No. 13-1175

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF LOS ANGELES, CALIFORNIA, *Petitioner*,

v.

NARANJIBHAI PATEL, ET AL, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* MANHATTAN INSTITUTE FOR POLICY RESEARCH IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment permit facial challenges to ordinances and statutes?

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research was established in 1978 as a nonpartisan public policy research foundation developing ideas that foster economic choice and individual responsibility. The Institute's Center for Legal Policy seeks to develop and communicate novel, sound ideas on how to improve the civil and the criminal justice systems.

Among the Institute's signature policy ideas is a collection of proactive policing methods developed by Institute scholars, which were put into place in various cities in the United States, beginning in New York in the 1990s, under former (and current) police commissioner William Bratton. Bratton also utilized many of these ideas in Los Angeles when he served as Chief of Police for that city from 2002 through 2009. These proactive policing methods have, according to various studies, been partially responsible for the significant decline in violent and property crimes in New York and other cities in which they have been implemented.

The Manhattan Institute is interested in this case both because it involves the appropriate methodology for interpreting the United State Constitution—central to the broader rule of law—and because a decision subjecting statutes and ordinances to faci-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in any manner, and no party, party's counsel, or any person other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

al challenge under the Fourth Amendment would imperil the core policy ideas the Institute has developed.

SUMMARY OF THE ARGUMENT[2]

A Fourth Amendment challenge is inherently an as-applied challenge for the simple reason that the Fourth Amendment binds the executive branch and restricts the paradigmatic executive action of searching and seizing.

Courts have not always been perfectly clear about the distinction between facial and as-applied challenges, and this case presents a perfect opportunity to clarify the distinction. What a close reading of the cases reveals is that this distinction simply turns on who has allegedly violated the Constitution. A facial challenge is a challenge to legislative action. An as-applied challenge is a challenge to executive action.

The Constitution empowers and restricts different officials differently. A constitutional claim is a claim that a particular government actor has exceeded a grant of power or transgressed a restriction. But because different government actors are vested with

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[2] The arguments that follow are set forth more comprehensively in two *Stanford Law Review* Articles written by *amicus*'s counsel of record. See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010) (Rosenkranz, *Subjects*); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 Stan. L. Rev. 1005 (2011) (Rosenkranz, *Objects*). These articles have been cited repeatedly by Courts of Appeals to help elucidate the distinction between "facial" and "as-applied" challenges. See *United States* v. *Jones*, 689 F.3d 696, 703 (7th Cir. 2012); *Diop* v. *ICE/Homeland Security*, 656 F.3d 221, 232 (3d Cir. 2011); *Ezell* v. *City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011).

different powers and bound by different restrictions, one cannot determine *whether* the Constitution has been violated without knowing *who* has allegedly violated it. The *predicates* of judicial review inevitably depend upon the *subjects* of judicial review. Courts sometimes write, euphemistically, of challenges to statutes or ordinances, thus obscuring the subjects of constitutional claims. But the Constitution does not prohibit statutes and ordinances; it prohibits *actions*—the actions of particular government actors. Thus, every constitutional inquiry properly begins with the subject of the constitutional claim. And the first question in any such inquiry is the *who* question: *who has allegedly violated the Constitution?*

The *who* question establishes the two basic forms of judicial review: "facial challenges" and "as-applied challenges." In the typical constitutional case, the legislature will make a law, the executive will execute it, and someone will claim that his constitutional rights have been violated. The first question to ask such a claimant is *who has violated the Constitution?* The legislature, by making the law? Or the executive, by executing the law?

This fundamental dichotomy, between judicial review of *legislative* action and judicial review of *executive* action, is the organizing dichotomy of constitutional law. It is this dichotomy that is obscured by the anthropomorphic trope that "statutes"—rather than government actors—violate the Constitution. And it is this dichotomy that courts implicitly acknowledge with the distinction between "facial challenges to statutes" and "as-applied challenges to statutes." Properly understood, *a "facial challenge" is nothing more nor less than a challenge to legislative*

action, and an "as-applied challenge" is nothing more nor less than a challenge to executive action.

The Fourth Amendment binds executive officials, forbidding them from executing unreasonable searches and seizures. Fourth Amendment challenges are always and inherently challenges to executive action. Thus, Fourth Amendment challenges are always and inherently fact-specific, "as-applied" challenges.[3]

ARGUMENT

I. THE CONSTITUTION PROHIBITS NOT ORDINANCES BUT ACTIONS

The Constitution prohibits certain *actions*. This is the nature of legal prohibitions; violations of the Constitution, like violations of a criminal code, are

