(ORDER LIST: 565 U.S.)

MONDAY, OCTOBER 31, 2011

APPEAL -- SUMMARY DISPOSITION

11-82 MS STATE CONF. OF NAACP, ET AL. V. BARBOUR, GOV. OF MS, ET AL.

The judgment is affirmed.

CERTIORARI -- SUMMARY DISPOSITIONS

10-1450 SONIC-CALABASAS A, INC. V. MORENO, FRANK

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of California for further consideration in light of *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. ___ (2011).

10-1499 L. PERRIGO COMPANY V. GAETA, AUGUSTINE, ET UX.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *PLIVA, Inc*. v. *Mensing*, 564 U.S. ___ (2011).

ORDERS IN PENDING CASES

11M37 LEE, YONG I., ET AL. V. CENTRAL PRESBYTERY

11M38 LEE, YONG I. V. CENTRAL PRESBYTERY

11M39 SMITH, JERRY M. V. KIRKLAND, WARDEN, ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

11-5980 STARBALA, STEVE, ET UX. V. HOMECOMINGS FINANCIAL

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until November 21,

2011, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI DENIED

10-1445 TEMPERLY, THOMAS C. V. INDIANA

10-1448 VARUGHESE, VARUGHESE A. V. HOLDER, ATT'Y GEN.

10-1535 VILLANUEVA, JOHN D. V. UNITED STATES

10-10352 CRAWFORD, VERN O. V. UNITED STATES

10-10784 MILLER, DONALD V. UNITED STATES

10-10954 McCLURE, PHILIP W. V. OR DOC, ET AL.

10-11137 PARKES, OTIS V. UNITED STATES

10-11143 MARS, TERRELL M. V. UNITED STATES

10-11193 CHAMBERLIN, LISA J. V. MISSISSIPPI

10-11211 KYEI, KOFI V. OR DEPT. OF TRANSPORTATION

11-2 STRYKER CORP., ET AL. V. BAUSCH, MARGARET J.

11-80 GILA RIVER INDIAN COMMUNITY V. LYON, G. GRANT

11-113 DONINGER, AVERY V. NIEHOFF, KARISSA, ET AL.

11-131 BARR LABORATORIES, ET AL. V. CANCER RESEARCH TECH. LIMITED

11-156 RHODES, WILLIAM R., ET AL. V. E. I. DU PONT DE NEMOURS

11-174 GARDEN GROVE SCHOOL DISTRICT V. C. B.

11-211 LIVE GOLD OPERATIONS, INC. V. DOW, ATT'Y GEN. OF NJ

11-216 CARRERA, DANIEL, ET AL. V. COMMERCIAL COATING SERVICES

11-223 TINSLEY, EDWARD V. BARKSDALE, ANGELA Q.

11-231 DOWNING/SALT POND PARTNERS, L.P. V. RHODE ISLAND, ET AL.

11-242 WOODRUFF, BRANDON D. V. TEXAS

11-243 SALAZAR, JUAN J., ET AL. V. MAYWOOD, CA, ET AL.

11-244 PARAMOUNT CONTRACTORS V. LOS ANGELES, CA

11-248 MEZA-CORANO, SANTIAGO, ET AL. V. HOLDER, ATT'Y GEN.

11-253 KING, ARIEL V. PFEIFFER, MICHAEL

11-255 TINSLEY, EDWARD V. BARKSDALE, ANGELA Q.

11-259 FLINT, EDWARD H. V. CHURCHILL DOWNS, ET AL.

11-261 PODARAS, CHARLES V. MENLO PARK, CA, ET AL.

11-264 BORST, CHRISTOPHER P. V. MISSOURI

11-267 KRASNER, GEOFFREY T. V. BATFE, ET AL.

11-268 HAYDEN, MITCH V. GREEN, DWIGHT

11-270 POLES, ROBERT E. V. BROOKLYN COMMUNITY HOUSING

11-273 TORGERSON, DAVID, ET AL. V. ROCHESTER, MN

11-276 LEON, CONNIE L. V. UNITED STATES

11-285 NOEL, CHARLES R., ET AL. V. ARTSON, CARLOS, ET AL.

11-286 PRIMM, SAMSON V. OHIO

11-291 GABAY, ALEXANDER V. CATE, SEC., CA DOC

11-294 KENTUCKY V. COBB, ROBERT

11-308 THOMAS, RICHARD E., ET AL. V. ALCOSER, EDWARD, ET AL.

11-309 TIDES, NICHOLAS P., ET AL. V. BOEING COMPANY

11-310 MONTERO, ADOLFO S. V. UNITED STATES

11-319 FOX, ALEJANDRO V. BAKERY UNION, ET AL.

11-320 HIGERD, JAMES L. V. FLORIDA

11-321 GILES, ADOLFUS O. V. WAL-MART STORES EAST, LP

11-325 ALLISON, DANIEL B. V. CIR

11-328 STINE, THOMAS V. UNITED STATES

11-330 BROWN, ALEXANDER R. V. NORTH CAROLINA

11-331 MARCELLO, DOUGLAS P. V. IRS

11-346 AMERICAN CENTRAL CITY, INC. V. JOINT ANTELOPE VALLEY AUTH.

11-351 NOORZAI, BASHIR V. UNITED STATES

11-352 OPPLIGER, GAYLE, ET AL. V. UNITED STATES

11-353 UNITED STATES, EX REL. UBL V. IIF DATA SOLUTIONS, INC., ET AL.

11-361 ALEXANDER, RUDOLPH V. OHIO STATE UNIV., ET AL.

11-366 RINGGOLD-LOCKHART, JUSTIN V. SANKARY, MYER J., ET AL.

11-370 O'CONNELL, COLT A. V. MILLER-STOUT, SUPT., AIRWAY

11-371 TRAN, NICK C. V. UNITED STATES

11-387 LEIGHTEY, DOUGLAS E. V. UNITED STATES

11-392 LOMBARD, FRANK M. V. UNITED STATES

11-5253 FLETCHER, LAMARR V. UNITED STATES

11-5328 SANBORN, PARAMORE V. PARKER, WARDEN

11-5551 VASQUEZ-DIAZ, ANAEL V. UNITED STATES

11-5552 WALDREN, LAWRENCE E. V. UNITED STATES

11-5606 KALFOUNTZOS, NIKIFOROS V. U.S. RAILROAD RETIREMENT BOARD

11-5925 AGUILAR, JUAN R. V. ADAMS, WARDEN

11-5926 BLAKE, SHAWNCEY V. SAN FRANCISCO POLICE, ET AL.

11-5927 BADEN, MARY K. V. WHEATON, IL, ET AL.

11-5932 MITCHELL, STEPHEN A. V. HOWES, WARDEN

11-5936 DERRINGER, DAVID V. ARIZONA, ET AL.

11-5937 SCHIED, DAVID V. WARD, RONALD, ET AL.

11-5943 NORINGTON, LAKESHA V. BUTTS, SUPT., PENDLETON

11-5953 MURRAY, JOSEPH V. DC DEPT. OF EMPLOYMENT, ET AL.

11-5958 CLARK, NOEL V. COFFEE, CRAIG

11-5960 MEYERS, RON J. V. MINNESOTA

11-5962 JELANI, DONALD J. V. PROVINCE, WARDEN

11-5963 JONES, WALLACE C. V. FLORIDA

11-5965 JOHNSON, CARL V. BROWN, SUPT., WABASH VALLEY

11-5967 DOLLERY, KENNETH W. V. TEXAS

11-5969 WALLACE, CYNTHIA L. V. KENTUCKY

11-5971 WILLIAMS, CHAUNCEY V. VIRGINIA, ET AL.

11-5974 LAW, JERRY V. OCHOA, WARDEN

11-5983 BELCHER, JAMES V. TUCKER, SEC., FL DOC, ET AL.

11-5989 VAN DE VIVER, JACK V. ARTUS, SUPT., CLINTON

11-5993 MARLAR, ANTHONY L. V. RILEY, WARDEN

11-5995 GRANGE, THEODORE V. SOUTHEASTERN MECHANICAL

11-5997 MORENO, DAVID R. V. YATES, WARDEN

11-5999 GONZALEZ, RICARDO V. TUCKER, SEC., FL DOC

11-6011 CLANTON, CYNTHIA V. SCHLEGEL SYSTEMS, INC., ET AL.

11-6013 GROSS, EREEDIUS V. CAIN, WARDEN

11-6015 SCHIED, DAVID V. SNYDER, SCOTT, ET AL.

11-6021 SAPANARA, ROBERT V. THOMAS, WARDEN

11-6023 SMITH, LAFAIR V. BOWERSOX, SUPT., SOUTH CENTRAL

11-6027 MANZELLA, MARK V. DORMIRE, SUPT., JEFFERSON CITY

11-6038 CARTER, JESSE L. V. CAMPBELL, HUGH K.

11-6042 COLLINS, JESSE V. JACKSONVILLE, FL

11-6044 COLON, JOSE F. V. BURNETT, WARDEN, ET AL.

11-6045 RODRIGUEZ, AMILCAR V. ILLINOIS

11-6047 SOJA, JEANNE M. V. CALIFORNIA

11-6051 PARKER, BILLY E. V. JONES, DIR., OK DOC

11-6054 SPRINGS, BARBARA V. NYC BOARD OF ED., ET AL.

11-6055 ROBERSON, BENJAMIN V. MISSISSIPPI

11-6058 ORTIZ, JAVIER V. PENNSYLVANIA, ET AL.

11-6059 ESPIE, JOHN R. V. RIVARD, WARDEN

11-6062 CAREY, PATRICK W. V. ROY, COMM'R, MN DOC, ET AL.

11-6063 DAVIS, MICHAEL L. V. THALER, DIR., TX DCJ

11-6069 MANSOR-HOPKINSON, HELEN V. LA MAISON MANAGEMENT, LLC

11-6070 PRITCHARD, ROBERT T., ET UX. V. DOW AGRO SCIENCES, ET AL.

11-6071 BRANDON, STEPHEN G. V. THALER, DIR., TX DOC

11-6072 BROWN, RONALD V. McDONALDS USA, ET AL.

11-6074 BYRD, MALACHI A. V. VIRGINIA

11-6077 MORRIS, RANDY V. CURTIN, WARDEN

11-6078 MINIARD, LENA M. V. SUPREME COURT OF OH, ET AL.

11-6081 CHAPA, MANUEL V. COOPER, WARDEN

11-6084 SINGLETON, WILLIAM E. V. BYARS, DIR., SC DOC, ET AL.

11-6086 WEBB, BURLIN C. V. ONEY, JUDGE, ETC., ET AL.

11-6090 EVANS, MICHAEL A. V. HERNANDEZ, ADRIENNE, ET AL.

