court on many occasions has ordered abstention where state tribunals were thought to be more appropriate for resolution of complex or unsettled questions of local law. *A. F. L.* v. *Watson, 327 U.S. 582*; *Spector Motor Service v. McLaughlin, 323 U.S. 101*; *Harrison v. NAACP, 360 U.S. 167.* Because this Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented, *Fox v. Washington, 236 U.S. 273*; *Poulos v. New Hampshire, 345 U.S. 395*, an interpretation of the 1931 oath in the Washington courts in light of the vagueness attack may eliminate the necessity of deciding this issue.

[***LEdHR9] [9] [***LEdHR10] [10]We are not persuaded. The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the "special circumstances," *Propper v. Clark, 337 U.S. 472*, prerequisite to its application must be made on a case-by-case basis. *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500*; *NAACP v. Bennett, 360 U.S. 471.* [11] Those special circumstances [***388] are not present here. We doubt, in the first place, [**1325] that a construction of the oath provisions, in light of the vagueness challenge, would [*376] avoid or fundamentally alter the constitutional issue raised in this litigation. See *Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77.* In the bulk of abstention cases in this Court, [12] including those few cases where vagueness was at issue, [13] the unsettled issue of state law principally [*377] concerned the applicability [***389] of [**1326] the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation. Here the [*378] uncertain issue of state law does not turn upon a choice between one or several alternative meanings of a state statute. The challenged oath is not open to one or a few interpretations, but to an indefinite number. There is no uncertainty that the oath applies to the appellants and the issue they raise is not whether the oath permits them to engage in certain definable activities. Rather their complaint is that they, about 64 in number, cannot understand the required promise, cannot define the range of activi-

ties in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms. In these circumstances it is difficult to see how an abstract construction of the challenged terms, such as precept, example, allegiance, institutions, and the like, in a declaratory judgment action could eliminate the vagueness from these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this.

11 "When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts for construction of the statute should not automatically be made." *NAACP v. Bennett, 360 U.S. 471.* See also *United States v. Livingston, 179 F.Supp. 9, 12-13* (D. C. E. D. S. C.), aff'd, *Livingston v. United States, 364 U.S. 281*: "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *Shelton v. McKinley, 174 F.Supp. 351* (D. C. E. D. Ark.) (abstention inappropriate where there are no substantial problems of statutory construction and delay would prejudice constitutional rights); *All American Airways v. Village of Cedarhurst, 201 F.2d 273* (C. A. 2d Cir.); *Sterling Drug v. Anderson, 127 F.Supp. 511, 513* (D. C. E. D. Tenn.).

12 See, *e. g., Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496*; *Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168*; *Spector Motor Service, Inc., v. McLaughlin, 323 U.S. 101*; *Alabama State Federation of Labor v. McAdory, 325 U.S. 450*; *American Federation of Labor v. Watson, 327 U.S. 582*; *Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368*; *Shipman v. DuPre, 339 U.S. 321*; *Albertson v. Millard, 345 U.S. 242*; *Leiter Minerals, Inc., v. United States, 352 U.S. 220*; *Government & Civic Employees Organizing Committee, C. I. O., v. Windsor, 353 U.S. 364*; *City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639.*

13 In *Musser v. Utah, 333 U.S. 95*, the appellants were convicted of committing "acts injurious to public morals." The vagueness challenge to the statute, either as applied or on its face, was raised for the first time in oral argument before this Court, and the Court vacated the conviction and remanded for a determination of whether the conviction for urging persons to commit polygamy rested solely on this broad-challenged provision. In *Albertson v. Millard, 345 U.S. 242*, the Communist Party of the State of Michigan and its secretary sought to enjoin on several constitutional grounds the application to them of a state statute, five days after its passage, requiring registration, under pain of criminal penalties, of "any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which . . . acts to further, the world communist movement" and of members of such an organization. They argued that the definitions were vague and failed to inform them if a local Communist organization and its members were required to register. The lower court took judicial notice of the fact that the Communist Party of the United States, with whom the local party was associated, was a part of the world Communist movement dominated by the Soviet Union, and held the statute constitutional in all other respects. This Court vacated the judgment and declined to pass on the appellants' constitutional claims until the Michigan courts, in a suit already pending, construed the statutory terms and determined if they required the local Party and its secretary, without more, to register. The approach was that the constitutional claims, including the one founded on vagueness, would be wholly eliminated if the statute, as construed by the state court, did not require all local Communist organizations without substantial ties to a foreign country and their members to register. Stated differently, the question was whether this statute applied to these plaintiffs, a question to be authoritatively answered in the state courts.

In *Harrison v. NAACP, 360 U.S. 167*, the NAACP and the NAACP Legal Defense and Education Fund sought a declaratory judgment and injunction on several constitutional grounds in respect to numerous recently enacted state statutes. The lower court enjoined the implementation of three statutes, including one provision on vagueness grounds, and ordered abstention as to two others, finding them ambiguous. This Court ordered abstention as to all the statutes, finding that they were all susceptible of constructions that would limit or eliminate their effect on the litigative and legal activities of the NAACP and construction might thereby eliminate the necessity for passing on the many constitutional questions raised. The vagueness issue, for example, would not require adjudication if the state courts found

that the challenged provisions did not restrict the activities of the NAACP or require the NAACP to register. Unlike the instant case, the necessity for deciding the federal constitutional issues in the above and other abstention cases turned on whether the restrictions or requirements of an uncertain or unclear state statute were imposed on the persons bringing the action or on their activities as defined in the complaint.

Other considerations also militate against abstention here. Construction of this oath in the state court, abstractly and without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association, *Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341* (Brandeis, J., concurring), would not only hold little hope of eliminating the issue of vagueness but also would very likely pose other constitutional issues for decision, a result not serving the abstention-justifying end of avoiding constitutional adjudication.

We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, *England v. Louisiana State Board of Medical Examiners, 375 U.S. 411*, thereby delaying ultimate adjudication on the merits [*379] for an undue length of time, *England, supra; Spector, supra; Government & Civic Employees Organizing Committee v. Windsor, 353 U.S. 364*, [14] a result quite costly where the vagueness of a state statute may inhibit the exercise of *First Amendment* freedoms. Indeed the 1955 subversive person oath has been under continuous constitutional attack since at least 1957, *Nostrand v. Balmer, 53 Wash. 2d 460, 463, 335 P. 2d 10, 12*, and is now before this Court for the third time. Remitting these litigants to the state courts for a construction of the 1931 oath would further protract these proceedings, [***390] already [**1327] pending for almost two years, with only the likelihood that the case, perhaps years later, will return to the three-judge District Court and perhaps this Court for a decision on the identical issue herein decided. See *Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 84; Public Utilities Comm'n of Ohio v. United Fuel Co., 317 U.S. 456.* [15] Meanwhile, where the vagueness of the statute deters constitutionally protected conduct, "the free dissemination of ideas may be the loser." *Smith v. California, 361 U.S. 147, 151.*

14 See Clark, Federal Procedural Reform and States' Rights, 40 Tex. L. Rev. 211 (1961); Note, 73 Harv. L. Rev. 1358, 1363 (1960).

15 "Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible." *317 U.S. 456, at 463.*

V.

[***LEdHR11] [11] [***LEdHR12] [12]As in *Cramp v. Board of Public Instruction, supra*, we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct. [*380] But measures which purport to define disloyalty must allow public servants to know what is and is not disloyal. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins, 367 U.S. 488, 495-496.*

Reversed.

DISSENT BY: CLARK

DISSENT

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins, dissenting.

The Court strikes down, as unconstitutionally vague, two Acts of the State of Washington. The first, the Act of 1955, requires every state employee to swear or affirm that he is not a "subversive person" as therein defined. The second, the Act of 1931, which requires that another oath be taken by teachers, is declared void without the benefit of an opinion of either a state or federal court. I dissent as to both, the first on the merits, and the latter, because the Court refuses to afford the State an opportunity to interpret its own law.

I.

The Court says that the Act of 1955 is void on its face because it is "unduly vague, uncertain and broad." The Court points out that the oath requires a teacher to "swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence." The Court further finds that the Act declares the Communist Party to be a subversive organization.

From these premises, the Court then reasons that under the 1955 Act "any person who aids the Communist Party [*381] or teaches or advises known members of the Party is a subversive person" because "at some future [***391] date" such teaching may aid the activities of the Party. This reasoning continues with the assertion that "one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the Communist Party or its members does not aid the Party . . . in furtherance of the stated purpose of overthrowing the Government by revolution, force, or violence." The Court then interrogates itself: Does the statute reach "endorsement or support for Communist candidates [**1328] for office? . . . a lawyer who represents the Communist Party or its members? . . . [defense of the] constitutional rights of the Communist Party or its members . . . [or support of] any cause which is likewise supported by Communists or the Communist Party?" Apparently concluding that the answers to these questions are unclear, the Court then declares the Act void, citing *Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).* Let us take up this reasoning in reverse order.

First, *Cramp* is not apposite. The majority has failed to recognize that the statute in *Cramp* required an oath of much broader scope than the one in the instant case: *Cramp* involved an oath "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party . . . ." That oath was replete with defects not present in the Washington oath. As MR. JUSTICE STEWART pointed out in *Cramp*:

"The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement." At 286.

[*382] These factors which caused the Court to find the *Cramp* oath unconstitutionally vague are clearly not present in the Washington oath. Washington's oath proscribes only the commission of an *act* of overthrow or alteration of the constitutional form of government by revolution, force or violence; or advising, teaching, abetting or advocating by any means another person to commit or aid in the commission of any act intended to overthrow or alter or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. The defects noted by the Court when it passed on the *Cramp* oath have been cured in the Washington statute.

It is strange that the Court should find the language of this statute so profoundly vague when in 1951 it had no such trouble with the identical language presented by another oath in *Gerende v. Board of Supervisors of Elections, 341 U.S. 56.* There, the constitutionality of Maryland's Ober Law, written in language identical to Washington's 1955 Act, was affirmed by a unanimous Court against the same attack of vagueness. It is unfortunate that *Gerende* is overruled so quickly. * Other state [***392] laws have been copied from the Maryland Act -- just as Washington's 1955 Act was -- primarily because of our approval of it, and now this Court would declare them void. Such action cannot command the dignity and respect due to the judicial process. It is, of course, absurd to say that, under the words of the Washington Act, [*383] a professor risks violation when he teaches German, English, history or any other subject included in the curriculum for a college degree, to a class in which a Communist Party member might sit. To so interpret the language of the Act is to extract more sunbeams from cucumbers than did Gulliver's mad scientist. And to conjure up such ridiculous questions, the answers to which we all know or should know are in the negative, is to build up a whimsical and farcical straw man which is not only grim but Grimm.