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[3] Strictly speaking, this case concerns the Fourth Amendment as incorporated against the States by the Fourteenth Amendment. This brief will refer only to the Fourth Amendment and will use state and federal examples interchangeably, because this Court granted certiorari on the Fourth Amendment question with no mention of the Fourteenth, and because this Court has held that the Fourth Amendment's proscriptions incorporate verbatim against the states. See *Ker* v. *California*, 374 U.S. 23, 33 (1963) ("the standard of reasonableness is the same under the Fourth and Fourteenth Amendments"). Some scholars have suggested that the Bill of Rights properly undergoes "refinement" when applied to the States, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 215–83 (2000); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 792 & n.134 (1994); Rosenkranz, *Objects* 1063–66. But the Court's doctrine is to the contrary, and so this brief will assume that the Fourth Amendment's prohibition against unreasonable searches and seizures is enforced in the same manner against both the federal government and the States.

effected by actions, by actus rei. See 2 Wayne R. LaFave, *Substantive Criminal Law* § 11 at 4 (2d ed. 2003) ("[o]ne of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime . . . . There must also be an act").

Judicial review is the constitutional review of such actions. And actions require actors, just as verbs require subjects. Thus, a constitutional claim is necessarily a claim that some *actor* has acted inconsistently with the Constitution.

Unfortunately, courts are sometimes vague about exactly who has violated the Constitution. If Congress makes a law, the President executes the law, and a constitutional right is violated, it must be that either Congress or the President violated the Constitution. And yet courts rarely say that "Congress has violated the Constitution" or "the President has violated the Constitution." Instead, they often use a formulation that elides this crucial *who* question: "*the statute* violates the Constitution."

This formulation derives, perhaps, from a linguistic quirk. Congress *acts* by making laws. But the *product* of the action of Congress—the statute, the public law—is also called an "Act of Congress." In grammatical terms, "act" is both a noun ("an act") and a verb ("to act"), see *Black's Law Dictionary* 42 (rev. 4th ed. 1968), as it has been since before the Founding. See, e.g., Francis Allen, *A Complete English Dictionary* 6 (London, J. Wilson & J. Fell 1765); 1 Samuel Johnson, *A Dictionary of the English Language* 43 (London, J.F. & C. Rivington et al. 8th ed. 1786). And so, in common parlance, when Congress *acts* (lowercase, verb), the result is an *Act* (uppercase, noun) of Congress.

But there is a subtle difference between saying that "an *act* of Congress *violated* the Constitution" and saying that "an *Act* of Congress *violates* the Constitution." The former (lowercase, past tense) properly focuses on *Congress*, its *action* in making the law, and the moment in the past when it was made; the latter (uppercase, present tense) erroneously focuses on the statute itself in the present, as though the statute were the culprit and its offense ongoing. Thus, in discussing legislative action, usage has varied from the analytically correct (*this "action" of Congress violated the Constitution*), see, e.g., *U.S. Dep't of Commerce* v. *Montana*, 503 U.S. 442, 459 (1992) ("[T]oday we review the *actions* of Congress.") (emphasis added), to the ambiguous (*this "act/Act" of Congress violated/violates the Constitution*), see, e.g., *United States* v. *Realty Co.*, 163 U.S. 427, 439 (1896) ("It is true that in general *an unconstitutional act of Congress* is the same as if there were no *act*.") (emphasis added), to the incorrect (*this "statute" violates the Constitution*), see, e.g., *Kansas* v. *Marsh*, 548 U.S. 163, 165–66 (2006) ("We must decide whether this *statute* . . . violates the Constitution.") (emphasis added).

The confusion is compounded by the notion of "challenging a statute as-applied." This formulation, more than any other, has engendered confusion about the *who* of constitutional violation and thus the structure of judicial review. To speak of a challenge to "a statute" may sound like a euphemistic way of describing a challenge to the action—or the "Act"—of the legislature in making it. But saying that the challenge is to the statute "as-applied" seems to suggest that the executive—who decided how to apply the statute—is somehow to blame.

When a statute is challenged "as-applied," who has allegedly violated the Constitution?

To say that a statute—or, in this case, an ordinance—violates the Constitution is not merely harmless euphemism. This formulation tends to perpetuate a misleading pathetic fallacy. Statutes and ordinances do not violate the Constitution any more than guns commit murder. Judicial review is not the review of statutes at large; judicial review is constitutional review of governmental *action*. See *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (referencing "courts of justice, whose duty it must be to declare all *acts* contrary to the manifest tenor of the Constitution void") (emphasis added); 1 Joseph Story, *Commentaries on the Constitution of the United States* § 542, at 405 (Melville M. Bigelow ed., William S. Hein 1994) (1833) ("[The judiciary faces] the constant necessity of scrutinizing the *acts* of [the other branches] . . . and the painful duty of pronouncing judgment, that these *acts* are a departure from the law or constitution . . . .") (emphasis added); see also *Nixon* v. *United States*, 506 U.S. 224, 238 (1993) ("[C]ourts possess power to review either legislative or executive *action* that transgresses identifiable textual limits.") (emphasis added); Alexander M. Bickel, *The Least Dangerous Branch* 1 (2d ed. 1986) ("The power which distinguishes the Supreme Court of the United States is that of constitutional review of *actions* of the other branches of government, federal and state.") (emphasis added). Government actors violate the Constitution. And the structure of judicial review—facial or as-applied—turns on which one committed the violation.