11-6091 PEREZ, MANUEL V. LEE, SUPT., GREEN HAVEN

11-6098 BIVERT, KENNETH R. V. CALIFORNIA

11-6101 JONES, GIL V. MD STATE'S ATTORNEY OFFICE

11-6102 LEWIS, JONATHAN V. FLORIDA, ET AL.

11-6104 KALFOUNTZOS, NIKIFOROS V. SACRAMENTO, CA, ET AL.

11-6107 TOMPSON, JUDITH V. MA DEPT. OF MENTAL HEALTH

11-6108 JUARBE, ROBERT V. CAIN, WARDEN

11-6109 JUNIER, KENNETH V. CONRAD, MARK, ET AL.

11-6110 ALEXANDER, CLAY V. CLEMENTS, EXEC. DIR., CO DOC

11-6111 ARTIS, VINCENT V. NEW YORK

11-6114 ROCHA, LUIS V. FEINERMAN, ADRIAN

11-6115 SONG, YOUNG B. V. WELCH, JAMES, ET AL.

11-6116 SINGLETON, MICHAEL A. V. TEN UNIDENTIFIED U. S. MARSHALS

11-6118 LITTLEJOHN, TRON M. V. REYNOLDS, WARDEN

11-6127 EASLEY, GARY D. V. CALIFORNIA, ET AL.

11-6130 KIM, BRIAN V. HENSE, WARDEN

11-6131 JACKSON, DAVID V. HARDY, WARDEN

11-6135 MITCHELL, RONALD V. GERSHEN, KAREN, ET AL.

11-6136 NOROUZIAN, MOHAMMAD V. TRUMAN MEDICAL CENTER, INC.

11-6137 SZMANIA, DANIEL V. COUNTRYWIDE HOME LOANS

11-6139 EVANS, RICKY A. V. CLARKE, DIR., VA DOC

11-6140 CARNLEY, TAMI V. MORGAN, SHERIFF

11-6141 FELDMAN, DEBRA V. TWENTIETH CENTURY FOX, ET AL.

11-6142 HAMMONTREE, RICKY H. V. HOREL, WARDEN

11-6150 REEVES, KENNETH E. V. FLORIDA

11-6155 SANJARI, AMIR H. V. GRATZOL, ALISON

11-6156 RICHARDSON, PATRICK L. V. WALKER, WARDEN

11-6161 BLACK, CARLTON G. V. HOLDER, ATT'Y GEN.

11-6170 HALLFORD, GARY W. V. MENDEZ, J., ET AL.

11-6171 MITCHELL, RONALD E. V. MISSOURI

11-6172 NORTHUP, KIRK J. V. GINSEL, WARDEN, ET AL.

11-6175 HILL, WILLIAM V. TUCKER, SEC., FL DOC, ET AL.

11-6177 GLEASON, MARK A. V. CATE, SEC., CA DOC, ET AL.

11-6185 MANIGAULTE, JOHN C. V. C.W. POST OF LONG ISLAND UNIV.

11-6188 JOE, DAVID L. V. WALGREENS CO./ILL, ET AL.

11-6189 HARRISON, MICHAEL V. LAWLER, SUPT., HUNTINGDON

11-6191 IBARRA-PEREZ, JORGE V. WARREN, WARDEN

11-6203 McKINSTRY, SCOTT P. V. CALIFORNIA

11-6214 MAXSON, DANIEL L. V. WOODS, WARDEN

11-6235 BERMUDEZ, JOSE V. CONWAY, SUPT., ATTICA, ET AL.

11-6236 BLANCHARD, ANTONIO V. ILLINOIS

11-6238 BARKER, STEPHEN R. V. UNITED STATES

11-6243 DUMONT, DANIEL W. V. MORGAN & STANLEY, ET AL.

11-6249 ROMERO, RICHARD V. RYAN, WARDEN

11-6259 CHRISTMAS, RONALD V. ILLINOIS

11-6260 STEVENSON, ROGER V. SHOUP, APRIL, ET AL.

11-6267 WADE, ROSSI V. PETERSON, WALTER

11-6269 WILKINS, RANDY V. HOBBS, DIR., AR DOC

11-6274 BIGHAM, EDDIE V. TUCKER, SEC., FL DOC

11-6275 ALLEN, MICHAEL V. TUCKER, SEC., FL DOC, ET AL.

11-6279 RANDOLPH, LINART V. BODISON, WARDEN

11-6284 PORTO, LEONARD J. V. LAGUNA BEACH, CA, ET AL.

11-6296 OCCHIONE, CLAUDIO V. BABBITT, ADM'R, FAA

11-6312 AMERSON, MARY V. DES MOINES, IA

11-6326 DAVIS, HENRY V. LAFLER, WARDEN

11-6327 DUBOIS, TERRELL V. MAINE

11-6328 CUNNINGHAM, BRUCE V. TUCKER, SEC., FL DOC, ET AL.

11-6331 THORNTON, WILLIAM C. V. CALIFORNIA

11-6340 SKAMFER, MATTHEW V. POLLARD, WARDEN

11-6342 PUTNEY, DEVINO P. V. UNITED STATES

11-6348 WILLIAMS, LAWRENCE V. WISCONSIN

11-6361) HATFIELD, REX I. V. UNITED STATES
)
11-6607) HATFIELD, EVERLY V. UNITED STATES

11-6363 GREER, JAMAR D. V. UNITED STATES

11-6373 HUDSON, DAMON V. LAFLER, WARDEN

11-6381 WEBSTER, ELIZABETH V. SHINSEKI, SEC. OF VA

11-6382 BROWN, CHRISTOPHER E. V. GEORGIA

11-6388 MAZYCK, JAMIN V. STEVENSON, WARDEN

11-6396 GOODMAN, EDWARD V. KERESTES, SUPT., MAHANOY

11-6398 HARPER, DARRELL J. V. UNITED STATES

11-6407 HORTON, DENNIS V. THOMAS, SUPT., CHESTER

11-6416 EL-AMIN, RUBEN L. V. UNITED STATES

11-6418 YAACOV, ABRAHAM V. TIBBALS, WARDEN

11-6419 VARGAS, JOSEPH V. GONZALEZ, ACTING WARDEN

11-6429 COLLIER, EDWARD T. V. TUCKER, SEC., FL DOC, ET AL.

11-6458 ROBERTSON, WADE V. CARTINHOUR, WILLIAM C.

11-6465 AMR, SALAME M. V. MOORE, EDDIE N., ET AL.

11-6474 PHIFFER, EARL D. V. WISCONSIN

11-6475 McKINNEY, HORACE V. FLORIDA

11-6484 TIERNEY, MICHAEL C. V. HAWAII

11-6485 DEL VALLE, JOSE V. UNITED STATES

11-6492 MENDOZA, JAIME G. V. UNITED STATES

11-6496 SMITH, DONALD L. V. VIRGINIA

11-6502 MICKENS, SHAWNDALE V. NEW YORK

11-6503 NELSON, SHEULO V. UNITED STATES

11-6504 MERCER, THOMAS L. V. UNITED STATES

11-6505 VAN, LAMONT V. HOBBS, DIR., AR DOC

11-6508 JACKSON, DWIGHT C. V. UNITED STATES

11-6509 LEWIS, TIMOTHY V. BERGH, WARDEN

11-6513 WALCOTT, MANUEL V. UNITED STATES

11-6515 ZAVALA, RAUL V. UNITED STATES

11-6516 VALDES, JORGE V. UNITED STATES

11-6522 SEAY, BOBBY D. V. O'BRIEN, WARDEN

11-6525 JOHNSON, JERRY V. UNITED STATES

11-6526 KATOPODIS, GREGORY J. V. UNITED STATES

11-6530 CONWAY, CHARLES D. V. UNITED STATES

11-6536 DICKERSON, KEVIN N. V. UNITED STATES

11-6539 DILLARD, SHAWN V. UNITED STATES

11-6540 ROCHIN-JEREZ, RICARDO V. UNITED STATES

11-6541 RODRIGUEZ-SAUCEDO, DANIEL V. UNITED STATES

11-6542 WILLIAMS, STACEY L. V. UNITED STATES

11-6544 AVILA, FELIPE A. V. TUCKER, SEC., FL DOC

11-6545 RODRIGUEZ, DOMINGO V. UNITED STATES

11-6546 SHIELDS, CLIFTON V. UNITED STATES

11-6547 SNELL, MALIK V. UNITED STATES

11-6552 CARRILLO, EDDIE V. UNITED STATES

11-6553 CANTY, MYRON C. V. UNITED STATES

11-6555 ALAS, ALVARO E. V. UNITED STATES

11-6556 BROWN, JASON A. V. UNITED STATES

11-6557 LECHUGA-GUERRERO, VICTOR V. UNITED STATES

11-6558 PLEASANT-BEY, ALI V. UNITED STATES

11-6561 ABEBE, UNULA V. UNITED STATES

11-6562 WISECARVER, MARC S. V. UNITED STATES

11-6564 BENNETT, OMAR V. UNITED STATES

11-6567 ROUNTREE, MARSHALL V. BALICKI, ADM'R, SOUTH WOODS

11-6569 RODRIGUEZ, JOEL V. UNITED STATES

11-6570 BROWN, CEDRIC V. UNITED STATES

11-6574 JOHNSON, ANTHONY V. UNITED STATES

11-6575 LADSON, JAMES V. UNITED STATES

11-6576 LIGONS, RONALDO V. KING, WARDEN

11-6583 DURAN-GARCIA, JOB V. UNITED STATES

11-6584 DELORME, VIVENS V. UNITED STATES

11-6585 CHRISTENSEN, MARK A. V. UNITED STATES

11-6588 SCOTT, YOLANDA D. V. UNITED STATES

11-6595 ZAIDI, SYED V. UNITED STATES

11-6596 TALIK, EUGENE J. V. UNITED STATES

11-6600 GRAURE, VASILE V. UNITED STATES

11-6603 GATHRITE, JIMMY V. UNITED STATES

11-6604 GONZALEZ-HUERTA, ENRIQUE V. UNITED STATES

11-6610 OLIVAS, JOSE V. UNITED STATES

11-6622 CUBIE, MARK V. UNITED STATES

11-6625 PERKINS, AARON V. UNITED STATES

11-6630 WESLEY, MONTERIAL V. UNITED STATES

11-6632 BUILES, LUIS A. V. UNITED STATES

11-6635 TOLLIVER, RICCARDO V. UNITED STATES

11-6642 CARTER, DONALD E. V. UNITED STATES

11-6643 LUMAR, REGINALD V. UNITED STATES

11-6650 VALADEZ, MARTIN V. UNITED STATES

11-6651 PAUL, PETER F. V. UNITED STATES

11-6652 McCAW, JAMES V. UNITED STATES

11-6653 CURRY, FREDDIE L. V. UNITED STATES

11-6659 SANCHEZ, RODOLFO S. V. UNITED STATES

11-6662 RICE, ROYCE D. V. UNITED STATES

11-6672 LERMAN, JOHN M. V. UNITED STATES

11-6674 STYERS, JAMES L. V. ARIZONA

11-6676 ARIAS, DAVID V. UNITED STATES

11-6681 CLARK, MICHAEL A. V. UNITED STATES

11-6685 DICKS, ANTUAN V. UNITED STATES

11-6693 ACOSTA-GALLARDO, CESAR V. UNITED STATES

11-6695 PASCUAL, JOSE H. V. UNITED STATES

11-6699 MEDINA-FLORES, JEAN C. V. UNITED STATES

11-6700 SCOTT, ROBERT V. UNITED STATES

11-6709 LOUIS, GERARD R. V. UNITED STATES

11-6721 WILSON, SAMMIE L. V. UNITED STATES

11-6726 SIMPSON, ELDRIDGE V. UNITED STATES

The petitions for writs of certiorari are denied.