* It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in *Gerende*, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the *Gerende* opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague.

In [**1329] addition to the Ober Law the Court has also found that other statutes using similar language were not vague. An unavoidable example is the Smith Act which we upheld against an attack based on vagueness in the landmark case of *Dennis v. United States, 341 U.S. 494 (1951).* The critical language of the Smith Act is again in the same words as the 1955 Washington Act.

"Whoever knowingly or willfully *advocates, abets, advises*, or *teaches* the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . ." *18 U. S. C. § 2385.* (Emphasis supplied.)

The opinion of the Court in *Dennis* uses this language in discussing the vagueness claim:

"We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. . . . We think [the statute] well serves to indicate to those

who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go -- a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand." At 515-516.

[*384] It appears to me from the statutory language that Washington's 1955 Act is much more clear than the Smith Act. Still the Court strikes it down. Where does this leave the constitutionality of the Smith Act?

II.

Appellants make other claims. They say that the 1955 Act violates their rights of association and free speech as guaranteed by the *First* and *Fourteenth Amendments*. But in light of *Konigsberg v. State Bar of California, 366 U.S. 36 (1961)*; *In re Anastaplo, 366 U.S. 82 (1961)*; *Adler v. Board of Education, 342 U.S. 485 (1952)*; *Garner v. Board of Public Works, 341 U.S. 716 (1951)*; and *American Communications Assn.* v. *Douds, 339 U.S. 382 (1950)*, this claim is frivolous. Likewise in view of the decision of Washington's highest court that tenured employees would be entitled to a hearing, *Nostrand v. Little, 58 Wash. 2d 111, 131, 361 P. 2d 551, 563*, the due process claim is without foundation. This conclusion would also apply to those employees without tenure, since they would be entitled to a hearing under Washington's [***393] Civil Service Act, Rev. Code Wash. § 41.04 *et seq.* and its Administrative Procedure Act, Rev. Code Wash. § 34.04.010 *et seq.*

III.

The Supreme Court of Washington has never construed the oath of allegiance required by the 1931 Act. I agree with the District Court that Washington's highest court should be afforded an opportunity to do so. As the District Court said:

"The granting or withholding of equitable or declaratory relief in federal court suits which seek to limit or control state action is committed to the sound discretion of the court. Accordingly, in the absence [*385] of a concrete factual showing that any plaintiff or any member of the classes of state employees here represented has suffered actual injury by reason of the application of the oath of allegiance statute (Chapter 103, Laws of 1931) this court will decline to render a declaratory judgment as to the constitutionality of that statute in advance of an authoritative construction by the Washington Supreme Court." *215 F.Supp. 439, 455.*

For these reasons, I dissent.

REFERENCES
Annotation References:

1. Indefiniteness of language as affecting validity of criminal legislation. 96 L ed 374, 97 L ed 203. See also 70 L ed 322 and 83 L ed 893.

2. Validity of governmental requirement of oath of allegiance or loyalty. *18 ALR2d 268, 97* L ed 226.

3. The United States Supreme Court and the right of freedom of speech and press. 93 L ed 1151, 2 L ed 2d 1706, 11 L ed 2d 1116.

4. Discretion of federal court to remit relevant state issues to state court in which no action is pending. 94 L ed 879, 3 L ed 2d 1827, *8 ALR2d 1228.*

EXHIBIT “4”

1 of 1 DOCUMENT

CITY OF CHICAGO, PETITIONER v. JESUS MORALES ET AL.

No. 97-1121

SUPREME COURT OF THE UNITED STATES

527 U.S. 41; 119 S. Ct. 1849; 144 L. Ed. 2d 67; 1999 U.S. LEXIS 4005; 67 U.S.L.W. 4415; 72 A.L.R.5th 665; 99 Cal. Daily Op. Service 4488; 99 Daily Journal DAR 5760; 1999 Colo. J. C.A.R. 3223; 12 Fla. L. Weekly Fed. S 331

December 9, 1998, Argued
June 10, 1999, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

DISPOSITION: *177 Ill. 2d 440, 687 N. E. 2d 53*, affirmed.

DECISION:

Chicago ordinance that prohibited loitering together in any public place by two or more people, of whom at least one was criminal street gang member, held to be impermissibly vague, in violation of *Fourteenth Amendment's due process clause.*

SUMMARY:

The city of Chicago enacted a "gang congregation" ordinance that prohibited loitering together in any public place by two or more people, of whom at least one was a "criminal street gang member." The ordinance created a criminal offense that was punishable by a fine of up to 500, imprisonment for not more than 6 months, and a requirement to perform up to 120 hours of community service. Under the ordinance, which defined "loitering" as remaining in any one place with no apparent purpose, (1) a police officer who observed a person whom the officer reasonably believed to be a criminal street gang member loitering in a public place with one or more persons was required to order all of the persons to disperse, and (2) any person, regardless of whether the person was a gang member, who disobeyed such a dispersal order was guilty of violating the ordinance. The Chicago Police Department promulgated guidelines that purported to prevent arbitrary or discriminatory enforcement of the ordinance by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership in such gangs, and providing for designated but publicly undisclosed enforcement areas. After 2 trial judges upheld the federal constitutionality of the ordinance but 11 others held that it was invalid, the Illinois Appellate Court, in affirming the judgments in the cases in which the ordinance was held invalid and reversing the convictions in the other cases, determined that the ordinance violated the Federal Constitution and the state constitution. The Illinois Supreme Court, in affirming the Appellate Court judgment, expressed the view that the ordinance violated due process of law, in that the ordinance was impermissibly vague on its face and was an arbitrary restriction on personal liberties (*177 Ill 2d 440, 687 NE 2d 53*).

On certiorari, the United States Supreme Court affirmed. In those portions of an opinion by Stevens, J., which constituted the opinion of the court and were joined by O'Connor, Kennedy, Souter, Ginsburg and Breyer, JJ., it was held that the ordinance was impermissibly vague, in violation of the due process clause of the *Federal Constitution's Fourteenth Amendment*, because the broad sweep of the ordinance violated the requirement that a legislature establish minimal guidelines to govern law enforcement, where (1) the ordinance's mandatory language directed the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stood or sat in the company of a gang member, (2) the ordinance required no harmful purpose and applied to nongang members as well as suspected gang members, (3) the most harmful gang loitering was motivated by an apparent purpose, and (4) the police guidelines did not sufficiently limit the discretion

granted to the police in enforcing the ordinance. Also, Stevens, J., joined by Souter and Ginsburg, JJ., expressed the view that (1) the freedom to loiter for innocent purposes is part of the liberty protected by the due process clause, (2) the ordinance was vague in the sense that it specified no standard of conduct, and (3) the ordinance afforded too little notice to citizens who wished to use the public streets.

O'Connor, J., joined by Breyer, J., concurring in part and concurring in the judgment, expressed the view that the ordinance was unconstitutionally vague, because it lacked sufficient minimal standards to guide law enforcement officers.

Kennedy, J., concurring in part and concurring in the judgment, expressed the view that the fact that a citizen had to disobey an order to disperse before being guilty of violating the ordinance was not sufficient to eliminate doubts regarding the adequacy of notice under the ordinance.

Breyer, J., concurring in part and concurring in the judgment, expressed the view that the ordinance was unconstitutional, because it allowed a police officer too much discretion in every case, there being no way to distinguish in the ordinance's terms between one application of discretion and another.

Scalia, J., dissenting, expressed the view that (1) the minor limitation upon the free state of nature that the ordinance imposed was a small price to pay for liberation of the streets of a city which had been afflicted with criminal street gangs, and (2) the court invalidated a perfectly reasonable measure by (a) ignoring rules governing facial challenges, (b) elevating loitering to a constitutionally guaranteed right, and (c) discerning vagueness where, according to the court's usual standards, none existed.

Thomas, J., joined by Rehnquist, Ch. J., and Scalia, J., dissenting, expressed the view that (1) the ordinance (a) was not vague in all of it applications, and (b) did not violate the due process clause; and (2) there is no fundamental right to loiter, as loitering has been consistently criminalized throughout the nation's history.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

MUNICIPAL CORPORATIONS §37.7

-- gang congregation ordinance -- vagueness

Headnote:[1A][1B][1C][1D][1E][1F]

A city "gang congregation" ordinance that prohibits loitering together in any public place by two or more people, of whom at least one is a "criminal street gang member"--where (1) the ordinance (a) defines "loitering" as remaining in any one place with no apparent purpose, (b) provides that a police officer who observes a person whom the officer reasonably believes to be a criminal street gang member loitering in a public place with one or more persons shall order all of the persons to disperse, and (c) makes guilty of a crime any person, regardless of whether the person is a gang member, who disobeys such a dispersal order; and (2) the city police department has promulgated guidelines that purport to prevent arbitrary or discriminatory enforcement of the ordinance by (a) confining arrest authority to designated officers, (b) establishing detailed criteria for defining criminal street gangs and membership in such gangs, and (c) providing for designated but publicly undisclosed enforcement areas--is impermissibly vague, in violation of the due process clause of the *Federal Constitution's Fourteenth Amendment*, because the broad sweep of the ordinance violates the requirement that a legislature establish minimal guidelines to govern law enforcement, as (1) the ordinance's mandatory language directs the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stand or sit in the company of gang members; (2) the fact that the ordinance does not apply to people who are moving does not address the question of how much discretion the police enjoy in deciding which stationary persons to disperse; (3) the fact that the ordinance does not permit an arrest until a dispersal order has been disobeyed provides no guidance to an officer deciding whether to issue such an order; (4) the ordinance requires no harmful purpose and applies to nongang members as well as suspected gang members; (5) the most harmful gang loitering is motivated by an apparent purpose either to publicize the gang's dominance of certain territory or to conceal ongoing commerce in illegal drugs; and (6) as to the police guidelines limiting enforcement of the ordinance to publicly undisclosed designated areas, (a) the guidelines will not provide a defense to a loiterer who might be arrested elsewhere, and (b) a person who knowingly loiters with a well-known gang member anywhere in the city cannot safely assume that they will not be ordered to disperse, no matter how innocent and harmless their loitering might be. (Scalia and Thomas, JJ., and Rehnquist, Ch. J., dissented from this holding.)