This is not a mere linguistic or grammatical point, but a deep structural implication of popular sovereignty, federalism, and separation of powers. Indeed, it is one of the principal structural differences between the United States Constitution and the government that the Framers left behind. As James Madison himself emphasized:

> In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate . . . . Hence . . . all the ramparts for protecting the rights of the people,—such as their Magna Charta, their bill of rights, &c., —are not reared against the Parliament, but against the royal prerogative.

James Madison, *Report on Virginia Resolutions* (1800), *reprinted in* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 569 (Jonathan Elliott ed., J.B. Lippincott & Co. 1876).

So in Great Britain, there was only one possible answer to the *who* question. But

> [i]n the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are

> secured against legislative as well as executive ambition.

Id. at 569.

Every government official is bound by the Constitution. "[United States] Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, [are] bound by Oath or Affirmation, to support th[e] Constitution . . . ." U.S. Const. art. VI, cl. 3. It binds them all, and any of them might violate it. Any branch of state or federal government could be the answer to the *who* question.

But—and this is the crucial point—*the Constitution restricts these different actors differently*. Some constitutional clauses restrict the actions of Congress; others restrict the actions of the President; still others restrict the actions of the judiciary; yet others restrict the actions of the corresponding branches of state governments. These restrictions differ in their subject matter from clause to clause. But even more important, they differ in their fundamental form. Each clause is carefully tailored, not only to its subject matter, but also to its *subject*—that is, to the governmental actor that it addresses and binds.

Chief Justice Marshall knew that the rights provisions of the Constitution, no less than the structural provisions, have specific *objects*—that they bind some government actors and not others. He emphasized that the *who* question is "of great importance," see *Barron* v. *Baltimore*, 32 U.S. 243, 247 (1833), and explained: "[The Constitution] organizes the gov-

ernment, . . . assigns, to different departments, their respective powers . . . [and] establish[es] certain limits not to be transcended by those departments . . . . [T]hose limits . . . confine *the persons on whom they are imposed*." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added).

In short, different clauses apply to different government actors. As Chief Justice Marshall knew, this is a fundamental structural feature of our Constitution, reflecting the Framers' deep insight that each branch and level of government poses different and distinct threats to individual liberty. And it is essential to identify the constitutional culprit, because judicial review of a legislative act is entirely different—formally, structurally, temporally different—from judicial review of an executive act.

And this is the heart of the distinction between facial and as-applied challenges. So, to determine whether a facial challenge is permissible under the Fourth Amendment, one need only determine who is bound by that Amendment. Because the Fourth Amendment restricts the paradigmatically *executive* actions of searching and seizing, a Fourth Amendment challenge is always and inherently as-applied.

II. THE FOURTH AMENDMENT WAS NOT VIOLATED WHEN LOS ANGELES PASSED ITS ORDINANCE; IT IS VIOLATED, IF AT ALL, WHEN AN OFFICER EXECUTES A PARTICULAR UNREASONABLE SEARCH

A violation of the Constitution is an *event*. It has a beginning and an end. There is a span of time before the constitutional violation. There is a span of time after the violation. And there is a moment when

the action that violates the Constitution actually happens. This is the *when* of constitutional violation. *Every constitutional violation must be located in time.*

The answer to the *when* question follows directly from the answer to the *who* question. Consider, for example, typical circumstances in which a legislature has made a law and the executive has executed it. Two governmental actors have acted, so there are two potential constitutional culprits. The legislature may have violated the Constitution by enacting the law, or the executive may have violated the Constitution by executing it. To know *when*, it is necessary to know *who*.

It may be that the legislature violated the Constitution, simply by enacting the statute. If so, it must be that the moment of violation was *when the legislature made the law*. This is true as a matter of simple temporal logic. Per the arrow of time, the legislature could not have violated the Constitution *before* it made the law at issue. Nor could it somehow have violated the Constitution *after* it made the law. To be sure, after the law is made, it may go on to have pernicious *effects*—particularly when it is executed—and those effects may require remedy. See *The Federalist No. 50*, at 315 (James Madison) (Clinton Rossiter ed., 2003) (distinguishing between legislative "abuses"—"breaking through the restraints of the Constitution"—and the subsequent "mischievous effects" of such abuses). But by then, the legislature may be an entirely different body. The legislators who made the law at issue may have long since retired, or passed away. It makes no sense to say that *they* violated their oaths and violated the Constitu-

tion *at the moment of enforcement*, from their beds, or their graves. Nor does it make any sense to say that the *new* legislature, as constituted at the moment of *enforcement*, somehow violated their oaths and violated the Constitution, even though these new legislators had nothing to do with *either* the enactment *or* the enforcement of the statute. It must be, then, that if the legislature violated the Constitution, then it did so *at the moment when it made the law*. Euphemistically, "the *Act* of Congress *violates* the Constitution," but to be precise, "the *act* of Congress *violated* the Constitution" in the past, on the day that Congress made the law.