10-1551 STEWART & JASPER ORCHARDS V. SALAZAR, SEC. OF INTERIOR

The motion of National Water Resources Association, et al. for leave to file a brief as *amici curiae* is granted. The motion of Center for Constitutional Jurisprudence, et al. for leave to file a brief as *amici curiae* is granted.

The motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* is granted. The motion of National Federation of Independent Business Small Business Legal Center for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

10-10900 PANTOJA, JUAN V. FLORIDA

The motion of Florida Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

11-5942 MUHAMMAD, AKEEM V. SAPP, GEORGE, ET AL.

11-5972 THOMAS, ALLEN G. V. TX DCJ, ET AL.

11-6143 CRUTCHER, BYRON E. V. NEVADA

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8. As the petitioners have repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioners unless the docketing fees required by Rule 38(a) are paid and the petitions are submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*).

11-6265 TOWNSEND, OTHA E. V. JACKS, SHARON

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

11-6601 GARRAUD, DANIEL V. UNITED STATES

11-6614 ALEXANDER, TOMMY V. UNITED STATES

11-6631 BECK, DARWIN V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

11-6644 LUCAS, GARY V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

11-6657 AKBAR, MUHAMMAD J. V. JETT, WARDEN

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

11-6668 ESCOBAR DE JESUS, EUSEBIO V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

HABEAS CORPUS DENIED

11-6661 IN RE MICHAEL L. SWAIN

The petition for a writ of habeas corpus is denied.

11-6623 IN RE JON M. COX

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

MANDAMUS DENIED

11-5945 IN RE DAVID SCHIED

11-6025 IN RE DAVID WEBB

11-6046 IN RE DOUGLAS ROBERTSON

11-6052 IN RE JEFFREY A. PLEASANT

11-6075 IN RE CARL J. BOWENS, JR.

11-6377 IN RE ANNE SEARS

The petitions for writs of mandamus are denied.

11-256 IN RE EILEEN VEY

The petition for a writ of mandamus and/or prohibition is denied.

REHEARINGS DENIED

10-7461 BRIGHT, JEFFREY O. V. PENNSYLVANIA, ET AL.

The petition for rehearing is denied.

10-1327 KIVISTO, JUSSI K. V. FLORIDA BAR

The motion to defer consideration and the motion for leave to file a petition for rehearing are denied.

ATTORNEY DISCIPLINE

D-2555 IN THE MATTER OF DISBARMENT OF ROBERT L. SHEPHERD

Robert L. Shepherd, of Ft. Lauderdale, Florida, having been suspended from the practice of law in this Court by order of October 4, 2010; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Robert L. Shepherd is disbarred from the practice of law in this Court.

D-2588 IN THE MATTER OF DISBARMENT OF DAVID ROBERT OSBORNE

David Robert Osborne, of Christiansted, St. Croix, Virgin Islands, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that David Robert Osborne is disbarred from the practice of law in this Court.

D-2589 IN THE MATTER OF DISBARMENT OF STEVEN BOYD ALDERMAN

Steven Boyd Alderman, of Syracuse, New York, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Steven Boyd Alderman is disbarred from the practice of law in this Court.

D-2591 IN THE MATTER OF DISBARMENT OF STEPHEN J. JONES

Stephen J. Jones, of Wichita, Kansas, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Stephen J. Jones is disbarred from the practice of law in this Court.

D-2592 IN THE MATTER OF DISBARMENT OF JAMES MICHAEL KORDELL

James Michael Kordell, of Woodlake, California, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that James Michael Kordell is disbarred from the practice of law in this Court.

D-2593 IN THE MATTER OF DISBARMENT OF F. RICHARD LOSEY

F. Richard Losey, of San Rafael, California, having been

suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that F. Richard Losey is disbarred from the practice of law in this Court.

D-2594 IN THE MATTER OF DISBARMENT OF BARRY STEPHEN TABACHNICK

Barry Stephen Tabachnick, of Folsom, California, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Barry Stephen Tabachnick is disbarred from the practice of law in this Court.

D-2595 IN THE MATTER OF DISBARMENT OF MERL ALAN WHITEBOOK

Merl Alan Whitebook, of Tulsa, Oklahoma, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Merl Alan Whitebook is disbarred from the practice of law in this Court.

D-2596 IN THE MATTER OF DISBARMENT OF ROBERT J. PLESHAW

Robert J. Pleshaw, of Washington, District of Columbia, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Robert J. Pleshaw is disbarred from the practice of law in this Court.

D-2597 IN THE MATTER OF DISBARMENT OF ZOILO I. SILVA

Zoilo I. Silva, of Aguadilla, Puerto Rico, having been suspended from the practice of law in this Court by order of June 20, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Zoilo I. Silva is disbarred from the practice of law in this Court.

D-2598 IN THE MATTER OF DISBARMENT OF WAYNE R. BRYANT

Wayne R. Bryant, of Cherry Hill, New Jersey, having been suspended from the practice of law in this Court by order of June 27, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Wayne R. Bryant is disbarred from the practice of law in this Court.

D-2599 IN THE MATTER OF DISBARMENT OF PAUL H. KING

Paul H. King, of La Union, Philippines, having been suspended from the practice of law in this Court by order of June 27, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Paul H. King is disbarred from the practice of law in this Court.

D-2600 IN THE MATTER OF DISBARMENT OF PHILIP M. KING

Philip M. King, of Mercer Island, Washington, having been

suspended from the practice of law in this Court by order of June 27, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Philip M. King is disbarred from the practice of law in this Court.

D-2601 IN THE MATTER OF DISBARMENT OF STEPHEN D. CRAMER

Stephen D. Cramer, of Federal Way, Washington, having been suspended from the practice of law in this Court by order of June 27, 2011; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Stephen D. Cramer is disbarred from the practice of law in this Court.

D-2602 IN THE MATTER OF DISBARMENT OF PAUL C. DROZ

Paul C. Droz, of Mesquite, Nevada, having been suspended from the practice of law in this Court by order of June 27, 2011; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Paul C. Droz is disbarred from the practice of law in this Court.

D-2603 IN THE MATTER OF DISBARMENT OF MICHAEL R. LUONGO

Michael R. Luongo, of Margale City, New Jersey, having been suspended from the practice of law in this Court by order of June 27, 2011; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Michael R. Luongo is disbarred from the practice of law in this Court.

Per Curiam

SUPREME COURT OF THE UNITED STATES

JAVIER CAVAZOS, ACTING WARDEN *v.* SHIRLEY REE SMITH

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

No. 10–1115. Decided October 31, 2011

PER CURIAM.

The opinion of the Court in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. What is more, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was "objectively unreasonable." *Renico* v. *Lett*, 559 U. S. ___, ___ (2010) (slip op., at 5) (internal quotation marks omitted).

Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold. The Court of Appeals in this case substituted its judgment for that of a California jury on the question whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death. For this reason, certiorari is granted and the judgment of the Court of Appeals is reversed.

* * *

This case concerns the death of 7-week-old Etzel Glass.

On November 29, 1996, Etzel's mother, Tomeka, put Etzel to sleep on a sofa before going to sleep herself in another room. Respondent Shirley Ree Smith—Tomeka's mother—slept on the floor next to Etzel. Several hours later, Smith ran into Tomeka's room, holding Etzel, who was limp, and told her that "[s]omething [was] wrong with Etzel." Tr. 416. By the time emergency officials arrived, Etzel was not breathing and had no heartbeat. Smith reported that she thought Etzel had fallen off the sofa. The officials' efforts to resuscitate Etzel failed.

Doctors initially attributed Etzel's death to sudden infant death syndrome (SIDS), the customary diagnosis when an infant shows no outward signs of trauma. But after an autopsy, the coroner concluded that the cause of death was instead shaken baby syndrome (SBS). When a social worker informed Smith of that finding, Smith told her that Etzel had not responded to her touch while sleeping, so she had picked him up and given him "a little shake, a jostle" to wake him. *Id.*, at 842. According to the social worker, Smith then said something to the effect of, "Oh, my God. Did I do it? Did I do it? Oh, my God." *Id.*, at 847 (internal quotation marks omitted). In an interview with the police a few days later, Smith said that she had shaken Etzel, but then she corrected herself and said that she had twisted him to try to elicit a reaction. Smith was arrested and charged with assault on a child resulting in death. See Cal. Penal Code Ann. §273ab (West 2008) ("Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment . . .").

At trial, the jury heard seven days of expert medical testimony on the cause of Etzel's death. The prosecution offered three experts, each of whom attested that Etzel's death was the result of SBS—not SIDS, as the defense

contended. The first expert, Dr. Eugene Carpenter, was the medical examiner for the Los Angeles County Coroner who had supervised Etzel's autopsy. Dr. Carpenter is board certified in forensic, anatomic, and clinical pathology. He testified that Etzel's autopsy revealed recent hemorrhages in the brain, and he opined that the bleeding and other features of Etzel's pathology, including a bruise and abrasion on the lower back of the baby's head, were consistent with violent shaking. Dr. Carpenter identified two means by which shaking can result in a baby's death: The first is that the shaking causes blood vessels in the brain to tear, creating a pool of blood that pushes the brain downward into the spinal canal, resulting in death but little direct damage to the brain. The second is that the shaking itself is sufficiently severe that the brain directly tears in vital areas, causing death with very little bleeding. Dr. Carpenter testified that Etzel's injuries were consistent with the latter pathology. He also explained that the injuries could not be attributed to either a fall from the sofa or the administration of cardiopulmonary resuscitation. Nor, according to Dr. Carpenter, was it possible that Etzel perished from SIDS, given the signs of internal trauma. Dr. Carpenter did testify, however, that while SBS victims often suffer retinal hemorrhaging, Etzel's autopsy revealed no such injury.