[***LEdHN2]

COURTS §805

-- construction of state statute

Headnote:[2]

The United States Supreme Court has no authority to construe the language of a state statute more narrowly than the construction given by that state's highest court.

[***LEdHN3]

COURTS §92.3

-- power -- construction of statute

Headnote:[3]

The power of a court to determine the meaning of a statute carries with it the power to describe its extent and limitations as well as the method by which they shall be determined.

[***LEdHN4]

COURTS §817

-- gang congregation ordinance -- construction

Headnote:[4]

For purposes of determining whether a city "gang congregation" ordinance that prohibits loitering--which the ordinance defines as remaining in any one place with no apparent purpose--together in any public place by two or more people, of whom at least one is a "criminal street gang member is vague, in violation of the due process clause of the *Federal Constitution's Fourteenth Amendment*, the United States Supreme Court must assume that the ordinance means what it says and that it has no application to people whose purpose is apparent, where the highest court for the state in which the city is located has not placed any limiting construction on the language of the ordinance.

SYLLABUS

Chicago's Gang Congregation Ordinance prohibits "criminal street gang members" from loitering in public places. Under the ordinance, if a police officer observes a person whom he reasonably believes to be a gang member loitering in a public place with one or more persons, he shall order them to disperse. Anyone who does not promptly obey such an order has violated the ordinance. The police department's General Order 92-4 purports to limit officers' enforcement discretion by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership therein, and providing for designated, but publicly undisclosed, enforcement areas. Two trial judges upheld the ordinance's constitutionality, but eleven others ruled it invalid. The Illinois Appellate Court affirmed the latter cases and reversed the convictions in the former. The State Supreme Court affirmed, holding that the ordinance violates due process in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties.

Held: The judgment is affirmed.

177 Ill. 2d 440, 687 N.E.2d 53, 227 Ill. Dec. 130, affirmed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, and V, concluding that the ordinance's broad sweep violates the requirement that a legislature establish minimal guidelines to govern law enforcement. *Kolender v. Lawson, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855*. The ordinance encompasses a great deal of harmless behavior: In any public place in Chicago, persons in the company of a gang member "shall" be ordered to disperse if their purpose is not apparent to an officer. Moreover, the Illinois Supreme Court interprets the ordinance's loitering definition -- "to remain in any one place with no apparent purpose" -- as giving officers absolute discretion to determine what activities constitute loitering. See *id. at 359*. This Court has no authority to construe the language of a state statute more narrowly than the State's highest court. See *Smiley v. Kansas, 196 U.S. 447, 455, 49 L. Ed. 546, 25 S. Ct. 289*. The three features of the ordinance that, the city argues, limit the officer's discretion -- (1) it does not permit issuance of a dispersal order to anyone who is moving along or who has an apparent purpose; (2) it does not permit an arrest if individuals obey a dispersal order; and (3) no order can issue unless the officer reasonably believes that one of the loiterers is a gang member -- are insufficient. Finally, the Illinois Supreme Court is correct that General Order 92-4 is not a sufficient limitation on police discretion. See *Smith v. Goguen, 415 U.S. 566, 575*. Pp. 16-20, *39 L. Ed. 2d 605, 94 S. Ct. 1242*.

JUSTICE STEVENS, joined by JUSTICE SOUTER and JUSTICE GINSBURG, concluded in Parts III, IV, and VI:

1. It was not improper for the state courts to conclude that the ordinance, which covers a significant amount of activity in addition to the intimidating conduct that is its factual predicate, is invalid on its face. An enactment may be attacked on its face as impermissibly vague if, *inter alia,* it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty. *Kolender v. Lawson, 461 U.S. at 358*. The freedom to loiter for innocent purposes is part of such "liberty." See, *e.g., Kent v. Dulles, 357 U.S. 116, 126, 2 L. Ed. 2d 1204, 78 S. Ct. 1113*. The ordinance's vagueness makes a facial challenge appropriate. This is not an enactment that simply regulates business behavior and contains a scienter requirement. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186*. It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin, 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675*, and infringes on constitutionally protected rights, see *id. at 391*. Pp. 7-12.

2. Because the ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted, it is impermissibly vague. See, *e.g., Coates v. Cincinnati, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686.* The term "loiter" may have a common and accepted meaning, but the ordinance's definition of that term -- "to remain in any one place with no apparent purpose" -- does not. It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an "apparent purpose." This vagueness about what loitering is covered and what is not dooms the ordinance. The city's principal response to the adequate notice concern -- that loiterers are not subject to criminal sanction until after they have disobeyed a dispersal order -- is unpersuasive for at least two reasons. First, the fair notice requirement's purpose is to enable the ordinary citizen to conform his or her conduct to the law. See *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618.* A dispersal order, which is issued only after prohibited conduct has occurred, cannot retroactively provide adequate notice of the boundary between the permissible and the impermissible applications of the ordinance. Second, the dispersal order's terms compound the inadequacy of the notice afforded by the ordinance, which vaguely requires that the officer "order all such persons to disperse and remove themselves from the area," and thereby raises a host of questions as to the duration and distinguishing features of the loiterers' separation. Pp. 12-16.

JUSTICE O'CONNOR, joined by JUSTICE BREYER, concluded that, as construed by the Illinois Supreme Court, the Chicago ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers; in particular, it fails to provide any standard by which police can judge whether an individual has an "*apparent* purpose." This vagueness alone provides a sufficient ground for affirming the judgment below, and there is no need to consider the other issues briefed by the parties and addressed by the plurality. It is important to courts and legislatures alike to characterize more clearly the narrow scope of the Court's holding. Chicago still has reasonable alternatives to combat the very real threat posed by gang intimidation and violence, including, *e.g.,* adoption of laws that directly prohibit the congregation of gang members to intimidate residents, or the enforcement of existing laws with that effect. Moreover, the ordinance could have been construed more narrowly to avoid the vagueness problem, by, *e.g.,* adopting limitations that restrict the ordinance's criminal penalties to gang members or interpreting the term "apparent purpose" narrowly and in light of the Chicago City Council's findings. This Court, however, cannot impose a limiting construction that a state supreme court has declined to adopt. See, *e.g., Kolender v. Lawson, 461 U.S. 352, 355-356, n. 4, 75 L. Ed. 2d 903, 103 S. Ct. 1855.* The Illinois Supreme Court misapplied this Court's precedents, particularly *Papachristou v. Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839*, to the extent it read them as *requiring* it to hold the ordinance vague in all of its applications. Pp. 1-5.

JUSTICE KENNEDY concluded that, as interpreted by the Illinois Supreme Court, the Chicago ordinance unconstitutionally reaches a broad range of innocent conduct, and, therefore, is not necessarily saved by the requirement that the citizen disobey a dispersal order before there is a violation. Although it can be assumed that disobeying some police commands will subject a citizen to prosecution whether or not the citizen knows why the order is given, it does not follow that any unexplained police order must be obeyed without notice of its lawfulness. The predicate of a dispersal order is not sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to such an order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose. Pp. 1-2.

JUSTICE BREYER concluded that the ordinance violates the Constitution because it delegates too much discretion to the police, and it is not saved by its limitations requiring that the police reasonably believe that the person ordered to disperse (or someone accompanying him) is a gang member, and that he remain in the public place "with no apparent purpose." Nor does it violate this Court's usual rules governing facial challenges to forbid the city to apply the unconstitutional ordinance in this case. There is no way to distinguish in the ordinance's terms between one application of unlimited police discretion and another. It is unconstitutional, not because a policeman applied his discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications. See *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618.* Contrary to JUSTICE SCALIA's suggestion, the ordinance does not escape facial invalidation simply because it may provide fair warning to some individual defendants that it prohibits the conduct in which they are engaged. This ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide the police. See *Coates v. Cincinnati, 402 U.S. 611, 614.* Pp. 1-5, *29 L. Ed. 2d 214, 91 S. Ct. 1686.*

COUNSEL: Lawrence Rosenthal argued the cause for petitioner.

Harvey Grossman argued the cause for respondents.

JUDGES: STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts III, IV, and VI, in which SOUTER and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined. KENNEDY, J., and BREYER, J., filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.

OPINION BY: STEVENS

OPINION

[*45] [**1854] [***73] JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III, IV, and VI, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

[***74] [***LEdHR1A] [1A]In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang [*46] members" from "loitering" with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the *Due Process Clause of the Fourteenth Amendment to the Federal Constitution.*

I

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment. [1]

1 The findings are quoted in full in the opinion of the *Supreme Court of Illinois. 177 Ill. 2d 440, 445, 687 N.E.2d 53, 58, 227 Ill. Dec. 130 (1997).* Some of the evidence supporting these findings is quoted in JUSTICE THOMAS' dissenting opinion. *Post*, at 3-4.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." *177 Ill. 2d 440, 445, 687 N.E.2d 53, 58, 227 Ill. Dec. 130 (1997).* Furthermore, the council stated that gang members "establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present . . . ." *Ibid.* It further found that "loitering in public places by [*47] criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear." Moreover, the council concluded that the city "has an interest in discouraging all persons from loitering in public places with criminal gang members." *Ibid.*

The ordinance creates a criminal offense punishable by a fine of up to $ 500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member." Second, the persons must be "loitering," which the ordinance defines as "remaining in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance. *Ibid.* [2]

2 The ordinance states in pertinent part:

"(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

" (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

"(c) As used in this section:

"(1) 'Loiter' means to remain in any one place with no apparent purpose.

"(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

. . . . .

"(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

"(e) Any person who violates this Section is subject to a fine of not less than $ 100 and not more than $ 500 for each offense, or imprisonment for not more than six months, or both.

"In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1-4-120 of this Code." Chicago Municipal Code § 8-4-015 (added June 17, 1992), reprinted in App. to Pet. for Cert. 61a-63a.