By contrast, if the executive has violated the Constitution, he presumably violated the Constitution at the moment when he executed the statute. In the paradigmatic case, this might be the moment when a police officer executes an unreasonable and unwarranted search. See U.S. Const. amend. IV; *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("[A] violation of the [Fourth] Amendment is 'fully accomplished' at the time of an unreasonable government intrusion."); *United States* v. *Leon*, 468 U.S. 897, 906 (1984) ("The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself . . . .").

If a legislature has violated the Constitution *by making a law*, it should never be the case that "the courts would benefit from further factual development of the issues." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998). Post-enactment facts should never matter to the merits of such a claim, because the constitutional violation is already complete. A pre-enforcement challenge to a legislative

action is anticipatory, in the limited sense that it is anticipating and attempting to prevent the harm of *enforcement*; but it does not anticipate the constitutional *violation*, because the violation is already complete.

By contrast, if the challenge is properly framed as a challenge to executive action—as in the Fourth Amendment context—then the constitutional violation is not consummated until the moment of execution. In this case, the merits of such a challenge will turn, crucially, on the facts of execution, because *those facts will themselves constitute the alleged violation*. Here, any pre-enforcement challenge is probably premature, precisely because "the courts would benefit from further factual development of the issues." *Id.* And here it may truly be said that the case involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). A pre-enforcement challenge to an executive action—such as an allegedly unreasonable search—is anticipatory in a far deeper sense. *Here, such a challenge actually precedes the constitutional violation itself.*

A Fourth Amendment challenge is always and inherently a challenge to executive action. An executive official must be the answer to the *who* question. The Fourth Amendment secures "one's privacy against arbitrary intrusion *by the police*." *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949), overruled on other grounds by *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (emphasis added). And so, the answer to the *when* question must be: when the officer executed an unreasonable search. "Courts . . . generally review such chal-

lenges in . . . post-enforcement settings . . . look[ing] at the claim in the context of an actual, not a hypothetical, search and in the context of a developed factual record of the reasons for and the nature of the search." *Warshak* v. *United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc) (Sutton, J.) (emphasis omitted). The Fourth Amendment binds executive officials and it is violated only at the moment when they execute an unreasonable search. Thus, as explained in Part IV, a Fourth Amendment challenge must always be "as-applied."

III. FACIAL CHALLENGES ARE CHALLENGES TO LEGISLATIVE ACTION; AS-APPLIED CHALLENGES ARE CHALLENGES TO EXECUTIVE ACTION

The legislative branch and the executive branch act in entirely different ways. The constitutional provisions that bind them are different. And the structure of judicial review must reflect these fundamental differences. Judicial review of a legislative act is entirely different—formally, structurally, temporally different—from judicial review of an executive act.

This Court has rightly made clear that there are two primary forms of judicial review. This Court has called these two distinct forms of judicial review "facial challenges" and "as-applied challenges." The Court is quite right that this distinction is of great importance, but the terms themselves have proven misleading, and they have, unfortunately, confused courts and scholars alike.

What a careful reading of this Court's cases reveals is that the true distinction is at once simple

and fundamental. It is nothing other than the fundamental difference between judicial review of *legislative* action and judicial review of *executive* action. The line that this Court has implicitly drawn is actually based on *who* has allegedly violated the Constitution.

A. The Development of the Doctrine

This Court first used the exact phrases "facial challenge" and "as-applied challenge" in the 1970s. It is instructive to trace the evolution of these terms.

As noted above, courts have historically tended to eschew straightforward holdings that "Congress has violated the Constitution" or "the President has violated the Constitution," adopting instead the pathetic fallacy that "the statute violates the Constitution." This usage may have been harmless at first—a well-understood euphemism for "Congress violated the Constitution by making this law." But the euphemism took on a life of its own, and the result has been a certain confusion about the two basic forms of judicial review.

The first step, harmless in itself, was that the euphemistic formulation crept backwards into descriptions of the pleadings, which, it is now said, pose constitutional "challenges," not to "actions of Congress" or "actions of the legislature," but to "statutes" and "ordinances" themselves. This usage, which is so familiar today, was unknown to the Court for its first century.

Justice Brewer was the first Supreme Court Justice to write of a "challenge" to a "law" or a "statute," in 1892, *United States* v. *Ballin*, 144 U.S. 1, 9 (1892) (Brewer, J.) ("[T]he law, as found in the office of the

secretary of state, is beyond challenge."), early in his tenure, and he used that formulation repeatedly in his two decades on the Court. See, e.g., *South Dakota* v. *North Carolina*, 192 U.S. 286, 309 (1904); *Beals* v. *Cone*, 188 U.S. 184, 188 (1903). But his colleagues resisted this imprecise formulation, realizing that the Constitution restricts governmental *action*, and that judicial review is the review of actions, not statutes. See, e.g., *Cunnius* v. *Reading Sch. Dist.*, 198 U.S. 458, 468 (1905) (White, J.) ("It will be observed that the propositions *challenge the authority of the state to enact the statute* which formed the basis of the proceedings . . . .") (emphasis added).