The prosecution's second expert, Dr. Stephanie Erlich, was the associate deputy medical examiner who actually performed Etzel's autopsy. She is board certified in anatomic pathology and neuropathology. She corroborated Dr. Carpenter's testimony about the autopsy findings, and added that a followup neuropathological examination of Etzel's brain confirmed the existence of recent hemorrhaging. Noting only a minimal amount of new blood in Etzel's brain, she testified that the cause of death was direct trauma to the brainstem. On cross-examination, she agreed with defense counsel that retinal hemorrhaging

(absent in Etzel's case) is present in 75 to 80 percent of SBS cases.

The third prosecution expert, Dr. David Chadwick, is board certified in pediatrics and the author of articles on childhood death by abusive trauma. He testified that Etzel's injuries were consistent with SBS and that old trauma could not have been the cause of the child's death.

The defense called two experts to dispute these conclusions. The first, pathologist Dr. Richard Siegler, testified that Etzel died from brain trauma, but that it was not the result of SBS, given the lack of retinal hemorrhaging. He admitted on cross-examination, however, that an absence of retinal hemorrhaging does not exclude a finding of SBS. He also acknowledged that he did not believe the cause of Etzel's death was SIDS. According to Dr. Siegler, Etzel died from old trauma, an opinion he reached on the basis of studying photographs of the neuropathological examination.

The other defense expert, pediatric neurologist Dr. William Goldie, testified that Etzel's death *was* due to SIDS. He noted that Etzel was born with jaundice, a heart murmur, and low birth weight—making him more susceptible to SIDS. Dr. Goldie testified that pathologists had not been able to determine the cause of Etzel's death and that the bleeding could be attributed to the resuscitation efforts.

The jury found Smith guilty. Concluding that the jury "carefully weighed" the "tremendous amount of evidence" supporting the verdict, Tr. 1649, the trial judge denied Smith's motion for a new trial and sentenced her to an indeterminate term of 15 years to life in prison.

On direct review, Smith contended that the evidence was not sufficient to establish that Etzel died from SBS. After thoroughly reviewing the competing medical testimony, the California Court of Appeal rejected this claim, concluding:

> "The expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusions that Etzel died from shaken baby syndrome. The conviction is supported by substantial evidence." *People* v. *Smith*, No. B118869 (Feb. 10, 2000), App. K to Pet. for Cert. 86.

The California Supreme Court denied review. App. J, *id.*, at 74.

Smith then filed this petition for a writ of habeas corpus with the United States District Court for the Central District of California, renewing her claim that the evidence was insufficient to prove that Etzel died of SBS. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, that court had no power to afford relief unless Smith could show either that the California Court of Appeal's decision affirming the conviction "was contrary to, or involved an unreasonable application of," clearly established federal law as reflected in the holdings of this Court's cases, 28 U. S. C. §2254(d)(1), or that it "was based on an unreasonable determination of the facts" in light of the state court record, §2254(d)(2). *Harrington* v. *Richter*, 562 U. S. ___, ___ (2011) (slip op., at 10).

The Magistrate Judge to whom the case was assigned issued a report acknowledging that "[t]his is not the typical shaken baby case" and that the evidence against Smith "raises many questions." App. I to Pet. for Cert. 65. But the Magistrate Judge nevertheless concluded that the evidence was "clearly sufficient to support a conviction." *Ibid.* The District Court adopted the Magistrate Judge's report and denied the petition. App. G, *id.*, at 52.

On appeal, the Ninth Circuit reversed with instructions to grant the writ. *Smith* v. *Mitchell*, 437 F. 3d 884 (2006). Despite the plentitude of expert testimony in the trial

record concluding that sudden shearing or tearing of the brainstem was the cause of Etzel's death, the Ninth Circuit determined that there was "no evidence to permit an expert conclusion one way or the other" on that question because there was "no physical evidence of . . . tearing or shearing, and no other evidence supporting death by violent shaking." *Id.*, at 890. The court said that the State's experts "reached [their] conclusion because *there was no evidence in the brain itself of the cause of death*." *Ibid.* (emphasis in original). The court concluded that because "[a]bsence of evidence cannot constitute proof beyond a reasonable doubt," *ibid.*, the California Court of Appeal had "unreasonably applied" this Court's opinion in *Jackson* v. *Virginia* in upholding Smith's conviction, 437 F. 3d, at 890.

That conclusion was plainly wrong. *Jackson* says that evidence is sufficient to support a conviction so long as "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U. S., at 319. It also unambiguously instructs that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.*, at 326. When the deference to state court decisions required by §2254(d) is applied to the state court's already deferential review, see *Renico*, 559 U. S., at ___ (slip op., at 11), there can be no doubt of the Ninth Circuit's error below.

The jury was presented with competing views of how Etzel died. It was made aware of the various experts' qualifications and their familiarity with both the subject of SBS and the physical condition of Etzel's body. It observed the attorneys for each party cross-examine the experts and elicit concessions from them. The State's

experts, whom the jury was entitled to believe, opined that the physical evidence was consistent with, and best explained by, death from sudden tearing of the brainstem caused by shaking. The Ninth Circuit's assertion that these experts "reached [their] conclusion because there was no evidence in the brain itself of the cause of death" is simply false. There *was* "evidence in the brain itself." The autopsy revealed indications of recent trauma to Etzel's brain, such as subdural and subarachnoid hemorrhaging, hemorrhaging around the optic nerves, and the presence of a blood clot between the brain's hemispheres. The autopsy also revealed a bruise and abrasion on the lower back of Etzel's head. These affirmative indications of trauma formed the basis of the experts' opinion that Etzel died from shaking so severe that his brainstem tore.

Defense counsel made certain that the jury understood that the prosecution's experts were unable to identify the precise point of tearing itself. But as Judge Bea noted in his dissent from the Ninth Circuit's denial of rehearing en banc, the experts explained why the location of the tear was undetectable: "Etzel's death happened so quickly that the effects of the trauma did not have time to develop." *Smith* v. *Mitchell,* 453 F. 3d 1203, 1207 (2006). According to the prosecutions' experts, there was simply no opportunity for swelling to occur around the brainstem before Etzel died.

In light of the evidence presented at trial, the Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise. See §2254(d). Doubts about whether Smith is in fact guilty are understandable. But it is not the job of this Court, and was not that of the Ninth Circuit, to decide whether the State's theory was correct. The jury decided that question,

and its decision is supported by the record.*

It is said that Smith, who already has served years in prison, has been punished enough, and that she poses no danger to society. These or other considerations perhaps would be grounds to seek clemency, a prerogative granted to executive authorities to help ensure that justice is tempered by mercy. It is not clear to the Court whether this process has been invoked, or, if so, what its course has been. It is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention.

The decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in §2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. See *Patrick* v. *Smith*, 550 U. S. 915 (vacating and remanding in light of *Carey* v. *Musladin*, 549 U. S. 70 (2006)), reinstated on remand, 508 F. 3d 1256 (2007) *(per curiam)*; 558 U. S. ___ (2010) (vacating and remanding in light of *McDaniel* v. *Brown*, 558 U. S. ___ (2010) *(per curiam)*), reinstated on remand *sub nom. Smith* v. *Mitchell*, 624 F. 3d 1235 (2010) *(per curiam)*. Its refusal to do so necessitates this Court's action today.

The petition for a writ of certiorari and respondent's

---

*The dissent's review of the evidence presented to the jury over seven days is precisely the sort of reweighing of facts that is precluded by *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979), and precisely the sort of second-guessing of a state court decision applying *Jackson* that is precluded by AEDPA, §2254(d). The dissent's views on how "adamantly" experts would testify today as opposed to at the time of trial, *post*, at 6 (opinion of GINSBURG, J.), are of course pure speculation, as would be any views on how a jury would react to less adamant testimony.

motion to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

JAVIER CAVAZOS, ACTING WARDEN *v.* SHIRLEY REE SMITH

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

No. 10–1115. Decided October 31, 2011

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

The Court's summary disposition of this case, in my judgment, is a misuse of discretion. I set out below my reasons for concluding that discretion, soundly exercised, would have occasioned denial of California's petition for review.

The Magistrate Judge who reviewed respondent Shirley Ree Smith's habeas corpus petition in the first instance concluded, as the Court does today, that relief was unwarranted. He observed, however, that the evidence, "though clearly sufficient to support a conviction, raises many questions":

> "Grandmothers, especially those not serving as the primary caretakers, are not the typical perpetrators [in shaken baby cases]. Further, [Smith] was helping her daughter raise her other children (a [4-year-old] and a 14-month-old) and there was no hint of [Smith] abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused [Smith] to snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there is no evidence that Etzel was doing anything other than

> sleeping the night he died. In addition, [Smith's] daughter [Tomeka], Etzel's mother, was in the room next door when Etzel died. The medical evidence was not typical either, in that some of the telltale signs usually found in shaken baby cases did not exist in this case." *Smith* v. *Mitchell*, Case No. CV 01–4484–ABC (CD Cal., Mar. 22, 2004), p. 10, App. I to Pet. for Cert. 65.

The District Court adopted the Magistrate Judge's recommendation to deny Smith's petition, but granted a certificate of appealability, recognizing that "reasonable jurists would find the [court's] assessment of [Smith's] claims debatable." Order in No. CV 01–4484–ABC (CD Cal., Apr. 29, 2004), Doc. 36, p. 1.

After full briefing and argument, the Ninth Circuit reversed the District Court's judgment. The Court of Appeals acknowledged the limitations on its authority. "We approach this case," the court said, "with a firm awareness of the very strict limits that the [Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] places on our collateral review of state criminal convictions." *Smith* v. *Mitchell*, 437 F. 3d 884, 888–889 (CA9 2006). Accurately describing the standards applicable under AEDPA and *Jackson* v. *Virginia*, 443 U. S. 307 (1979), and reviewing the evidence in some detail, the court concluded that "[i]n this most unusual case,. . . the [California] Court of Appeal unreasonably applied *Jackson*." 437 F. 3d, at 889.

Beyond question, the Court today reviews a case as tragic as it is extraordinary and fact intensive. By taking up the case, one may ask, what does the Court achieve other than to prolong Smith's suffering and her separation from her family. Is this Court's intervention really necessary? Our routine practice counsels no.

Error correction is "outside the mainstream of the

Court's functions." E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice §5.12(c)(3), p. 351 (9th ed. 2007). As this Court's Rule 10 informs, "[a] petition for a writ of certiorari is rarely granted when the asserted error [is] . . . the misapplication of a properly stated rule of law." The Ninth Circuit correctly described the relevant legal rules under AEDPA and *Jackson* v. *Virginia*. This Court, therefore, has no law-clarifying role to play. Its summary adjudication seems to me all the more untoward for these reasons: What is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled against Smith; and uncontradicted evidence shows that she poses no danger whatever to her family or anyone else in society.