[*48] [**1855] Two months after the ordinance [***75] was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern its enforcement. [3] That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." Chicago Police Department, General Order 92-4, reprinted in App. to Pet. for Cert. 65a. The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, [4] and establish detailed criteria for defining street gangs and membership in such gangs. *Id. at 66*a-67a. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated [*49] areas." *Id. at 68*a-69a. The city, however, does not release the locations of these "designated areas" to the public. [5]

3 As the Illinois Supreme Court noted, during the hearings preceding the adoption of the ordinance, "representatives of the Chicago law and police departments informed the city counsel that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordinance itself." *177 Ill. 2d at 445, 687 N.E.2d at 58-59.*

4 Presumably, these officers would also be able to arrest all nongang members who violate the ordinance.

5 Tr. of Oral Arg. 22-23.

II

During the three years of its enforcement, [6] the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the [***76] ordinance. [7] In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance, but eleven others ruled that it was invalid. [8] In respondent Youkhana's case, the trial judge held that the "ordinance fails to notify individuals what conduct [*50] is prohibited, and it encourages arbitrary and capricious enforcement by police." [9]

6 The city began enforcing the ordinance on the effective date of the general order in August 1992 and stopped enforcing it in December 1995, when it was held invalid in *Chicago v. Youkhana, 277 Ill. App. 3d 101, 660 N.E.2d 34, 213 Ill. Dec. 777 (1995)*. Tr. of Oral Arg. 43.

7 Brief for Petitioner 16. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. City of Chicago, R. Daley & T. Hillard, Gang and Narcotic Related Violent Crime: 1993-1997, p. 7 (June 1998).

The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26%. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11%. Pet. for Cert. 9, n. 5. However, gang-related homicides fell by 19% in 1997, over a year after the suspension of the ordinance. Daley & Hillard, at 5. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy. Cf. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, *97 Mich. L. Rev. 291, 296 (1998)* (describing the "hotly contested debate raging among . . . experts over the causes of the decline in crime in New York City and nationally").

8 See Poulos, Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws, *83 Cal. L. Rev. 379, 384, n. 26 (1995).*

9 *Chicago* v. *Youkhana,* Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), App. to Pet. for Cert. 45a. The court also concluded that the ordinance improperly authorized arrest on the basis of a person's status instead of conduct and that it was facially overbroad under the *First Amendment to the Federal Constitution* and *Art. 1, § 5, of the Illinois Constitution. Id. at 59*a.

[**1856] The Illinois Appellate Court affirmed the trial court's ruling in the *Youkhana* case, [10] consolidated and affirmed other pending appeals in accordance with *Youkhana*, [11] and reversed the convictions of respondents Gutierrez, Morales, and others. [12] The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of non-gang members in violation of the *First Amendment to the Federal Constitution* and Article I of the Illinois Consti- tution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the *Fourth Amendment.* [13]

10 *Chicago v. Youkhana, 277 Ill. App. 3d 101, 660 N.E.2d 34, 213 Ill. Dec. 777 (1995).*

11 *Chicago* v. *Ramsey*, Nos. 1-93-4125 et al. (Ill. App., Dec. 29, 1995), reprinted in App. to Pet. for Cert. 39a.

12 *Chicago* v. *Morales,* Nos. 1-93-4039 et al. (Ill. App., Dec 29, 1995), reprinted in App. to Pet. for Cert. 37a.

13 *Chicago v. Youkhana, 277 Ill. App. 3d at 106, 660 N.E.2d at 38*; *id. at 112, 660 N.E.2d at 41*; *id. at 113, 660 N.E.2d at 42.*

The Illinois Supreme Court affirmed. It held "that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." *177 Ill. 2d at 447, 687 N.E.2d at 59.* The court did not reach the contentions that the ordinance "creates a status offense, permits arrests without probable cause or is overbroad." *Ibid.*

In support of its vagueness holding, the court pointed out that the definition of "loitering" in the ordinance drew no distinction between innocent conduct and conduct calculated [*51] [***77] to cause harm. [14] "Moreover, the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." *177 Ill. 2d at 451-452, 687 N.E.2d at 60-61.* Furthermore, it concluded that the ordinance was "not reasonably susceptible to a limiting construction which would affirm its validity." [15]

14 "The ordinance defines 'loiter' to mean 'to remain in any one place with no apparent purpose.' Chicago Municipal Code § 8-4-015(c)(1) (added June 17, 1992). People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a job, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer." *177 Ill. 2d at 451-452, 687 N.E.2d at 60-61.*

15 It stated, "Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." *Id. at 458, 687 N.E.2d at 64.*

[***LEdHR1B] [1B]We granted certiorari, 523 U.S. (1998), and now affirm. Like the Illinois Supreme Court, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

III

The basic factual predicate for the city's ordinance is not in dispute. As the city argues in its brief, "the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." [16] The findings in the ordinance explain that it was motivated by these concerns. We have no doubt [*52] that a law that directly prohibited such intimidating conduct [**1857] would be constitutional, [17] but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

16 Brief for Petitioner 14.

17 In fact the city already has several laws that serve this purpose. See, *e.g.,* Ill. Comp. Stat. ch. 720 §§ 5/12-6 (1998) (Intimidation); 570/405.2 (Streetgang criminal drug conspiracy); 147/1 *et seq.* (Illinois Streetgang Terrorism Omnibus Pre-

vention Act); 5/25-1 (Mob action). Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance, testified that, of the kinds of behavior people had discussed at the hearing, "90 percent of those instances are actually criminal offenses where people, in fact, can be arrested." Record, Appendix II to plaintiff's memorandum in opposition to Motion to Dismiss 182 (Transcript of Proceedings, Chicago City Council Committee on Police and Fire, May 18, 1992).

We are confronted at the outset with the city's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. The city correctly points out that imprecise laws can be attacked on their face under two different doctrines. [18] First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise [***78] of *First Amendment* rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma, 413 U.S. 601, 612-615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*. Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*.

18 Brief for Petitioner 17.

While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission that the law does not have a sufficiently substantial impact on conduct [*53] protected by the *First Amendment* to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. Cf. *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)*; *Gregory v. Chicago, 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969)*. Its impact on the social contact between gang members and others does not impair the *First Amendment* "right of association" that our cases have recognized. See *Dallas v. Stanglin, 490 U.S. 19, 23-25, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989)*.

On the other hand, as the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the *Due Process Clause of the Fourteenth Amendment*. [19] We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears, 179 U.S. 270, 274, 45 L. Ed. 186, 21 S. Ct. 128 (1900)*; see also *Papachristou v. Jacksonville, 405 U.S. 156, 164, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)*. [20] [*54] Indeed, it is apparent [**1858] that an individual's [***79] decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles, 357 U.S. 116, 126, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (1958)*, or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765). [21]

19 See Brief for United States as *Amicus Curiae* 23: "We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others." The city appears to agree, at least to the extent that such activities include "social gatherings." Brief for Petitioner 21, n. 13. Both JUSTICE SCALIA, *POST*, at 12-15, and JUSTICE THOMAS, *post*, at 5-9, not only disagree with this proposition, but also incorrectly assume (as the city does not, see Brief for Petitioner 44) that identification of an obvious liberty interest that is impacted by a statute is equivalent to finding a violation of substantive due process. See n. 35, *infra*.

20 *Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." Brief for Petitioner 12. While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. In 16th-century England, for example, the "'Slavery acts'" provided for a 2-year enslavement period for anyone who "'liveth idly and loiteringly, by the space of three days.'" Note, Homelessness in a Modern Urban Setting, 10 Fordham Urb. L. J. 749, 754, n. 17 (1982). In Papachristou* we noted that many American vagrancy laws were patterned on these "Elizabethan poor laws." *405 U.S. at 161-162*. These laws went virtually unchallenged in this country until attorneys became widely available to the indigent following our decision in *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)*. See Recent Developments,

Constitutional Attacks on Vagrancy Laws, 20 Stan. L. Rev. 782, 783 (1968). In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include "'any runaway, stubborn servant or child'" and "'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.'" T. Wilson, Black Codes of the South 76 (1965). The Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children. L. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship 50-69 (1998). Neither this history nor the scholarly compendia in JUSTICE THOMAS' dissent, *post*, at 5-9, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause.

21 The freewheeling and hypothetical character of JUSTICE SCALIA's discussion of liberty is epitomized by his assumption that citizens of Chicago, who were once "free to drive about the city" at whatever speed they wished, were the ones who decided to limit that freedom by adopting a speed limit. *Post*, at 1. History tells quite a different story.

> In 1903, the Illinois Legislature passed, "An Act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads, and highways of the state of Illinois." That statute, with some exceptions, set a speed limit of 15 miles per hour. See *Christy v. Elliott, 216 Ill. 31, 74 N.E. 1035 (1905)*. In 1900, there were 1,698,575 citizens of Chicago, 1 Twelfth Census of the United States 430 (1900) (Table 6), but only 8,000 cars (both private and commercial) registered in the entire United States. See Ward's Automotive Yearbook 230 (1990). Even though the number of cars in the country had increased to 77,400 by 1905, *ibid*. It seems quite clear that it was pedestrians, rather than drivers, who were primarily responsible for Illinois' decision to impose a speed limit.

[*55] There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. Cf. *Aptheker v. Secretary of State, 378 U.S. 500, 515-517, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964)* (right to travel); *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 82-83, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976)* (abortion); *Kolender v. Lawson, 461 U.S. at 358-360*, nn. 3, 9. For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." See *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)*. It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin, 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)*, and infringes on constitutionally protected rights, see *id. at 391*. When vagueness permeates the text of such a law, it is subject to facial attack. [22]

22 The burden of the first portion of JUSTICE SCALIA's dissent is virtually a facial challenge to the facial challenge doctrine. See *post*, at 2-11. He first lauds the "clarity of our general jurisprudence" in the method for assessing facial challenges and then states that the clear import of our cases is that, in order to mount a successful facial challenge, a plaintiff must "establish that no set of circumstances exists under which the Act would be valid." See *post*, at 7; *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*. To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, see *id. at 745, n. 3*, the Court nevertheless entertained their facial challenge). Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.

We need not, however, resolve the viability of *Salerno*'s dictum, because this case comes to us from a state -- not a federal -- court. When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution. See *Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)*. When a state court has reached the merits of a constitutional claim, "invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose." *City of Revere v. Massachusetts Gen. Hospital, 463 U.S.*

239, 243, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1983) (internal quotation marks omitted).

Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases-a proposition which is doubtful-state courts need not apply prudential notions of standing created by this Court. See *ASARCO Inc. v. Kadish, 490 U.S. 605, 618, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (1989)*. JUSTICE SCALIA's assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law; moreover it contradicts "essential principles of federalism." See Dorf, Facial Challenges to State and Federal Statutes, *46 Stan. L. Rev. 235, 284 (1994)*.