Strikingly, not once in Justice Brewer's two decades on the Court did any other Justice independently refer to a "challenge" to a "law" or "statute." Not until 1912, two years after Justice Brewer's death, did another Justice employ Justice Brewer's imprecise phrase. See *Standard Stock Food Co.* v. *Wright*, 225 U.S. 540, 548 (1912) (Hughes, J.) ("The appellant challenges the constitutional validity of the statute . . . .").

While Justice Brewer's euphemistic imprecision may have been harmless at first, it has ultimately fostered deep analytical confusion about the two distinct types of judicial review.

In the following decades, the Court gradually began to elucidate the two primary forms of judicial review—but its development of this idea happened in the shadow of Justice Brewer's unfortunate euphemism. In Justice Brewer's formulation, judicial review entails constitutional "challenges" to "statutes." And so, this Court chose to describe the two basic types of judicial review as "facial challenges to stat-

utes" and "as-applied challenges to statutes." The phrase "facial challenge" first appeared in an opinion of this Court in 1971, see *Lemon* v. *Kurtzman*, 403 U.S. 602, 665 (1971) (White, J., concurring in judgment) ("Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment . . . ."). The phrase "as-applied challenge" first appeared in an opinion of this Court in 1974, in contradistinction to the phrase "facial challenge," see *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974) ("[T]he 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks.").

Unfortunately, both of these terms are malapropisms, and, for this reason, the distinction between them has remained opaque. Under current doctrine, an "as-applied challenge" is somehow narrower, turning on the challenger's specific facts and implying a remedy tailored to those facts. A "facial challenge" is broader and more general, implying, somehow, that the statute is rotten to the core, and perhaps suggesting a sweeping remedial declaration that the statute is "void." But when is the former appropriate and when the latter? Indeed, what exactly do these terms—"facial" and "as-applied"—even mean?

This Court has not been entirely explicit about the distinction, but what a careful reading of the cases reveals is that the ultimate answer to this doctrinal riddle is at once simple and fundamental. It simply turns on *who* has allegedly violated the Constitution.

B. Facial Challenges Are Challenges To Legislative Action

As discussed, in some circumstances, legislatures can violate the Constitution. For example, some clauses of the Constitution are written in the active voice, with "Congress" as their only subject; at least if one of these clauses is at issue, then Congress must be the answer to the *who* question. And if the answer to *who* is Congress, then the answer to *when* must be *when Congress made the law*.

But at the moment of the law's making, there has been no enforcement, and there are no facts about the application of the statute. At that moment, there is only the text of the statute and the text of the Constitution. And so, if Congress has violated the Constitution at that moment, *the violation must inhere in the text of the statute itself*. It must be theoretically possible, at that moment, "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." *United States* v. *Butler*, 297 U.S. 1, 62 (1936).

To take a simple example, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. On July 14, 1798, despite the First Amendment, Congress made just such a law: the Sedition Act of 1798. The simple point here is that *Congress* violated the First Amendment. And the violation occurred *on July 14, 1798*, the day that it made this law. See *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 273–76 (1964). The *who* was *Congress*. The *when* was *the moment of en-*

actment. And thus, inevitably, the *how* was visible *on the face of the statute.*

Thus, the answer to the *who* question dictates the structure of judicial review. *A challenge to an action (or "Act") of Congress must be "facial."* It makes no sense to speak of "as-applied" challenges to legislative actions, because the challenged action is complete before the application begins. See *Hacienda Valley Mobile Estates* v. *City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) ("a facial challenge by its nature does not involve a decision applying the statute or regulation"). "In a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant." *Ezell* v. *City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (citing Rosenkranz, *Subjects* 1238).

Thomas Jefferson understood all this, which is why he later pardoned everyone convicted under the Sedition Act, *regardless of what exactly they had written*: "I discharged *every person* under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be *a nullity* . . . ." Letter from Thomas Jefferson to Mrs. Adams (July 22, 1804), *in* 4 *The Writings of Thomas Jefferson* 555, 555–56 (H.A. Washington ed., 1854) (emphasis added).

Because Congress is the subject of the clause, the inquiry is inherently facial, and individual facts cannot matter; no one can rightly be prosecuted under such a "law."