I turn first to the medical evidence presented at trial. Dr. Carpenter, the autopsy supervisor, testified that the following symptoms are consistent with, but not required for, a diagnosis of SBS: cerebral edema, subdural hemorrhage, retinal hemorrhage, bleeding at the joints of the back of the neck, bruises on the arms, fractures of the ribs, and internal injuries to the buttocks, abdominal organs, and chest organs. Tr. 575. Few of these signs of SBS were present here. Etzel's subdural hemorrhage and subarachnoid hemorrhage were "minimal," insufficient to cause death. *Id.,* at 540–541, 557–558, 675, 693, 700, 729, 1484–1485. There was no brain swelling and no retinal hemorrhage in either eye. *Id.,* at 580, 693, 802, 1274.[1] Similarly absent were any fractures, sprains, bleeding in the joints, or displacement of joints. *Id.,* at 682. A "tiny" abrasion on the skin and a corresponding bruise under the scalp did not produce brain trauma. *Id.,* at 555, 562, 576, 712–713.

These findings led Dr. Carpenter, the autopsy supervi-

---

[1]The State's third expert, Dr. Chadwick, who was not present at Etzel's autopsy, testified that there may have been some swelling. But he conceded that any swelling could not have caused death. Tr. 1478.

sor, and Dr. Erlich, who performed Etzel's autopsy, to rule out two commonly proffered causes of death in SBS cases: massive bleeding and massive swelling that create pressure and push the brain downward. *Id.,* at 541, 551–552, 729–730, 801. Instead, they opined, Etzel's death was caused by direct injury—shearing or tearing of the brainstem or the brain itself. *Id.,* at 694–696, 729–730, 801, 1298. The autopsy revealed no physical evidence of such injury, either grossly or microscopically. *Id.,* at 730, 763, 803–804, 1298–1299. Dr. Carpenter was unable to state which particular areas of the brain were injured, and the neuropathologist found no evidence of specific brain injury. *Id.,* at 696, 1475. No doctor located any tear. Indeed, the examining physicians did not cut open Etzel's brainstem, or submit it to neuropathology, because, in their own estimation, "[w]e wouldn't have seen anything anyway." *Id.,* at 803, 1299.[2]

Neither doctor testified to ever having performed an autopsy on an infant in which a similar conclusion was reached. Nor did either physician point to any medical literature supporting their belief that shearing or tearing of the brainstem or the brain itself caused Etzel's death. *Id.,* at 694–696, 801–802. Dr. Carpenter nevertheless maintained that when there is subdural hemorrhage without signs of external trauma to the head or skull, the injury is necessarily caused by violent shaking. *Id.,* at 576–577, 660–661. Smith's conviction thus turned on, as Dr. Erlich put it, "direct trauma which we don't see to the brainstem." *Id.,* at 801. That this gave the Ninth Circuit pause is understandable. Dr. Erlich herself conceded that "[i]t is a difficult concept to absorb." *Id.,* at 1298.

Reason to suspect the Carpenter-Erlich thesis has

---

[2] Dr. Chadwick mentioned new methods, not then standard in medical examiners' offices and not used here, which may reveal this type of brainstem damage. *Id.,* at 1448, 1481–1482.

grown in the years following Smith's 1997 trial. Doubt has increased in the medical community "over whether infants can be fatally injured through shaking alone." *State* v. *Edmunds*, 2008 WI App. 33, ¶15, 308 Wis. 2d 374, 385, 746 N. W. 2d 590, 596. See, *e.g.,* Donohoe, Evidence-Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003) (By the end of 1998, it had become apparent that "there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS," and that "the commonly held opinion that the finding of [subdural hemorrhage] and [retinal hemorrhage] in an infant was strong evidence of SBS was unsustainable."); Bandak, Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms, 151 Forensic Sci. Int'l 71, 78 (2005) ("Head acceleration and velocity levels commonly reported for SBS generate forces that are far too great for the infant neck to withstand without injury. . . . [A]n SBS diagnosis in an infant . . . without cervical spine or brain stem injury is questionable and other causes of the intracerebral injury must be considered."); Minns, Shaken Baby Syndrome: Theoretical and Evidential Controversies, 35 J. Royal College of Physicians of Edinburgh 5, 10 (2005) ("[D]iagnosing 'shaking' as a mechanism of injury . . . is not possible, because these are unwitnessed injuries that may be incurred by a whole variety of mechanisms solely or in combination."); Uscinski, Shaken Baby Syndrome: An Odyssey, 46 Neurol. Med. Chir. (Tokyo) 57, 59 (2006) ("[T]he hypothetical mechanism of manually shaking infants in such a way as to cause intracranial injury is based on a misinterpretation of an experiment done for a different purpose, and contrary to the laws of injury biomechanics as they apply specifically to the infant anatomy."); Leestma, Case Analysis of Brain-Injured Admittedly Shaken Infants, 54 Cases,

1969–2001, 26 Am. J. Forensic Med. & Pathology 199, 211 (2005) ("[M]ost of the pathologies in allegedly shaken babies are due to impact injuries to the head and body."); Squier, Shaken Baby Syndrome: The Quest for Evidence, 50 Developmental Med. & Child Neurology 10, 13 (2008) ("[H]ead impacts onto carpeted floors and steps from heights in the 1 to 3 feet range result in far greater . . . forces and accelerations than shaking and slamming onto either a sofa or a bed.").

In light of current information, it is unlikely that the prosecution's experts would today testify as adamantly as they did in 1997. Noteworthy in this regard, prosecution witnesses Carpenter and Erlich testified that the belated diagnosis of old (*i.e.,* chronic) blood in Etzel's brain and around his optic nerves did not change their initial cause-of-death findings, because rebleeding of old subdural blood does not occur in infants. Tr. 608–609, 672–673, 721–722, 771, 776, 1269–1270, 1283. Recent scientific opinion undermines this testimony. See Miller & Miller, Over-representation of Males in Traumatic Brain Injury of Infancy and in Infants with Macrocephaly, 31 Am. J. Forensic Med. & Pathology 165, 170 (2010) ("Small, asymptomatic [subdural hematomas] from the normal trauma of the birth process can spontaneously rebleed or rebleed with minimal forces, enlarge, and then present with clinical symptoms and [subdural hematoma, retinal hemorrhages, and neurologic dysfunction] in the first year of life. . . . [This situation] mimic[s] child abuse, and we believe many such infants in the past have been mistakenly diagnosed as victims of child abuse, when they were likely not."). What is now known about SBS hypotheses seems to me worthy of considerable weight in the discretionary decision whether to take up this tragic case.

I consider next the State's meager nonmedical evidence. There was no evidence whatever that Smith abused her grandchildren in the past or acted with any malicious

intent on the night in question. Instead, the evidence indicated that Smith was warm hearted, sensitive, and gentle. Tr. 1086. As earlier observed, see *supra,* at 1, the Magistrate Judge noted the absence of any motive or precipitating event that might have led Smith to shake Etzel violently. Although shaking may quiet a crying child, Tr. 601, no evidence showed that Etzel was crying in the hours before he died, *id.,* at 444. To the contrary: Any loud crying likely would have woken Etzel's siblings, Yondale, age 14 months, and Yolanda, age 4, asleep only feet away, even Etzel's mother, Tomeka, asleep in the neighboring room. *Id.,* at 335, 358–361. Yet no one's slumber was disturbed. *Id.,* at 358–361.

The prosecution relied on the testimony of a social worker, who asserted that Smith, after hearing that the cause of Etzel's death had been changed from Sudden Infant Death Syndrome (SIDS) to shaken baby syndrome, *id.,* at 840, and after stating that she had given Etzel "a little shake, a jostle to awaken him" when she found him unresponsive, asked "something like 'Oh, my God. Did I do it? Did I do it? Oh, my God.'" *Id.,* at 842, 847.[3] Etzel's mother, Tomeka, contradicted this account. According to Tomeka, after the social worker accused Smith of killing Etzel, Smith started crying, *id.,* at 429–430, and responded, "No, I didn't," *id.,* at 387. Taking the social worker's version of events as true, Smith's distraught and equivocal question fairly cannot be equated to a confession of guilt. Giving a baby "a little shake, a jostle to wake him," *ante*, at 2 (internal quotation marks omitted), after finding him unexpectedly unresponsive, surely is not an admission to shaking a child violently, causing his brainstem to tear.

---

[3]The social worker also testified that Etzel's mother, Tomeka, told Smith: "If it wasn't for you this wouldn't have happened." *Id.,* at 847. Tomeka denied making any statement to that effect. *Id.,* at 389.

Moreover, Smith's counsel, Ubiwe Eriye,[4] represented her poorly at trial. In a case as trying as this one, competent counsel might have persuaded the jury to disbelieve the prosecution's case. A few examples from the record are illustrative. At the suppression hearing, the presiding judge was so disturbed about Eriye's preparation for trial that he remarked to the defendant, "Miss Smith, I'm scared." Tr. A52. Eriye badly misportrayed the burden of proof when he declared, both at the suppression hearing and in his opening remarks, that he would prove, beyond a shadow of a doubt, that Smith was not guilty. *Id.,* at A58–A59, 213. The two experts Eriye called presented testimony that hardly meshed.[5]

In sum, this is a notably fact-bound case in which the Court of Appeals unquestionably stated the correct rule of law. It is thus "the type of case in which we are *most* inclined to deny certiorari." *Kyles* v. *Whitley*, 514 U. S. 419, 460 (1995) (SCALIA, J., dissenting). Nevertheless, the Court is bent on rebuking the Ninth Circuit for what it conceives to be defiance of our prior remands. See *ante,* at 8. I would not ignore Smith's plight and choose her case as a fit opportunity to teach the Ninth Circuit a lesson.

But even if granting review qualified as a proper exercise of our discretionary authority, I would resist summary reversal of the Court of Appeals' decision. The fact-intensive character of the case calls for attentive review of the record, including a trial transcript that runs over 1,500 pages. Careful inspection of the record would be aided by the adversarial presentation that full briefing

---

[4] Eriye has since resigned from the California Bar with discipline charges pending.

[5] Dr. Goldie testified that the old blood in Etzel's brain did not contribute to his death, and Etzel died of SIDS. *Id.,* at 994–995, 1403. In contrast, Dr. Siegler testified that the old blood provided the basis for his conclusion that Etzel died of an earlier brain trauma, *id.,* at 1152–1153, 1166–1167, not SIDS, *id.,* at 1193–1194.

and argument afford. See, *e.g.,* R. Fallon, J. Manning, D. Meltzer, D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1480 (6th ed. 2009) (posing question whether summary reversal would "smack of unfairness to the losing party unless an opportunity were afforded for the filing of briefs on the merits"); Gressman, Supreme Court Practice §6.12(c), p. 417, and n. 46 (questioning the Court's reliance on its own examination of the record in summarily reversing, without at least affording the parties, "particularly the respondent," an opportunity to brief the critical issue and identify the relevant portions of the record). Peremptory disposition, in my judgment, is all the more inappropriate given the grave consequences of upsetting the judgment below: Smith, who has already served ten years, will be returned to prison to complete a sentence of fifteen years to life. Before depriving Smith of the liberty she currently enjoys, and her family of her care, I would at least afford her a full opportunity to defend her release from a decade's incarceration.