[*56] [**1859]

Vagueness may invalidate a criminal law for either of two independent [***80] reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. See *Kolender v. Lawson, 461 U.S. at 357*. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

IV

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." *Giaccio v. Pennsylvania, 382 U.S. 399, 402-403, 15 L. Ed. 2d 447, 86 S. Ct. 518 (1966)*. The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, *177 Ill. 2d at 451, 687 N.E.2d at 61*, but the definition of that term in this ordinance -- "to remain in any one place with no apparent purpose" -- does not. It is difficult to imagine how [*57] any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose? [23]

23 The Solicitor General, while supporting the city's argument that the ordinance is constitutional, appears to recognize that the ordinance cannot be read literally without invoking intractable vagueness concerns. "The purpose simply to stand on a corner cannot be an 'apparent purpose' under the ordinance; if it were, the ordinance would prohibit nothing at all." Brief for United States as *Amicus Curiae* 12-13.

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather [***81] about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm. [24] Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. [25] [**1860] However, state [*58] courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime. [26]

24 *177 Ill. 2d at 452, 687 N.E.2d at 61*. One of the trial courts that invalidated the ordinance gave the following illustration: "Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone." *Chicago* v. *Youkhana*, Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), reprinted in App. to Pet. for Cert. 45a.

25 See, *e.g., Tacoma v. Luvene, 118 Wn.2d 826, 827 P.2d 1374 (1992)* (upholding ordinance criminalizing loitering with purpose to engage in drug-related activities); *People v. Superior Court, 46 Cal. 3d 381, 394-395, 758 P.2d 1046, 1052, 250 Cal. Rptr. 515 (1988)* (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

26 See, *e.g., State v. Richard, 108 Nev. 626, 629, 836 P.2d 622, 624, n. 2 (1992)* (striking down statute that made it unlawful "for any person to loiter or prowl upon the property of another without lawful business with the owner or occupant thereof").

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "Whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do." [27] We find this response unpersuasive for at least two reasons.

27 Brief for Petitioner 31.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 (1939).* Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. [28] If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham, 382 U.S. 87, 90, 15 L. Ed. 2d 176, 86 S. Ct.* [***82] *211* [*59] *(1965).* [29] Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law. [30]

28 In this way, the ordinance differs from the statute upheld in *Colten v. Kentucky, 407 U.S. 104, 110, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972).* There, we found that the illegality of the underlying conduct was clear. "Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under . . . Kentucky's statute if he fails to obey an order to move on." *Ibid.*

29 *"Literally read. . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration." 382 U.S. 87 at 90.*

30 *As we have noted in a similar context: "If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." Wright v. Georgia, 373 U.S. 284, 292, 10 L. Ed. 2d 349, 83 S. Ct. 1240 (1963).*

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." App. to Pet. for Cert. 61a. This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." *Connally v. General Constr. Co., 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926).* We remarked in *Connally* that "both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id. at 395.*

Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance [**1861] unconstitutionally [*60] vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese, 92 U.S. 214, 221, 23 L. Ed. 563 (1876).* This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971).*

V

[***LEdHR1C] [1C]The broad sweep of the ordinance also violates "'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson, 461 U.S. at 358.* There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an [***83] order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may -- indeed, she "shall" -- order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson, 461 U.S. at 359* (internal quotation marks omitted). As we discussed in the context of fair notice, [*61] see *supra, at 12,* the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

[***LEdHR2] [2] [***LEdHR3] [3]As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." *177 Ill. 2d at 457, 687 N.E.2d at 63.* We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. [31] "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." *Smiley v. Kansas, 196 U.S. 447, 455, 49 L. Ed. 546, 25 S. Ct. 289 (1905).*

> 31 This critical fact distinguishes this case from *Boos v. Barry, 485 U.S. 312, 329-330, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988).* There, we noted that the text of the relevant statute, read literally, may have been void for vagueness both on notice and on discretionary enforcement grounds. We then found, however, that the Court of Appeals had "provided a narrowing construction that alleviates both of these difficulties." *Ibid.*

Nevertheless, the city disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

[***LEdHR1D] [1D]Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving -- that is, to activity that would not constitute loitering under any possible definition of the term -- does not even address the question of how much discretion the police enjoy in deciding which stationary persons [*62] to disperse under the ordinance. [32] Similarly, that the [**1862] ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because [***84] its application depends on whether some purpose is "apparent" to the officer on the scene.

> 32 *It is possible to read the mandatory language of the ordinance and conclude that it affords the police no* discretion, since it speaks with the mandatory "shall." However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.

Presumably an officer would have discretion to treat some purposes -- perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening -- as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council's reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, [33] or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to non-gang members as well as suspected gang members. [34] It applies to everyone in the city [*63] who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

> 33 JUSTICE THOMAS' dissent overlooks the important distinction between this ordinance and those that authorize the police "to order groups of individuals who threaten the public peace to disperse." See *post,* at 11.
>
> 34 Not all of the respondents in this case, for example, are gang members. The city admits that it was unable to prove that Morales is a gang member but justifies his arrest and conviction by the fact that Morales admitted "that he knew he was with criminal street gang members." Reply Brief for Petitioner 23, n. 14. In fact, 34 of the 66 respondents in this case were charged in a document that only accused them of being in the

presence of a gang member. Tr. of Oral Arg. 34, 58.

[***LEdHR1E] [1E] [***LEdHR4] [4]Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

[***LEdHR1F] [1F]Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. We agree. See *Smith v. Goguen, 415 U.S. 566, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)*. That the police [***85] have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city [*64] safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

[**1863] VI

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." [35] *177 Ill. 2d at 459, 687 N.E.2d at 64*. We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." *Houston v. Hill, 482 U.S. 451, 471-472, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987)*. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

35 This conclusion makes it unnecessary to reach the question whether the Illinois Supreme Court correctly decided that ordinance is invalid as a deprivation of substantive due process. For this reason, JUSTICE THOMAS, see *post,* at 5, and JUSTICE SCALIA, see *post*, at 13, are mistaken when they asserts that our decision must be analyzed under the framework for substantive due process set out in *Washington v. Glucksberg, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)*.

Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

CONCUR BY: O'CONNOR; KENNEDY; BREYER

CONCUR

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I agree with the Court that Chicago's Gang Congregation Ordinance, Chicago Municipal Code § 8-4-015 (1992) (gang loitering ordinance or ordinance) is unconstitutionally vague. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to [*65] establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. *Kolender v. Lawson, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*. Of these, "the more important aspect of vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id. at 358* (quoting *Smith v. Goguen, 415 U.S. 566, 574-575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)*). I share JUSTICE THOMAS' concern about the consequences of gang violence, and I agree that some degree of police discretion is necessary to allow the police "to perform their peacekeeping responsibilities satisfactorily." See *post,* at 12 (dissenting opinion). A criminal law, however, must not permit policemen, prosecutors, and juries to conduct "'a standardless sweep . . . to pursue their personal predilections.'" *Kolender v. Lawson, supra, at 358* (quoting *Smith v. Goguen, supra, at 575*).

The ordinance at issue provides:

"Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public [***86] place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any per-

son who does not promptly obey such an order is in violation of this section." App. to Pet. for Cert. 61a.

To "loiter," in turn, is defined in the ordinance as "to remain in any one place with no apparent purpose." *Ibid.* The Illinois Supreme Court declined to adopt a limiting construction of the ordinance and concluded that the ordinance vested "*absolute* discretion to police officers." *177 Ill. 2d 440, 457, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (1997)* (emphasis added). This Court is bound by the Illinois Supreme Court's construction of the ordinance. See *Terminiello v. Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949).*

As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement [*66] officers. In particular, it fails to provide police with any standard by which they can judge whether an individual has an "*apparent* purpose." Indeed, because any person standing on the street has a general "purpose" -- even if it is simply to stand -- the ordinance permits police officers to choose which purposes are *permissible*. Under this [**1864] construction the police do not have to decide that an individual is "threatening the public peace" to issue a dispersal order. See *post,* at 11 (THOMAS, J., dissenting). Any police officer in Chicago is free, under the Illinois Supreme Court's construction of the ordinance, to order at his whim any person standing in a public place with a suspected gang member to disperse. Further, as construed by the Illinois court, the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or "other location open to the public, whether publicly or privately owned." Chicago Municipal Code § 8-4-015(c)(5) (1992).

To be sure, there is no violation of the ordinance unless a person fails to obey promptly the order to disperse. But, a police officer cannot issue a dispersal order until he decides that a person is remaining in one place "with no apparent purpose," and the ordinance provides no guidance to the officer on how to make this antecedent decision. Moreover, the requirement that police issue dispersal orders only when they "reasonably believe" that a group of loiterers includes a gang member fails to cure the ordinance's vague aspects. If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued. Cf. *ante,* at 18-19. But, the Illinois Supreme Court did not construe the ordinance to be so limited. See *177 Ill. 2d at 453-454, 687 N.E.2d at 62.*

This vagueness consideration alone provides a sufficient ground for affirming the Illinois court's decision, and I agree [*67] with Part V of the Court's opinion, which discusses this consideration. See *ante*, at 18 ("That the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue"); *ante,* at 18-19 [***87] ("It is true . . . that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members"). Accordingly, there is no need to consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them.

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," see *id. at 18,* from laws that target only gang members, see *ibid.* and from laws that incorporate limits on the area and manner in which the laws may be enforced, see *ante*, at 19. In addition, the ordinance here is unlike a law that "directly prohibits" the "'presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways,'" that "'intimidates residents.'" *Ante*, at 7 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. See *ante*, at 7-8, n.17. Chicago has even enacted a provision that "enables police officers to fulfill . . . their traditional functions," including "preserving the public peace." See *post*, at 10 (THOMAS, J., dissenting). Specifically, [*68] Chicago's general disorderly conduct provision allows the police to arrest those who knowingly "provoke, make or aid in making a breach of peace." See Chicago Municipal Code § 8-4-010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal [**1865] activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court. See

App. to Pet. for Cert. 60a-61a. As noted above, so would limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. To the extent it relied on our precedents, particularly *Papachristou v. Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)*, as *requiring* it to hold the ordinance vague in all of its applications because it was intentionally drafted in a vague manner, the Illinois court misapplied our precedents. See *177 Ill. 2d at 458-459, 687 N.E.2d at 64.* This Court has never [***88] held that the intent of the drafters determines whether a law is vague. Nevertheless, we cannot impose a limiting construction that a state supreme court has declined to adopt. See *Kolender, 461 U.S. at 355-356, n. 4* (noting that the Court has held that "'for the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it'" (citations and internal quotation marks omitted)); *New York* [*69] *v. Ferber, 458 U.S. 747, 769, n. 24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)* (noting that where the Court is "dealing with a state statute on direct review of a state-court decision that has construed the statute[,] such a construction is binding on us"). Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, and V of JUSTICE STEVENS' opinion.