Or, to take another example, consider this Court's recent Commerce Clause jurisprudence. This Court

has emphasized that it generally considers facial challenges to be a "disfavored" exception to the rule. See *Wash. State Grange* v. *Wash. State Republican Party,* 552 U.S. 442, 450 (2008); see also *Gonzalez* v. *Carhart*, 550 U.S. 124, 168 (2007) (Thomas, J., concurring) (as-applied challenges are the "building blocks" of constitutional adjudication). But in the Commerce Clause context, the opposite appears to be true. *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), were both apparently facial challenges. See *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005) ("[I]n both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety."). But no Justice objected on that ground or purported to apply the "no set of circumstances" test. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). To the contrary, in the next case, the Court seemed to disfavor Ms. Raich's claim precisely because it, unlike *Lopez* and *Morrision*, was "as-applied." See *Raich*, 545 U.S. at 8; see also *Perez* v. *United States*, 402 U.S 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise as trivial, individual instances of the class.") (internal quotation marks omitted) (emphasis omitted). As Justice Scalia explains: "[w]hen . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional on its face." *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (emphasis omitted).

At first glance, this may seem like a doctrinal anomaly, but once one focuses on the *who* question, it

is easy to see that this is not anomalous at all. A Commerce Clause challenge is inherently a challenge to *legislative* action—a claim that *Congress* exceeded its legislative power. The answer to *who* is Congress. The answer to *when* is when Congress made the law. So any violation must be visible on the face of the statute, *lex ipsa loquitur*, and subsequent facts do not alter the inquiry. *Raich*, 545 U.S. at 29 n.38 ("California's decision (made 34 years after the [Controlled Substances Act] was enacted) to impose strict controls on the cultivation and possession of marijuana for medical purposes cannot retroactively divest Congress of its authority under the Commerce Clause.") (citation omitted). A claim that Congress violated the Constitution by making a law, when it made the law, is inherently a facial challenge. Again:

> When *an act of Congress* is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

Butler, 297 U.S. at 62 (emphasis added).

This is the core concept of a "facial challenge." The notion of a challenge to a statute—or an ordinance—is a deceptive euphemism; the challenge is to the *action* of a governmental actor. And a "facial challenge," in particular, is a challenge to the action of a *legislature*. But the key word, "facial," points in the right direction. These challenges are "facial" in the important sense that, under these circumstances,

the constitutional violation must be visible on the *face* of the statute. If a legislature has violated the Constitution by making an impermissible law, then it has violated the Constitution at the moment of making the law. And so, it must be possible to identify a constitutional flaw on the face of the statute itself. Thus, *a "facial challenge" is nothing more nor less than a claim that a legislature has violated the Constitution*.[4]

In short, facial challenges are to constitutional law what res ipsa loquitur is to facts—in a facial challenge, *lex ipsa loquitur*: the law speaks for itself.

C. "As-Applied" Challenges Are Challenges To Executive Action

This Court disfavors "facial challenges to statutes" and prefers "as-applied challenges to statutes." See *Wash. State Grange,* 552 U.S. at 450. But this latter phrase is also a bit of a malapropism. Again, the foundational error, born of euphemistic usage, is the suggestion that the statute, rather than the action of a governmental actor, has violated the Constitution. But, here, the error is compounded by the odd suggestion that the challenge is to the statute "as-applied." This phrase, more than any other, has engendered profound confusion about the *who* of judicial review. If someone "challenges a statute as-applied," whom does he allege to have violated the Constitution?

As discussed above, if a legislature has violated the Constitution by making a law, then the violation

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[4] Petitioner makes a version of this point. See Pet'r's Br. 26 (citing Rosenkranz, *Subjects* 1239–41).

occurred at the moment of the making of the law, and it should be possible to identify the violation at that moment, on the face of the statute. This is the idea that the Court has been alluding to with its doctrine of "facial challenges."

But, as this Court has made clear, that will be the more unusual case. See *Salerno*, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). More often the clause at issue will bind executive officials, like police officers, and so they will be the answer to the *who* question. They will have violated the Constitution, *in the application of the law*. And the answer to the *when* question follows: the violation will have occurred *at the moment of execution*.

For example, "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement[.]" *Brendlin* v. *California*, 551 U.S. 249, 254 (2007). See also *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 450 (1990) ("a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."). In this context, the violation will *not* be visible on the face of a statute. Indeed, *the act of the legislature will not itself be a constitutional violation*. "Congress did not violate the Constitution when it passed the law, but the Executive Branch might violate the Constitution in individual circumstances depending on how the law is applied." *Diop* v. *ICE/Homeland Security*, 656 F.3d 221, 232 n.10 (3d Cir. 2011) (citing

Rosenkranz, *Subjects* 1230–35). Here, unlike in a "facial challenge," the facts of execution *will* be relevant to an assessment of the merits—indeed, here, those facts will *be* the constitutional violation.

This is what is properly meant by an "as-applied challenge to a statute." In these cases, it is the *application* of the statute that violates the Constitution. These challenges should perhaps be called "as-executed challenges" or, better, simply "execution challenges," to gesture more clearly toward executive officials. If the execution of a statute is unconstitutional (because, for example, it involves an unreasonable search), then it is the executive who has violated the Constitution.