* * *

For the reasons stated, justice is not served by the Court's exercise of discretion to take up this tragic, fact-bound case. I would therefore deny the petition for review.

SUPREME COURT OF THE UNITED STATES

UTAH HIGHWAY PATROL ASSOCIATION
10–1276 *v.*
AMERICAN ATHEISTS, INC., ET AL.

LANCE DAVENPORT ET AL.
10–1297 *v.*
AMERICAN ATHEISTS, INC., ET AL.

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

Nos. 10–1276 and 10–1297. Decided October 31, 2011

The petitions for writs of certiorari are denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles. A sharply divided Court of Appeals for the Tenth Circuit has declared unconstitutional a private association's efforts to memorialize slain police officers with white roadside crosses, holding that the crosses convey to a reasonable observer that the State of Utah is endorsing Christianity. The Tenth Circuit's opinion is one of the latest in a long line of "'religious display'" decisions that, because of this Court's nebulous Establishment Clause analyses, turn on little more than "judicial predilections." See *Van Orden* v. *Perry*, 545 U. S. 677, 696, 697 (2005) (THOMAS, J., concurring). Because our jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess, I would grant certiorari.

I

The Utah Highway Patrol Association (Association) is a private organization dedicated to supporting Utah High-

way Patrol officers and their families.[1] In 1998, the Association began commemorating officers who died in the line of duty by placing memorials, in the form of 12- by 6-foot white crosses, at or near locations where the officers were killed. The fallen officer's name, rank, and badge number are emblazoned across the full length of the horizontal beam of each memorial. The vertical beam bears the symbol of the Utah Highway Patrol, the year of the officer's death, and a plaque displaying the officer's picture, his biographical information, and details of his death. To date, the Association has erected 13 cross memorials.

The Association chose the cross because it believed that crosses are used both generally in cemeteries to commemorate the dead and specifically by uniformed services to memorialize those who died in the line of duty. The Association also believed that only the cross effectively and simultaneously conveyed the messages of death, honor, remembrance, gratitude, sacrifice, and safety that the Association wished to communicate to the public. Surviving family members of the fallen officers approved each memorial, and no family ever requested that the Association use a symbol other than the cross.

The private Association designed, funded, owns, and maintains the memorials. To ensure that the memorials would be visible to the public, safe to view, and near the spot of the officers' deaths, the Association requested and received permission from the State of Utah to erect some of the memorials on roadside public rights-of-way, at rest areas, and on the lawn of the Utah Highway Patrol office. In the permit, the State expressed that it "neither approves or disapproves the memorial marker." Brief in Opposition 3, n. 3 (internal quotation marks omitted).

Respondents, American Atheists, Inc., and some of its

---

[1] These cases were decided on a motion for summary judgment. These facts are undisputed.

members, sued several state officials, alleging that the State violated the Establishment Clause of the First Amendment, as incorporated by the Fourteenth Amendment, because most of the crosses were on state property and all of the crosses bore the Utah Highway Patrol's symbol. The Association, a petitioner along with the state officials in this Court, intervened to defend the memorials. The District Court granted summary judgment in favor of petitioners.

A panel of the Tenth Circuit reversed. As an initial matter, the panel noted that this Court remains "sharply divided on the standard governing Establishment Clause cases." *American Atheists, Inc.* v. *Duncan*, 616 F. 3d 1145, 1156 (2010). The panel therefore looked to Circuit precedent to determine the applicable standard and then applied the so-called "*Lemon*/endorsement test," which asks whether the challenged governmental practice has the actual purpose of endorsing religion or whether it has that effect from the perspective of a "reasonable observer." *Id.*, at 1157; see *County of Allegheny* v. *American Civil Liberties Union*, *Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989) (modifying the three-pronged test of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), which considered whether a government action has a secular purpose, has the primary effect of advancing or inhibiting religion, or fosters an excessive entanglement between government and religion). The court concluded that, even though the cross memorials had a secular purpose, they would nonetheless "convey to a reasonable observer that the state of Utah is endorsing Christianity." 616 F. 3d, at 1160. This was so, the court concluded, because a cross is "the preeminent symbol of Christianity," and the crosses stood alone, on public land, bearing the Utah Highway Patrol's emblem. *Ibid*. According to the panel, none of the other "contextualizing facts" sufficiently reduced the memorials' message of religious endorsement. *Id.*, at 1161.

The Tenth Circuit denied rehearing en banc, with four judges dissenting. The dissenters criticized the panel for presuming that the crosses were unconstitutional and then asking whether contextual factors were sufficient to rebut that presumption. Instead, the dissenters argued, the panel should have considered whether the crosses amounted to an endorsement of religion in the first place in light of their physical characteristics, location near the site of the officer's death, commemorative purpose, selection by surviving family members, and disavowal by the State. 637 F. 3d 1095, 1103–1105 (2010) (opinion of Kelly, J.). The dissenters also criticized the panel's "unreasonable 'reasonable observer,'" *id.*, at 1104, describing him as "biased, replete with foibles, and prone to mistake," *id.*, at 1108 (opinion of Gorsuch, J.). Noting that the court "continue[d] to apply (or misapply) a reasonable observer/endorsement test that has come under much recent scrutiny," the dissenters emphasized that the panel's decision was "worthy of review." *Id.*, at 1109–1110 (same).

II

Unsurprisingly, the Tenth Circuit relied on its own precedent, rather than on any of this Court's cases, when it selected the *Lemon*/endorsement test as its governing analysis. Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases. Some of our cases have simply ignored the *Lemon* or *Lemon*/endorsement formulations. See, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Marsh* v. *Chambers*, 463 U. S. 783 (1983). Other decisions have indicated that the *Lemon*/endorsement test is useful, but not binding. *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984) (despite *Lemon*'s usefulness, we are "unwillin[g] to be confined to any single test or criterion in

this sensitive area"); *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973) (*Lemon* provides "no more than helpful signposts"). Most recently, in *Van Orden*, 545 U. S. 677, a majority of the Court declined to apply the *Lemon*/endorsement test in upholding a Ten Commandments monument located on the grounds of a state capitol.[2] Yet in another case decided the same day, *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 859–866 (2005), the Court selected the *Lemon*/endorsement test with nary a word of explanation and then declared a display of the Ten Commandments in a courthouse to be unconstitutional. See also *Van Orden*, *supra,* at 692 (SCALIA, J., concurring) ("I join the opinion of THE CHIEF JUSTICE because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time"). Thus, the *Lemon*/endorsement test continues to "stal[k] our Establishment Clause jurisprudence" like "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398 (1993) (SCALIA, J., concurring in judgment).

Since *Van Orden* and *McCreary*, lower courts have understandably expressed confusion. See *American Civil Liberties Union of Ky.* v. *Mercer Cty.*, 432 F. 3d 624, 636

---

[2] In *Van Orden*, a plurality determined that the nature of a government display and our Nation's historical traditions should control. 545 U. S., at 686; see also *ibid.* ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected"). In a concurring opinion, JUSTICE BREYER considered the "basic purposes of the First Amendment's Religion Clauses themselves" rather than "a literal application of any particular test." *Id.*, at 703–704 (opinion concurring in judgment); see also *id.*, at 700 ("[I]n [difficult borderline] cases, I see no test-related substitute for the exercise of legal judgment").

(CA6 2005) (after *McCreary* and *Van Orden*, "we remain in Establishment Clause purgatory").[3] This confusion has caused the Circuits to apply different tests to displays of religious imagery challenged under the Establishment Clause. Some lower courts have continued to apply the *Lemon*/endorsement test.[4] Others have followed *Van*

---

[3] See also *Green* v. *Haskell Cty. Bd. of Comm'rs*, 574 F. 3d 1235, 1235 n. 1 (CA10 2009) (Kelly, J., dissenting from denial of rehearing en banc) (noting that "[w]hether *Lemon* . . . and its progeny actually create discernable 'tests,' rather than a mere ad hoc patchwork, is debatable" and describing the "judicial morass resulting from the Supreme Court's opinions"); *Card* v. *Everett*, 520 F. 3d 1009, 1016 (CA9 2008) ("Confounded by the ten individual opinions in *[McCreary* and *Van Orden]* . . . courts have described the current state of the law as both 'Establishment Clause purgatory' and 'Limbo'" (citation omitted)); *id.*, at 1023–1024 (Fernandez, J., concurring) (applauding the majority's "heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials" and lamenting the "still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time," as "so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable" (footnote omitted)); *Skoros* v. *New York*, 437 F. 3d 1, 13 (CA2 2006) ("[W]e confront the challenge of frequently splintered Supreme Court decisions" and Justices who "have rarely agreed—in either analysis or outcome—in distinguishing the permissible from the impermissible public display of symbols having some religious significance"); *Staley* v. *Harris Cty.*, 461 F. 3d 504, 515 (2006), (Smith, J., dissenting) (admonishing the majority for failing to "integrate *McCreary* and *Van Orden* into as coherent a framework as possible"), dism'd as moot on rehearing en banc, 485 F. 3d 305 (CA5 2007).

[4] See *American Civil Liberties Union of Ohio Foundation, Inc.* v. *DeWeese*, 633 F. 3d 424, 431 (CA6 2011) (applying *Lemon*); *Green* v. *Haskell Cty. Bd. of Comm'rs*, 568 F. 3d 784, 797–798, and n. 8 (CA10 2009) ("While the Supreme Court may be free to ignore *Lemon*, this court is not. Therefore, we cannot . . . be guided in our analysis by the *Van Orden* plurality's disregard of the *Lemon* test" (citations and internal quotation marks omitted)); *Skoros*, *supra*, at 17, and n. 13 ("The *Lemon* test has been much criticized over its twenty-five year history. Nevertheless, the Supreme Court has never specifically disavowed *Lemon's* analytic framework. . . . Accordingly, we apply *Lemon*" (citations omitted)); *American Civil Liberties Union of Ky.* v.

Orden.[5] One Circuit, in a case later dismissed as moot, applied both tests.[6]

Respondents assure us that any perceived conflict is "artificial," Brief in Opposition 8, because the lower courts have quite properly applied *Van Orden* to "the distinct class of Ten Commandments cases" indistinguishable from *Van Orden* and have applied the *Lemon*/endorsement test to other religious displays. *Id.*, at 12, 16. But respondents' "Ten Commandments" rule is nothing more than a thinly veiled attempt to attribute reason and order where none exists. Respondents offer no principled basis for applying one test to the Ten Commandments and another test to other religious displays that may have similar relevance to our legal and historical traditions. Indeed, that respondents defend the purportedly uniform application of one Establishment Clause standard to the "Ten Commandments' realm" and another standard to displays of other religious imagery, *id.,* at 16, speaks volumes about the superficiality and irrationality of a jurisprudence meant to assess whether government has made a

---

Mercer Cty., 432 F. 3d 624, 636 (CA6 2005) ("Because *McCreary County* and *Van Orden* do not instruct otherwise, we must continue to" apply "*Lemon*, including the endorsement test").