I also share many of the concerns he expresses in Part IV with respect to the sufficiency of notice under the ordinance. As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct. For this reason it is not necessarily saved by the requirement that the citizen must disobey a police order to disperse before there is a violation.

We have not often examined these types of orders. Cf. *Shuttlesworth v. Birmingham, 382 U.S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211 (1965).* It can be assumed, however, that some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official. It does not follow, however, that any unexplained police order must be obeyed without notice of the lawfulness of the order. The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; [*70] nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose.

JUSTICE BREYER, concurring in part and concurring in the judgment.

The ordinance before us creates more than a "*minor* limitation upon the free state of nature." *Post*, at 2 (SCALIA, J., dissenting) (emphasis added). The law authorizes a police officer to order any person to remove himself from any "location open to the public, whether publicly or privately owned," Chicago Municipal Code § 8-4-015(c)(5) (1992). *i.e.*, any sidewalk, front stoop, public park, public square, lakeside promenade, hotel, restaurant, bowling alley, bar, barbershop, sports arena, shopping mall, etc., but with two, and only two, limitations: First, that person must be accompanied by (or must himself be) [***89] someone police reasonably believe is a gang member. Second, that person [**1866] must have remained in that public place "with no apparent purpose." § 8-4-015(c)(1).

The first limitation cannot save the ordinance. Though it limits the number of persons subject to the law, it leaves many individuals, gang members and nongang members alike, subject to its strictures. Nor does it limit in any way the range of conduct that police may prohibit. The second limitation is, as JUSTICE STEVENS, *ante* at 18, and JUSTICE O'CONNOR, *ANTE* at 2, point out, not a limitation at all. Since one always has some apparent purpose, the so-called limitation invites, in fact requires, the policeman to interpret the words "no apparent purpose" as meaning "no apparent purpose except for . . . ." And it is in the ordinance's delegation to the policeman of open-ended discretion to fill in that blank that the problem lies. To grant to a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a "minor," "limitation upon the free state of nature."

[*71] Nor does it violate "our rules governing facial challenges," *post*, at 2 (SCALIA, J., dissenting), to forbid the city to apply the unconstitutional ordinance in this case. The reason *why* the ordinance is invalid explains how that is so. As I have said, I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see

no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications. The city of Chicago may be able validly to apply some *other* law to the defendants in light of their conduct. But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, "It is a crime to do wrong," even to the worst of murderers. See *Lanzetta v. New Jersey, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 (1939)* ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").

JUSTICE SCALIA's examples, *post*, at 10-11, reach a different conclusion because they assume a different basis for the law's constitutional invalidity. A statute, for example, might not provide fair warning to many, but an individual defendant might still have been aware that it prohibited the conduct in which he engaged. Cf., *e.g., Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* ("One who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. [*72] One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"). But I believe this ordinance is [***90] unconstitutional, not because it provides insufficient notice, but because it does not provide "sufficient minimal standards to guide law enforcement officers." See *ante*, at 2 (O'CONNOR, J., concurring in part and concurring in judgment).

I concede that this case is unlike those *First Amendment* "overbreadth" cases in which this Court has permitted a facial challenge. In an overbreadth case, a defendant whose conduct clearly falls within the law and may be constitutionally prohibited can nonetheless have the law declared facially invalid to protect the rights of others (whose protected speech might otherwise be chilled). In the present case, the right that the defendants assert, the right to be free from the officer's exercise of unchecked discretion, is more clearly their own.

This case resembles *Coates v. Cincinnati, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971)*, where this Court declared facially unconstitutional on, among other grounds, the due process standard of vagueness an ordinance that prohibited persons assembled [**1867] on a sidewalk from "conducting themselves in a manner annoying to persons passing by." The Court explained:

"It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. . . . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id. at 614* (citation omitted).

[*73] The ordinance in *Coates* could not constitutionally be applied whether or not the conduct of the particular defendants was indisputably "annoying" or of a sort that a different, more specific ordinance could constitutionally prohibit. Similarly, here the city might have enacted a different ordinance, or the Illinois Supreme Court might have interpreted this ordinance differently. And the Constitution might well have permitted the city to apply that different ordinance (or this ordinance as interpreted differently) to circumstances like those present here. See *ante*, at 4 (O'CONNOR, J., concurring in part and concurring in judgment). But *this* ordinance, as I have said, cannot be constitutionally applied to anyone.

DISSENT BY: SCALIA; THOMAS

DISSENT

JUSTICE SCALIA, dissenting.

The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle. This infringed upon the "freedom" of all citizens, but was not unconstitutional.

Similarly, the citizens of Chicago were once free to stand around and [***91] gawk at the scene of an accident. At some point Chicagoans discovered that this obstructed traffic and caused more accidents. They did not make the practice unlawful, but they did authorize police officers to order the crowd to disperse, and imposed penalties for refusal to obey such an order. Again, this prophylactic measure infringed upon the "freedom" of all citizens, but was not unconstitutional.

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose -- to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated [*74] in public places to deal in drugs, and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed. The means they took was similar to the second, and more mild, example given above rather than the first: Loitering was not made unlawful, but when a group of people occupied a public place without an apparent purpose and in the company of a known gang member, police officers were authorized to order them to disperse, and the failure to obey such an order was made unlawful. See Chicago Municipal Code § 8-4-015 (1992). The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

The majority today invalidates this perfectly reasonable measure by ignoring our rules governing facial challenges, by elevating loitering to a constitutionally guaranteed right, and by discerning vagueness where, according to our usual standards, none exists.

I

Respondents' consolidated appeal presents a facial challenge to the Chicago Ordinance on vagueness grounds. When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, [**1868] and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration. The rationale for our power to review federal legislation for constitutionality, expressed in *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)*, was that we *had* to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case. [*75]

That limitation was fully grasped by Tocqueville, in his famous chapter on the power of the judiciary in American society:

"The second characteristic of judicial power is, that it pronounces on special cases, and not upon general principles. If a judge, in deciding a particular point, destroys a general principle by passing a judgment which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle [***92] without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority; he assumes a more important, and perhaps a more useful influence, than that of the magistrate; but he ceases to represent the judicial power.

. . . . .

"Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule . . . . But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force. Those to whom it is prejudicial learn that means exist of overcoming its authority; and similar suits are multiplied, until it becomes powerless. . . . The political power which the Americans have entrusted to their courts of justice is therefore immense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. . . . When a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its authority is not taken away; and its final destruction can [*76] be accomplished only by the reiterated attacks of judicial functionaries." Democracy in America 73, 75-76 (R. Heffner ed. 1956).

As Justice Sutherland described our system in his opinion for a unanimous Court in *Massachusetts v. Mellon, 262 U.S. 447, 488, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)*:

"We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. . . . If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

And as Justice Brennan described our system in his opinion for a unanimous Court in *United States v. Raines, 362 U.S. 17, 21-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)*:

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies before them. . . . This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to [**1869] anticipate a question [***93] of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of [*77] constitutional law broader than is required by the precise facts to which it is to be applied'. . . . Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."

It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion -- which a federal court should never issue at all, see *Hayburn's Case*, 2 Dall. 409 (1792), and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions, see, *e.g., Ashwander v. TVA, 297 U.S. 288, 347, 80 L. Ed. 688, 56 S. Ct. 466 (1936)* (Brandeis, J., concurring). I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?

I must acknowledge, however, that for some of the present century we have done just this. But until recently, at least, we have -- except in free-speech cases subject to the doctrine of overbreadth, see, *e.g., New York v. Ferber, 458 U.S. 747, 769-773, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)* -- *required* the facial challenge to *be* a go-for-broke proposition. That is to say, before declaring a statute to be void in all its applications (something we should not be doing in the first place), we have at least imposed upon the litigant the eminently reasonable requirement that he establish [*78] that the statute was *unconstitutional* in all its applications. (I say that is an eminently reasonable requirement, not only because we should not be holding a statute void in all its applications unless it is unconstitutional in all its applications, but also because *unless* it is unconstitutional in all its applications we do not even know, without conducting an as-applied analysis, whether it is void with regard to the very litigant *before* us -- whose case, after all, was the occasion for undertaking this inquiry in the first place. [1])

1 In other words, a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)* ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law"); *Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness").

The plurality asserts that in *United States v. Salerno, 481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*, which I discuss in text immediately following this footnote, the Court "entertained" a facial challenge even though "the defendants . . . did not claim that the statute was unconstitutional as applied to them." *Ante*, at 11, n. 22. That is not so. The Court made it absolutely clear in *Salerno* that a facial challenge requires the assertion that "*no set of circumstances exists* under which the Act would be valid," *481 U.S. at 745* (emphasis added). The footnoted statement upon which the plurality relies ("Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case," *id. at 745, n. 3*) was obviously meant to convey the fact that the defendants were not making, *in addition to their facial challenge*, an alternative as-applied challenge -- *i.e.*, asserting that *even if* the statute was not unconstitutional in *all* its applications it was *at least* unconstitutional in its particular application to them.

As we said in *United States v. Salerno,* [***94] *481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*: [**1870]

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances* [*79] *exists under which the Act would be*

valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the *First Amendment*." (Emphasis added.) [2]

> 2 *Salerno*, a criminal case, repudiated the Court's statement in *Kolender v. Lawson, 461 U.S. 352, 359, n. 8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*, to the effect that a facial challenge to a criminal statute could succeed "even when [the statute] could conceivably have had some valid application." *Kolender* seems to have confused the standard for *First Amendment* overbreadth challenges with the standard governing facial challenges on all other grounds. See *ibid.* (citing the Court's articulation of the standard for *First Amendment overbreadth* challenges from *Hoffman Estates, supra, at 494*). As *Salerno* noted, *481 U.S. at 745*, the overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression. See, *e.g., Broadrick v. Oklahoma, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*.