In short, the most common form of judicial review—the kind that the Court has called "as-applied challenges to statutes"—is not the review of actions (or "Acts") of Congress at all. See 1 Norman J. Singer, *Statutes and Statutory Construction* § 2:6, at 44 (6th ed. 2002) ("Sometimes it is said of a statute which is not void 'on its face' that it nevertheless is invalid as applied. This is a malapropism, however, for a provision which is only invalid as applied in the facts of a particular case is possibly capable of valid application in another fact situation. In reality, it is only the implementing action which purports to apply the legislation and not the provision itself which is invalid in such cases.") (citations omitted). This most common form of judicial review is nothing other than constitutional review of *executive* action. Just as "facial challenges" are challenges to actions (or "Acts") of legislatures, "as-applied challenges" are challenges to actions of executive officials.

IV. FOURTH AMENDMENT CHALLENGES ARE CHALLENGES TO EXECUTIVE ACTION, AND SO THEY ARE INHERENTLY "AS-APPLIED"

The Fourth Amendment, like most of the Bill of Rights, is written in the passive voice, so it does not specify who may violate it. But text and structure strongly suggest that the Fourth Amendment is concerned with executive and judicial actions rather than legislative actions.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The first clause of the Amendment prohibits the executive act of unreasonable *searching*, not the act of *authorizing unreasonable searches*. As the Court has said, "[t]he wrong condemned by the [Fourth] Amendment is 'fully accomplished' *by the unlawful search or seizure itself*." *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (emphasis added). And the second, Warrants Clause of the Amendment, which *is* concerned with the authorizing of searches, is directed not at Congress but at the Judiciary.

Another way to see the point is to compare the Fourth Amendment with the many constitutional provisions that *do* concern legislative action. Actions

associated with Congress are, by their nature, legislative. When Congress is the subject, the predicates are generally "legislative" predicates—"make law," synonyms for "make law," or jurisdictional actions that can be fully accomplished by the making of a law. This is true of provisions that empower Congress, like Article I, Section 8 ("Congress shall have Power . . . [t]o *make* all *Laws* which shall be necessary and proper[,]" U.S. Const. art. I, § 8, cls. 1, 18 (emphasis added)) and it is true of provisions that restrict Congress, like the First Amendment ("Congress shall *make* no *law*[,]" *id.* amend. I (emphasis added)). And the same principle applies in the passive voice. The Ex Post Facto Clause, for example, is written in the passive voice, with no explicit answer to the *who* question. But the legislative nature of the subjects and verb answers the question: "No *Bill* of Attainder or ex post facto *Law* shall be *passed*." *Id.* art. I, § 9, cl. 3 (emphasis added). This provision, like the First Amendment, is a restriction on Congress. See, e.g., *Marks* v. *United States*, 430 U.S. 188, 191 (1977) ("The Ex Post Facto Clause is a limitation upon the powers of the Legislature[.]")

But the first clause of the Fourth Amendment does not read like a legislative prohibition. It does not follow the active-voice, First Amendment model; it does not say: "Congress shall make no law authorizing unreasonable searches and seizures." And it does not follow the passive-voice, Ex Post Facto Clause model; it does not say: "No law authorizing unreasonable searches and seizures shall be passed." The First Amendment is violated by making a law. The Ex Post Facto Clause is violated by passing a law. By contrast, the Fourth Amendment is not violated by making a law; it is violated by *executing an*

unreasonable search or seizure. Searches and seizures are paradigmatic executive actions. See *United States* v. *Grubbs*, 547 U.S. 90, 98 (2006) (referring to searches as "exercise[s] of executive power"). A legislature might purport to *authorize* a Fourth Amendment violation, but it cannot actually *commit* a Fourth Amendment violation. See *United States* v. *Karo*, 468 U.S. 705, 712 (1984) (Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches[.]"). "The [Fourth] Amendment has always prohibited specific [executive] government conduct—'unreasonable searches and seizures'—not legislation that could potentially permit such conduct." *Patel* v. *City of Los Angeles*, 738 F.3d 1058, 1066 (9th Cir. 2013) (Tallman, J., dissenting).

To put the point another way, one can identify the object of a provision of the Bill of Rights by identifying the corresponding constitutional *power* that is limited by the provision. The Fourth Amendment is not a gloss on Article I, like the First Amendment; it is, rather, a gloss on the Take Care Clause of Article II: "[The President] shall take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. If Congress criminalizes certain conduct, the President might have believed that faithful execution of such a statute requires indiscriminate searches to root out the forbidden conduct. But the Fourth Amendment glosses the adverb "faithfully," forbidding the President from taking this approach. In other words, the Fourth Amendment is not an *absolute* prohibition on *legislative* action, like the First Amendment. It is, instead, a *conditional, judicial* check on *executive* action. See, e.g., *McDonald* v. *United States*, 335 U.S. 451, 453 (1948) (The Fourth Amendment "stays the

hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation."). In this sense, the Fourth Amendment—like much of the Bill of Rights, see generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (2000), including the Due Process Clause, see *United States* v. *Jones*, 689 F.3d 696, 703 (7th Cir. 2012) (citing Rosenkranz, *Objects* 1041–43)—is a separation of powers provision. The Fourth Amendment is a calibration of executive and judicial power; it does not concern legislative power.