[5] See *Card*, *supra*, at 1018 (applying JUSTICE BREYER's concurring opinion in *Van Orden*, which "carv[ed] out an exception" from *Lemon* for certain displays); *ACLU Neb. Foundation* v. *Plattsmouth*, 419 F. 3d 772, 778, n. 8 (CA8 2005) (en banc) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test"); see also *Trunk* v. *San Diego*, 629 F. 3d 1099, 1107 (CA9 2011) (JUSTICE BREYER's controlling opinion in *Van Orden* "establishes an 'exception' to the *Lemon* test in certain borderline cases," but "we need not resolve the issue of whether *Lemon* or *Van Orden* control" because "both cases guide us to the same result").

[6] See *Staley*, *supra*, at 508–509, and n. 6 (applying *Lemon*/endorsement *and* JUSTICE BREYER's concurrence in *Van Orden* after concluding that the objective observer standard of the endorsement test was "implicit" in JUSTICE BREYER's opinion).

law "respecting an establishment of religion." See *Card* v. *Everett*, 520 F. 3d 1009, 1016 (CA9 2008) (describing "Recent Developments in Ten Commandments Law"). But even assuming that the lower courts uniformly understand *Van Orden* to apply only to those religious displays "factually indistinguishable" from the display in *Van Orden*, Brief in Opposition 16, that understanding conflicts with JUSTICE BREYER's controlling opinion. JUSTICE BREYER's concurrence concluded that there is "no test-related substitute for the exercise of legal judgment" or "exact formula" in "fact-intensive," "difficult borderline cases." 545 U. S., at 700 (opinion concurring in judgment). Nothing in his opinion indicated that only Ten Commandments displays identical to the one in *Van Orden* call for a departure from the *Lemon*/endorsement test.

Moreover, the lower courts have *not* neatly confined *Van Orden* to similar Ten Commandments displays. In *Myers* v. *Loudoun Cty. Public Schools,* 418 F. 3d 395, 402, and n. 8 (2005), the Fourth Circuit applied the *Van Orden* plurality opinion and JUSTICE BREYER's concurring analysis to resolve an Establishment Clause challenge to a statute mandating recitation of the Pledge of Allegiance. In *Staley* v. *Harris Cty.,* 461 F. 3d 504, 511–512 (2006), dism'd as moot on rehearing en banc, 485 F. 3d 305 (2007), the Fifth Circuit applied *Van Orden* to a monument displaying an open bible. And, in *Green* v. *Haskell Cty. Bd. of Comm'rs,* 568 F. 3d 784, 796–797 (2009), the Tenth Circuit applied the *Lemon*/endorsement test to hold unconstitutional a Ten Commandments monument located on the grounds of a public building and surrounded by other secular monuments, facts materially indistinguishable from those in *Van Orden*.

Respondents further suggest that any variation among the Circuits concerning the Establishment Clause standard for displays of religious imagery is merely academic, for much like the traditional *Lemon*/endorsement inquiry,

JUSTICE BREYER's opinion in *Van Orden* considered the "context of the display" and the "message" it communicated. Brief in Opposition 8–12, and n. 5 (internal quotation marks omitted); see *Van Orden*, 545 U. S., at 701–702 (BREYER, J., concurring in judgment); *id.*, at 703 ("For these reasons, I believe that the Texas display . . . might satisfy this Court's more formal Establishment Clause tests"). I do not doubt that a given court could reach the same result under either test. See *ACLU Neb. Foundation* v. *Plattsmouth*, 419 F. 3d 772, 778, n. 8 (CA8 2005) (en banc) (upholding the constitutionality of a display of the Ten Commandments under either standard); *Trunk* v. *San Diego*, 629 F. 3d 1099, 1107, 1125 (CA9 2011) (concluding that the display of a cross was unconstitutional under either standard). The problem is that both tests are so utterly indeterminate that they permit different courts to reach inconsistent results. Compare *Harris* v. *Zion*, 927 F. 2d 1401 (CA7 1991) (applying *Lemon*/endorsement to strike down a city seal bearing a depiction of a cross), with *Murray* v. *Austin*, 947 F. 2d 147 (CA5 1991) (applying *Lemon*/endorsement to uphold a city seal bearing a depiction of a cross); compare also *Plattsmouth, supra* (applying *Van Orden* to uphold a display of the Ten Commandments), with *Staley, supra* (applying *Van Orden* to strike down a display of a Bible). As explained below, it is "the very 'flexibility' of this Court's Establishment Clause precedent" that "leaves it incapable of consistent application." *Van Orden, supra*, at 697 (THOMAS, J., concurring).

III

In *Allegheny*, a majority of the Court took the view that the endorsement test provides a "sound analytical framework for evaluating governmental use of religious symbols." 492 U. S., at 595 (opinion of Blackmun, J.); *id.,* at 629 (O'Connor, J., concurring in part and concurring in judgment) ("I . . . remain convinced that the endorsement

test is capable of consistent application"). That confidence was misplaced. Indeed, JUSTICE KENNEDY proved prescient when he observed that the endorsement test amounted to "unguided examination of marginalia," "using little more than intuition and a tape measure." *Id.,* at 675–676 (opinion concurring in judgment in part and dissenting in part).

Since the inception of the endorsement test, we have learned that a creche displayed on government property violates the Establishment Clause, except when it doesn't. Compare *id.,* at 579–581 (opinion of Blackmun, J.) (holding unconstitutional a solitary creche, surrounded by a "fence-and-floral frame," bearing a plaque stating "This Display Donated by the Holy Name Society," and located in the "main," "most beautiful," and "most public" part of a county courthouse (internal quotation marks omitted), and *Smith* v. *County of Albemarle*, 895 F. 2d 953, 955, and n. 2 (CA4 1990) (holding unconstitutional a creche consisting of "large figures, easily visible, and illuminated at night," bearing a disclaimer reading "'Sponsored and maintained by Charlottesville-Albemarle Jaycees not by Albemarle County,'" and located on the lawn of a county office building), with *Lynch,* 465 U. S., at 671 (upholding a creche displaying 5-inch to 5-foot tall figures of Jesus, Mary, Joseph, angels, shepherds, kings, and animals, surrounded by "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that rea[d] 'SEASONS GREETINGS,'" situated in a park in the "heart of the shopping district"), *American Civil Liberties Union of Ky.* v. *Wilkinson*, 895 F. 2d 1098, 1099, 1104 (CA6 1990) (upholding a 15-foot stable "furnished with a manger, two large pottery jugs, a ladder, railings, and some straw, but not with the figurines or statues commonly found in a

crèche," bearing a disclaimer stating that "'This display . . . does not constitute an endorsement by the Commonwealth of any religion,'" and located on the grounds of the state capitol, 100 yards from a Christmas tree), and *Elewski* v. *Syracuse*, 123 F. 3d 51, 52 (CA2 1997) (upholding a solitary creche, raised on a platform "two feet above sidewalk level," containing "statues representing Jesus, Mary, and Joseph, a shepherd, a donkey, a lamb, and an angel" holding a banner reading "'Gloria in Excelsis Deo,'" "illuminated at night by two forty-watt spotlights" located in a park on a "major downtown thoroughfare," 300 feet from a menorah and down the street from secular holiday symbols).

Likewise, a menorah displayed on government property violates the Establishment Clause, except when it doesn't. Compare *Kaplan* v. *Burlington*, 891 F. 2d 1024, 1026, 1030 (CA2 1989) (holding unconstitutional a solitary 16- by 12-foot menorah, bearing a sign stating "'Happy Chanukah'" and "'Sponsored by: Lubavitch of Vermont,'" located 60 feet away from City Hall, and "appear[ing] superimposed upon City Hall" when viewed from "the general direction of the westerly public street"), with *Allegheny*, supra, at 587, 582 (opinion of Blackmun, J.) (upholding an "18-foot Chanukah menorah of an abstract tree-and-branch design," placed next to a 45-foot Christmas tree, bearing a sign entitled "'Salute to Liberty,'" and located outside of a city-county building), and *Skoros* v. *New York*, 437 F. 3d 1 (CA2 2006) (upholding school policy permitting display of menorah along with the Islamic star and crescent, the Kwanzaa kinara, the Hebrew dreidel, and a Christmas tree, but prohibiting a creche).

A display of the Ten Commandments on government property also violates the Establishment Clause, except when it doesn't. Compare *Green,* 568 F. 3d, at 790 (holding unconstitutional a monument depicting the Ten Commandments and the Mayflower Compact on the lawn of a

county courthouse, among various secular monuments and personal message bricks, with a sign stating "'Erected by Citizens of Haskell County'"), and *American Civil Liberties Union of Ohio Foundation, Inc.* v. *DeWeese*, 633 F. 3d 424, 435 (CA6 2011) (holding unconstitutional a poster of the Ten Commandments and "seven secular 'Humanist Precepts'" in a courtroom, with "editorial comments" that link religion and secular government), with *Van Orden,* 545 U. S., at 681–682 (plurality opinion) (upholding a monument depicting the Ten Commandments, the Eye of Providence, an eagle, and the American flag and bearing a sign stating that it was "'Presented . . . by the Fraternal Order of Eagles,'" among various secular monuments, on the grounds of a state capitol (some capitalization omitted)), *Card*, 520 F. 3d 1009 (same, on the grounds of old city hall), *Plattsmouth*, 419 F. 3d, at 778, n. 8 (same, in a city park), and *Mercer Cty.,* 432 F. 3d, at 633 (upholding a poster of the Ten Commandments, along with eight other equally sized "American legal documents" and an explanation of the Commandments' historical significance, in a courthouse).

Finally, a cross displayed on government property violates the Establishment Clause, as the Tenth Circuit held here, except when it doesn't. Compare *Friedman* v. *Board of Cty., Comm'rs of Bernalillo Cty.*, 781 F. 2d 777, 779 (CA10 1985) (holding unconstitutional a county seal displaying a Latin cross, "highlighted by white edging and a blaze of golden light," under the motto "'With This We Conquer'" written in Spanish), *Harris*, 927 F. 2d, at 1404 (holding unconstitutional one city seal displaying a cross on a shield, surrounded by a dove, crown, scepter, and a banner proclaiming "'God Reigns,'" and another city seal displaying a cross surrounded by a one-story building, a water tower, two industrial buildings, and a leaf), and *Trunk*, 629 F. 3d 1099 (holding unconstitutional a 29- by 12-foot cross atop a 14-foot high base on the top of a hill,

surrounded by thousands of stone plaques honoring military personnel and the American flag), with *Murray*, 947 F. 2d 147 (upholding a Latin cross, surrounded by a pair of wings, in a city insignia), and *Weinbaum* v. *Las Cruces*, 541 F. 3d 1017, 1025 (CA10 2008) (upholding "three interlocking crosses," with a white, slightly taller center cross, surrounded by a sun symbol, in a city insignia, as well as a cross sculpture outside of a city sports complex and a mural of crosses on an elementary school wall). See also *Salazar* v. *Buono*, 559 U. S. ___, ___ (2010) (plurality opinion) (slip op., at 14–15) ("A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs").