This proposition did not originate with *Salerno*, but had been expressed in a line of prior opinions. See, *e.g.*, *Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)* (opinion for the Court by STEVENS, J.) (statute not implicating *First Amendment* rights is invalid on its face if "it is unconstitutional in every conceivable application"); *Schall v. Martin, 467 U.S. 253, 269, n. 18, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984)*; *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)*; *United States v. National Dairy Products Corp., 372 U.S. 29, 31-32, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963)*; *Raines, supra, at 21*. And the proposition has been reaffirmed in many cases and opinions since. See, *e.g.*, *Anderson v. Edwards, 514 U.S. 143, 155-156, n. 6, 131 L. Ed. 2d 178, 115 S. Ct. 1291 (1995)* (unanimous Court); *Babbitt v. Sweet Home Chapter of Communities for Great Oregon, 515 U.S. 687, 699, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995)* (opinion for the Court by STEVENS, J.) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); *Reno v. Flores, 507 U.S. 292, 301, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993)*; *Rust v. Sullivan,* [*80] *500 U.S. 173, 183, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)*; *Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 514, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990)* (opinion of KENNEDY, J.); *Webster v. Reproductive Health Servs.,* [***95] *492 U.S. 490, 523-524, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989)* (O'CONNOR, J., concurring in part and concurring in judgment); *New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 11-12, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988)*. [3] Unsurprisingly, given the clarity of our general jurisprudence on this [**1871] point, the Federal Courts of Appeals *all* apply the *Salerno* standard in adjudicating facial challenges. [4]

> 3 The plurality asserts that the *Salerno* standard for facial challenge "has never been the decisive factor in any decision of this Court." It means by that only this: in rejecting a facial challenge, the Court has never contented itself with identifying *only one* situation in which the challenged statute would be constitutional, but has mentioned several. But that is not at all remarkable, and casts no doubt upon the validity of the principle that *Salerno* and these many other cases enunciated. It is difficult to conceive of a statute that would be constitutional in only a single application -- and hard to resist mentioning more than one.
>
> The plurality contends that it *does not matter* whether the *Salerno* standard is federal law, since facial challenge is a species of third-party standing, and federal limitations upon third-party standing do not apply in an appeal from a state decision which takes a broader view, as the Illinois Supreme Court's opinion did here. *Ante*, at 11, n. 22. This is quite wrong. Disagreement over the *Salerno* rule is not a disagreement over the "standing" question of whether the person challenging the statute can *raise* the rights of third parties: under both *Salerno* and the plurality's rule he *can*. The disagreement relates to *how many* third-party rights he must *prove to be infringed* by the statute before he can *win*: *Salerno* says "all" (in addition to his own rights), the plurality says "many." That is not a question of standing but of substantive law. The notion that, if *Salerno* is the federal rule (a federal statute is not totally invalid unless it is invalid in all its applications), it can be *altered* by a state court (a federal statute is totally invalid if it is invalid in *many* of its applications), and that that alteration must be accepted by the Supreme Court of the United States is, to put it as gently as possible, remarkable.
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> 4 See, *e.g., Abdullah v. Commissioner of Ins. of Commonwealth of Mass., 84 F.3d 18, 20 (CA1 1996)*; *Deshawn E. v. Safir, 156 F.3d 340, 347 (CA2 1998)*; *Artway v. Attorney Gen. of State of N. J., 81 F.3d 1235, 1252, n. 13 (CA3 1996)*; *Manning v. Hunt, 119 F.3d 254, 268-269 (CA4 1997)*; *Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1104* (CA5), cert. denied, *522 U.S. 943, 139 L. Ed. 2d 278, 118 S. Ct. 357 (1997)*;

Aronson v. City of Akron, 116 F.3d 804, 809 (CA6 1997); *Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1283 (CA7 1992)*, cert. denied, *506 U.S. 1053, 122 L. Ed. 2d 131, 113 S. Ct. 977 (1993)*; *Woodis v. Westark Community College, 160 F.3d 435, 438-439 (CA8 1998)*; *Roulette v. Seattle, 97 F.3d 300, 306 (CA9 1996)*; *Public Lands Council v. Babbitt, 167 F.3d 1287, 1293 (CA10 1999)*; *Dimmitt v. Clearwater, 985 F.2d 1565, 1570-1571 (CA11 1993)*; *Time Warner Entertainment Co. v. FCC, 320 U.S. App. D.C. 294, 93 F.3d 957, 972 (CADC 1996)*.

[*81] I am aware, of course, that in some recent facial-challenge cases the Court has, without any attempt at explanation, created entirely irrational exceptions to the "unconstitutional in every conceivable application" rule, when the statutes at issue concerned hot-button social issues on which "informed opinion" was zealously united. See *Romer v. Evans, 517 U.S. 620, 643, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)* (SCALIA, J., dissenting) (homosexual rights); *Planned Parenthood of Southeastern Pa.* v. *Casey*,

[***H] R1B *505 U.S. 833, 895, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)* (abortion rights). But the present case does not even lend itself to such a "political correctness" exception -- which, though illogical, is at least predictable. It is not *a la mode* to favor gang members and associated loiterers over the beleaguered law-abiding residents of the inner city.

When our normal criteria for facial challenges are applied, it is clear that the Justices in the majority have transposed the burden of proof. Instead of requiring the respondents, who are challenging the Ordinance, to show that it is invalid in all its applications, they have required the petitioner to show that it is valid in all its applications. Both the plurality [***96] opinion and the concurrences display a lively imagination, creating hypothetical situations in which the law's application would (in their view) be ambiguous. But that creative role has been usurped from the petitioner, who can defeat the respondents' facial challenge by conjuring up *a single valid application* of the law. My contribution would go something like this [5] : Tony, a member of the Jets criminal street gang, is standing [*82] alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the Ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement -- not entirely coherent, but evidently intended to be rude -- "Gee, Officer Krupke, krup you." A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order. Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents' facial challenge to the Ordinance's vagueness.

5 With apologies for taking creative license with the work of Messrs. Bernstein, Sondheim, and Laurents. West Side Story, copyright 1959.

Of course respondents would still be able to claim that the Ordinance was vague as applied to them. But the ultimate demonstration of the inappropriateness of the Court's holding of *facial* invalidity is the fact that it is doubtful whether some of these respondents could even sustain an *as-applied* challenge on the basis of the majority's own criteria. For instance, respondent Jose Renteria -- who admitted that he was a member of the Satan Disciples gang -- was observed by the arresting officer loitering on a street corner with other gang members. The officer issued a dispersal order, but when she returned to the same corner 15 to [**1872] 20 minutes later, Renteria was still there with his friends, whereupon he was arrested. In another example, respondent Daniel Washington and several others -- who admitted they were members of the Vice Lords gang -- were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using [*83] the sidewalks. The arresting officer issued a dispersal order, issued *another* dispersal order later when the group did not move, and finally arrested the group when they were found loitering in the same place still later. Finally, respondent Gregorio Gutierrez -- who had previously admitted to the arresting officer his membership in the Latin Kings gang -- was observed loitering with two other men. The officer issued a dispersal order, drove around the block, and arrested the men after finding them in the same place upon his return. See Brief for Petitioner 7, n. 5; Brief for United States as *Amicus Curiae* 16, n. 11. Even on the majority's assumption that to avoid vagueness it must be clear to the object of the dispersal order *ex ante* that his conduct is covered by the Ordinance, it seems most improbable [***97] that any of these as-applied challenges would be sustained. Much less is it possible to say that the Ordinance is invalid in *all* its applications.

II

The plurality's explanation for its departure from the usual rule governing facial challenges is seemingly contained in the following statement: "[This] is a criminal law that contains no *mens rea* requirement . . . *and* infringes on constitutionally protected rights . . . . When vagueness permeates the text of *such* a law, it is subject to facial attack." *Ante*, at 11 (emphasis added). The proposition is set forth with such assurance that one might suppose that it repeats some well-accepted formula in our jurisprudence: (Criminal law without *mens rea* requirement) + (infringement of constitutionally protected right) + (vagueness) = (entitlement to facial invalidation). There is no such formula; the plurality has made it up for this case, as the absence of any citation demonstrates.

But no matter. None of the three factors that the plurality relies upon exists anyway. I turn first to the support for the proposition that there is a constitutionally protected right to loiter -- or, as the plurality more favorably describes [*84] it, for a person to "remain in a public place of his choice." *Ibid.* The plurality thinks much of this Fundamental Freedom to Loiter, which it contrasts with such lesser, constitutionally *un*protected, activities as doing (ugh!) *business*: "This is not an ordinance that simply regulates business behavior and contains a scienter requirement. . . . It is a criminal law that contains no *mens rea* requirement . . . and infringes on constitutionally protected rights." *Ibid.* (internal quotation marks omitted). (Poor Alexander Hamilton, who has seen his "commercial republic" devolve, in the eyes of the plurality, at least, into an "indolent republic," see The Federalist No. 6, p. 56; No. 11, pp. 84-91 (C. Rossiter ed. 1961).)

Of course every activity, even scratching one's head, can be called a "constitutional right" if one means by that term nothing more than the fact that the activity is covered (as all are) by the *Equal Protection Clause*, so that those who engage in it cannot be singled out without "rational basis." See *FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)*. But using the term in that sense utterly impoverishes our constitutional discourse. We would then need a *new* term for those activities -- such as political speech or religious worship -- that cannot be forbidden even *with* rational basis.

The plurality tosses around the term "constitutional right" in this renegade sense, because there is not the slightest evidence for the existence of a genuine constitutional right to loiter. JUSTICE THOMAS recounts the vast historical tradition of criminalizing the activity. *Post*, at 5-9. It is simply not maintainable that the right to loiter would have been regarded as an essential attribute of liberty at the time of the framing or at the time of adoption of the *Fourteenth Amendment*. For the plurality, however, the historical practices of our people are nothing more than a speed bump on the road to the "right" result. Its opinion [**1873] blithely proclaims: "Neither this history nor the scholarly [*85] compendia in JUSTICE THOMAS' dissent, [***98] *post*, at 5-9, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause." *Ante*, at 10, n. 20. The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the *Bill of Rights* (usually under the rubric of so-called "substantive due process") is in my view judicial usurpation. But we have, recently at least, sought to limit the damage by tethering the courts' "right-making" power to an objective criterion. In *Washington v. Glucksberg, 521 U.S. 702, 720-721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997)*, we explained our "established method" of substantive due process analysis: carefully and narrowly describing the asserted right, and then examining whether that right is manifested in "our Nation's history, legal traditions, and practices." See also *Collins v. Harker Heights, 503 U.S. 115, 125-126, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992)*; *Michael H. v. Gerald D., 491 U.S. 110, 122-123, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)*; *Moore v. East Cleveland, 431 U.S. 494, 502-503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977)*. The plurality opinion not only ignores this necessary limitation, but it leaps far beyond any substantive-due-process atrocity we have ever committed, by actually placing the burden of proof upon the defendant to establish that loitering is *not* a "fundamental liberty." It never does marshal any support *for* the proposition that loitering *is* a constitutional right, contenting itself with a (transparently inadequate) explanation of why the historical record of laws banning loitering does not positively *contradict* that proposition, [6] and the (transparently erroneous) assertion that the City of Chicago appears to have conceded the [*86] point. [7] It is enough for the members of the plurality that "history . . . [fails to] persuade us that the right to engage in loitering that is entirely harmless in both purpose and effect is *not* a part of the liberty protected by the Due Process Clause," *ante*, at 10, n. 20 (emphasis added); they apparently think it quite unnecessary for anything to persuade them that it *is*. [8]

6 The plurality's explanation for ignoring these laws is that many of them carried severe penalties and, during the Reconstruction era, they had "harsh consequences on African-American women and children." *Ante*, at 9-10, n. 20. Those severe penalties and those harsh consequences are certainly regrettable, but they in no way lessen (indeed, the harshness of penalty tends to increase) the capacity of these laws to *prove* that

loitering was never regarded as a fundamental liberty.

7 *Ante*, at 9, n. 19. The plurality bases its assertion of apparent concession upon a footnote in Part I of petitioner's brief which reads: "Of course, laws regulating social gatherings affect a liberty interest, and thus are subject to review under the rubric of substantive due process . . . . We address that doctrine in Part II below." Brief for Petitioner 21-22, n. 14. If a careless reader were inclined to confuse the term "social gatherings" in this passage with "loitering," his confusion would be eliminated by pursuing the reference to Part II of the brief, which says, in its introductory paragraph: "As we explain below, substantive due process does not support the court's novel holding that the Constitution secures the right to stand still on the public way even when one is not engaged in speech, assembly, or other conduct that enjoys affirmative constitutional protection." *Id. at 39.*

8 The plurality says, *ante*, at 20, n. 35, that since it decides the case on the basis of *procedural* due process rather than *substantive* due process, I am mistaken in analyzing its opinion "under the framework for substantive due process set out in *Washington* v. *Glucksberg.*" *Ibid.* But I am not analyzing it under that framework. I am simply assuming that when the plurality says (as an essential part of its reasoning) that "the right to loiter for innocent purposes is . . . a part of the liberty protected by the Due Process Clause" it does not believe that the same word ("liberty") means one thing for purposes of substantive due process and something else for purposes of procedural due process. There is no authority for that startling proposition. See *Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572-575, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)* (rejecting procedural-due-process claim for lack of "liberty" interest, and citing substantive-due-process cases).

The plurality's opinion seeks to have it both ways, invoking the *Fourteenth Amendment's* august protection of "liberty" in defining the standard of certainty that it sets, but then, in identifying the conduct protected by that high standard, ignoring our extensive case-law defining "liberty," and substituting, instead, all "harmless and innocent" conduct, *ante*, at 14.

It would be unfair, however, to criticize the plurality's failed attempt [***99] to establish that [**1874] loitering is a constitutionally [*87] protected right while saying nothing of the concurrences. The plurality at least makes an attempt. The concurrences, on the other hand, make no pretense at attaching their broad "vagueness invalidates" rule to a liberty interest. As far as appears from JUSTICE O'CONNOR's and JUSTICE BREYER's opinions, *no* police officer may issue *any* order, affecting *any* insignificant sort of citizen conduct (except, perhaps, an order addressed to the unprotected class of "gang members") unless the standards for the issuance of that order are precise. No modern urban society -- and probably none since London got big enough to have sewers -- could function under such a rule. There are innumerable reasons why it may be important for a constable to tell a pedestrian to "move on" -- and even if it were possible to list in an ordinance all of the reasons that are known, many are simply unpredictable. Hence the (entirely reasonable) Rule of the City of New York which reads: "No person shall fail, neglect or refuse to comply with the lawful direction or command of any Police Officer, Urban Park Ranger, Parks Enforcement Patrol Officer or other [Parks and Recreation] Department employee, indicated by gesture or otherwise." 56 RCNY § 1-03(c)(1) (1996). It is one thing to uphold an "as applied" challenge when a pedestrian disobeys such an order that is unreasonable -- or even when a pedestrian asserting some true "liberty" interest (holding a political rally, for instance) disobeys such an order that is reasonable *but unexplained.* But to say that such a general ordinance permitting "lawful orders" is void *in all its applications* demands more than a safe and orderly society can reasonably deliver.

JUSTICE KENNEDY apparently recognizes this, since he acknowledges that "some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given," including, for example, an order "telling a pedestrian not to enter a building" when the reason is "to avoid impeding a rescue team." *Ante*, at 1. [*88] But his only explanation of why the present interference with the "right to loiter" does not fall within that permitted scope of action is as follows: "The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance." *Ibid.* I have not the slightest idea what this means. But I *do* understand that the follow-up explanatory sentence, showing how this principle invalidates the present ordinance, applies equally to the rescue-team example [***100] that JUSTICE KENNEDY thinks is constitutional -- as is demonstrated by substituting for references to the facts of the present case (shown in italics) references to his rescue-team hypothetical (shown in brackets): "A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a *dispersal order* [order not to enter a building] based on the officer's own knowledge of *the identity or affiliations of other persons with whom the citizen is congregating* [what is

going on in the building]; nor may the citizen be able to assess what an officer might conceive to be *the citizen's lack of an apparent purpose* [the impeding of a rescue team]." *Ibid.*

III

I turn next to that element of the plurality's facial-challenge formula which consists of the proposition that this criminal ordinance contains no *mens rea* requirement. The first step in analyzing this proposition is to determine what the *actus reus*, to which that *mens rea* is supposed to be attached, consists of. The majority believes that loitering forms part of (indeed, the essence of) the offense, and must be proved if conviction is to be obtained. See *ante*, at 2, 6, 9-13, 14-15, 16-18 (plurality and majority opinions); *ante*, at 2-3, 4 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 1-2 (KENNEDY, J., concurring in part and concurring in judgment); *ante*, at 3-4 (BREYER, J., concurring in part and concurring in judgment). That is not what the Ordinance provides. The [*89] only part of the Ordinance that refers to loitering is the portion that addresses, not the punishable conduct of the defendant, but what the police officer must observe before he can issue an order to disperse; and what he must observe is carefully defined in terms of what [**1875] the defendant *appears* to be doing, not in terms of what the defendant is *actually* doing. The Ordinance does not require that the defendant have been loitering (*i.e.*, have been remaining in one place with no purpose), but rather that the police officer have observed him remaining in one place without any *apparent* purpose. Someone who in fact *has* a genuine purpose for remaining where he is (waiting for a friend, for example, or waiting to hold up a bank) *can* be ordered to move on (assuming the other conditions of the Ordinance are met), so long as his remaining has no *apparent* purpose. It is likely, to be sure, that the Ordinance will come down most heavily upon those who are *actually* loitering (those who *really* have no purpose in remaining where they are); but that activity is not a condition for issuance of the dispersal order.

The *only* act of a defendant that is made punishable by the Ordinance -- or, indeed, that is even mentioned by the Ordinance -- is his failure to "promptly obey" an order to disperse. The question, then, is whether that *actus reus* must be accompanied by any wrongful intent -- and of course it must. As the Court itself describes the requirement, "a person must *disobey* the officer's order." *Ante*, at 3 (emphasis added). No one thinks a defendant could be successfully prosecuted under the Ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure [***101] to obey a police order is wrongful intent enough.

IV

Finally, I address the last of the three factors in the plurality's facial-challenge formula: the proposition that the Ordinance is vague. It is not. Even under the ersatz overbreadth [*90] standard applied in *Kolender v. Lawson, 461 U.S. 352, 358 n. 8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)*, which allows facial challenges if a law reaches "a substantial amount of constitutionally protected conduct," respondents' claim fails because the Ordinance would not be vague in most or even a substantial number of applications. A law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement. See, *e.g., Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).*

The plurality relies primarily upon the first of these aspects. Since, it reasons, "the loitering is the conduct that the ordinance is designed to prohibit," and "an officer may issue an order only after prohibited conduct has already occurred," *ante*, at 14, 15, the order to disperse cannot itself serve "to apprise persons of ordinary intelligence of the prohibited conduct." What counts for purposes of vagueness analysis, however, is not what the Ordinance is "designed to prohibit," but what it actually subjects to criminal penalty. As discussed earlier, that consists of nothing but the refusal to obey a dispersal order, as to which there is no doubt of adequate notice of the prohibited conduct. The plurality's suggestion that even the dispersal order *itself* is unconstitutionally vague, because it does not specify *how far to disperse (!)*, see *ante*, at 15, scarcely requires a response. [9] If it were true, it would render unconstitutional for vagueness many of the Presidential proclamations issued under that provision of the United States Code which requires the President, [*91] before using the militia or the Armed Forces for law enforcement, to issue a proclamation ordering the insurgents to disperse. See *10 U.S.C. § 334.* President Eisenhower's proclamation relating to the obstruction of court-ordered enrollment of black students in public schools at Little Rock, Arkansas, read as follows: "I . . . command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith." Presidential [**1876] Proclamation No. 3204, 3 CFR 132 (1954-1958 Comp.). See also Presidential Proclamation No. 3645, 3 CFR 103 (1964-1965 Comp.) (ordering those obstructing the civil rights march from Selma to Montgomery, Alabama, to "disperse . . . forthwith"). See also *Boos v. Barry, 485 U.S. 312, 331, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988)* (rejecting overbreadth/vagueness challenge to a law allowing police officers to order congregations near foreign embassies to disperse); *Cox v. Louisiana, 379 U.S. 536, 551,*