One might be forgiven for failing to discern a workable principle that explains these wildly divergent outcomes. Such arbitrariness is the product of an Establishment Clause jurisprudence that does nothing to constrain judicial discretion, but instead asks, based on terms like "context" and "message," whether a hypothetical reasonable observer of a religious display could think that the government has made a law "respecting an establishment of religion."[7] Whether a given court's hypothetical observer will be "*any* beholder (no matter how unknowledgeable), or the *average* beholder, or . . . the 'ultra-reasonable' beholder," *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 769, n. 3 (1995) (plurality opinion), is en-

---

[7] That a violation of the Establishment Clause turns on an observer's potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact* done so, is perhaps the best evidence that our Establishment Clause jurisprudence has gone hopelessly awry. See *McCreary County* v. *American Civil Liberties Union of Ky.,* 545 U. S. 844, 901 (2005) (SCALIA, J., dissenting) (describing the "oddity" that "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer").

tirely unpredictable. Indeed, the Tenth Circuit stated below that its observer, although not "omniscient," would "know far more than most actual members of a given community," and then unhelpfully concluded that "[h]ow much information we will impute to a reasonable observer is unclear." 616 F. 3d, at 1159 (internal quotation marks omitted). But even assuming that courts could employ observers of similar insight and eyesight, it is "unrealistic to expect different judges . . . to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think." *Pinette*, *supra*, at 769, n. 3.

IV

It comes as no surprise, then, that despite other cases holding that the combination of a Latin cross and a public insignia on public property does not convey a message of religious endorsement, see *Murray, supra*; *Weinbaum, supra*, the Tenth Circuit held otherwise. And, of course, the Tenth Circuit divided over what, exactly, a reasonable observer would think about the Association's memorial cross program.

First, the members of the court disagreed as to what a reasonable observer would *see*. According to the panel, because the observer would be "driving by one of the memorial crosses at 55-plus miles per hour," he would not see the fallen officer's biographical information, but he would see that the "cross conspicuously bears the imprimatur of a state entity . . . and is found primarily on public land." 616 F. 3d, at 1160. According to the dissenters, on the other hand, if the traveling observer could see the police insignia on the cross, he should also see the much larger name, rank, and badge number of the fallen officer emblazoned above it. 637 F. 3d, at 1108–1109 (opinion of Gorsuch, J.); *id.*, at 1104 (opinion of Kelly, J.). The dissenters would also have employed an observer who was able to

pull over and view the crosses more thoroughly and would have allowed their observer to view four of the memorials located on side-streets with lower speed limits. *Id.*, at 1109 (opinion of Gorsuch, J.).

Next, the members of the court disagreed about what a reasonable observer would *feel*. The panel worried that the use of a Christian symbol to memorialize fallen officers would cause the observer to think the Utah Highway Patrol and Christianity had "some connection," leading him to "fear that Christians are likely to receive preferential treatment from the [patrol]—both in their hiring practices and, more generally, in the treatment that people may expect to receive on Utah's highways." 616 F. 3d, at 1160. The dissenters' reasonable observer, however, would not take such a "paranoid," "conspiratorial view of life," "conjur[ing] up fears of religious discrimination" by a "'Christian police,'" especially in light of the more plausible explanation that the crosses were simply memorials. 637 F. 3d, at 1105 (opinion of Kelly, J.). The panel also emphasized that the "massive size" of these crosses would heighten the reasonable observer's fear of discrimination and proselytization, unlike the "more humble spirit of small roadside crosses." 616 F. 3d, at 1161–1162. The dissenters, by contrast, insisted that the size of the crosses was necessary to ensure that the reasonable observer would "take notice of the display and absorb its message" of remembrance and to ensure that the crosses could contain all of the secular facts necessary to assuage the reasonable observer's fears. 637 F. 3d, at 1105–1106 (opinion of Kelly, J.).

Finally, the members of the court disputed what the reasonable observer would *know*. The panel acknowledged that the reasonable observer would recognize that the crosses commemorated death, but he would see only that the symbol "memorializes the death of a *Christian*." 616 F. 3d, at 1161. That the designers of the cross memorials

were Mormons, or that Christians who revere the cross are a minority in Utah, would have no effect on him. *Id.,* at 1163–1164. Conversely, the dissenters' reasonable observer would have known that the crosses were chosen by the fallen officer's family and erected by a private group without design approval from the State, and that most Utahns do not revere the cross.[8] 637 F. 3d, at 1110 (opinion of Gorsuch, J.); *id.*, at 1105 (opinion of Kelly, J.).

To any truly "reasonable observer," these lines of disagreement may seem arbitrary at best. But to be fair to the Tenth Circuit, it is our Establishment Clause jurisprudence that invites this type of erratic, selective analysis of the constitutionality of religious imagery on government property. These cases thus illustrate why "[t]he outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Van Orden*, 545 U. S., at 697 (THOMAS, J., concurring).

V

Even if the Court does not share my view that the Establishment Clause restrains only the Federal Government, and that, even if incorporated, the Clause only prohibits "'actual legal coercion,'" see *id.*, at 693, the Court should be deeply troubled by what its Establishment Clause jurisprudence has wrought. Indeed, five sitting Justices have questioned or decried the *Lemon*/endorsement test's continued use. *Salazar*, 559 U. S., at ___–___ (plurality opinion of KENNEDY, J., joined in full by ROBERTS, C. J., and in part by ALITO, J.) (slip op., at 15–18) (emphasizing criticism of the endorsement test and

---

[8] According to the statement of undisputed facts before the District Court, approximately 57 percent of Utahns are members of the Church of Jesus Christ of Latter-day Saints. Neither the Church nor its members use the cross as a symbol of their religion or in their religious practices. *American Atheists, Inc.* v. *Duncan*, 528 F. Supp. 2d 1245, 1249 (Utah 2007).

its workability); *id.*, at ___ (ALITO, J., concurring in part and concurring in judgment) (slip op., at 6) ("Assuming that it is appropriate to apply the so-called 'endorsement test,' this test would not be violated [here]"); *Pinette*, 515 U. S., at 768, n. 3 (plurality opinion of SCALIA, J.) (The endorsement test "supplies no standard whatsoever"); *Van Orden*, *supra*, at 692–693 (THOMAS, J., concurring) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges," citing, *inter alia*, the *Lemon* and endorsement tests); *Allegheny*, 492 U. S., at 669 (KENNEDY, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice"); see also *McCreary County*, 545 U. S., at 890 (2005) (SCALIA, J., joined in full by Rehnquist, C. J., and THOMAS, J., and in part by KENNEDY, J., dissenting) ("[A] majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'").

And yet, six years after *Van Orden*, our Establishment Clause precedents remain impenetrable, and the lower courts' decisions—including the Tenth Circuit's decision below—remain incapable of coherent explanation. It is difficult to imagine an area of the law more in need of clarity, as the 46 *amici curiae* who filed briefs in support of certiorari confirm. Respondents tell us there is no reason to think that a case with facts similar to this one will recur, Brief in Opposition 17, but if that counsels against certiorari here, this Court will never again hear another case involving an Establishment Clause challenge to a religious display. It is *this* Court's precedent that has rendered even the most minute aesthetic details of a religious display relevant to the constitutional question. We should not now abdicate our responsibility to clean up our mess because these disputes, by our own making, are

"factbound."[9] This suit, which squarely implicates the viability and application of the *Lemon*/endorsement test,[10] is as ripe a suit for certiorari as any.[11]

---

[9] In any event, respondents' incredible assertion is belied by the fact that, two days after respondents filed their brief in opposition to certiorari in our Court, respondents sued the Port Authority of New York City and demanded removal of a cross located at Ground Zero. See *Complaint in American Atheists, Inc.* v. *Port Auth. of New York,* No. 108670–2011 (N. Y. Sup. Ct.); Notice of Removal in *American Atheists, Inc.* v. *Port Auth. of New York,* No. 1:11–cv–06026 (SDNY).

[10] That the petition of the Association presents the question whether the cross memorials in this suit are government speech is no obstacle to certiorari. The Court need not grant certiorari on that question, and the state petitioners only ask this Court to resolve the viability and application of the endorsement test.

[11] Respondents argue that this suit would be a poor vehicle to explore the contours of a coercion-based Establishment Clause test because the State has raised the specter of a preference for one religion over others. In this regard, respondents point out that the State took the position before the lower courts that it would not be able to approve the Association's memorials "'in the same manner'" if the Association, as it indicated it would, allowed an officer's family to request a symbol other than a cross. Brief in Opposition 3–4, 31.

Because no such situation has ever arisen, and because the State has only indicated it could not approve a different marker *in the same manner* as the roadside crosses, respondents distort the record by claiming that the State has put families to the choice of "a Latin cross or no roadside memorial at all." *Id.,* at 4. Moreover, it is undisputed that the State's position stemmed from its belief that "if [the Association] were to change the shape of the memorial to reflect the religious symbol of the fallen trooper, rather than the shape of the cross, the memorial would no longer be a *secular* shape recognized as a symbol of death." App. to Brief in Opposition 9a–15a (emphasis added). That position is entirely consistent with the Tenth Circuit's conclusion that the purposes of the State and Association in permitting and implementing the memorial program were secular. In any event, that the State and Association, both defending the memorial program's constitutionality, took conflicting positions about whether it was impermissibly religious to use only crosses, or impermissibly religious to use other symbols reflective of the deceased's religious preference, only highlights the confusion surrounding the Establishment Clause's requirements.

* * *

Concurring in *Allegheny*, JUSTICE O'CONNOR wrote that "the courts have made case-specific examinations" of government actions in order to *avoid* "sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens." 492 U. S., at 623 (opinion concurring in part and concurring in judgment). But that is precisely the effect of this Court's repeated failure to apply the correct standard—or at least a clear, workable standard—for adjudicating challenges to government action under the Establishment Clause. Government officials, not to mention everyday people who wish to celebrate or commemorate an occasion with a public display that contains religious elements, cannot afford to guess whether a federal court, applying our "jurisprudence of minutiae," *id.*, at 674 (KENNEDY, J., concurring in judgment in part and dissenting in part), will conclude that a given display is sufficiently secular. The safer course will be to "purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U. S., at 699 (BREYER, J., concurring in judgment). Because "the Establishment Clause does not compel" that result, *ibid.*, I would grant certiorari.