If the first clause of the Fourth Amendment were to be read non-literally, to bind Congress, it would presumably mean something like: "No unreasonable searches or seizures shall be *authorized*." But this non-literal interpretation would run headlong into the second half of the Fourth Amendment, which *is* expressly about authorizing searches, via warrant. Reading the two clauses together, it is clear that the first concerns the actual executive acts of *searching* and *seizing*, while the second concerns the *authorizing* of searches and seizures. For the first clause of the Fourth Amendment, the answer to the *by whom* question is the executive. An action—or act—of a legislature cannot violate this clause, because the legislature is not the object of the clause. Only the executive can violate the Searches and Seizures Clause.

If the executive is the answer to the *who* question, then the answer to the *when* question must be *when an executive officer searches or seizes*. A facial challenge to a statute or ordinance is untenable under this clause, for the simple reason that the clause has nothing to do with actions of legislatures.

And so, there is a fundamental structural difference between challenges to *executive* action (for example, a claim that an executive violated the Fourth Amendment by executing a search) and challenges to *legislative* action (for example, a claim that Congress violated the First Amendment by making a law). As discussed above, Thomas Jefferson realized that the merits of a First Amendment challenge to, for example, the Sedition Act should turn not at all on what any particular defendant actually wrote. The constitutional violation was complete on July 14, 1798, when Congress made the Sedition Act, before any defendant took pen to paper. In that case, the challenge is "facial" and *lex ipsa loquitur*—the enforcement facts are irrelevant and the law speaks for itself.

But in the Fourth Amendment context, the reverse is true: the statute or ordinance matters little if at all, while the enforcement facts are crucial. The ordinance does not much matter to the merits, because an unreasonable search would be a Fourth Amendment violation with or without it. But the litigation will very much turn on the defendant's specific facts—what exactly was searched, and when, and where. Here the enforcement facts do not postdate the constitutional violation; here the enforcement facts *are* the constitutional violation.

This Court has made all of these points in various cases, and its Fourth Amendment doctrine is almost entirely consistent with this analysis. So, for example, this Court was quite right to hold that "the Fourth Amendment[] protect[s] against unreasonable searches and seizures *by federal agents*." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 (1971) (emphasis added).

See also *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949) (The Fourth Amendment secures "one's privacy against arbitrary intrusion *by the police*.") (emphasis added), overruled on other grounds by *Mapp* v. *Ohio*, 367 U.S. 643 (1961). This is the correct answer to the *who* question. And it was quite right to hold that "[t]he wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself." *Leon*, 468 U.S. at 906; cf. *Byars* v. *United States*, 273 U.S. 28, 33 (1927) (holding the character of a search is determined at the moment of execution, rather than at the moment when resulting evidence is introduced). This is the correct answer to the *when* question. Thus, the Court generally and quite rightly insists on a fact-specific, "as-applied" approach to the merits, focusing on the execution of the search itself, rather than an abstract, "facial" approach, focused on an authorizing statute:

> The parties . . . have urged that the principal issue before us is the constitutionality of [an authorizing statute] "on its face." We decline . . . to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of [the statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case.

Sibron v. *New York*, 392 U.S. 40, 59 (1968). See also *Dow Chem Co.* v. *United States*, 476 U.S. 227, 239 n.5 (1986) ("Fourth Amendement cases must be decided on the facts of each case, not by extravagant generalizations."); *Karo*, 468 U.S. at 712 (Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches.").

All this is exactly right.

When viewed through this lens, it becomes clear that some of the language in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), is anomalous and inconsistent with the general and sound practice of this Court. It is not quite right to say, as the Court did in that case, that the "*Act* [of Congress] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent." 436 U.S. at 325 (emphasis added). The act of Congress did not violate the Fourth Amendment; the act of executive officers did. *Congress* cannot violate this clause by *authorizing* a search; only the *President* can violate it, and only by *executing* a search. Cf. *Illinois* v. *Krull*, 480 U.S. 340, 351 (1987) ("There is no evidence suggesting that Congress . . . [has] enacted a significant number of statutes *permitting* warrantless administrative *searches violative* of the Fourth Amendment.") (emphasis added). A statute might purport to "*permit[]*" an unconstitutional search, but it is the search itself, not the statute, that is "violative of the Fourth Amendment."

Happily, this exceptional case proves the rule; *Marshall* v. *Barlow's, Inc.* is *the only case in the Court's history* that has purported to strike down an action (or "Act") of Congress under the Fourth

Amendment.[5] See Cong. Research Serv., The Constitution of the United States of America: Analysis And Interpretation 1375–76, 1387–89, 2138 (2014 Supp.), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014.pdf. And the handful of cases that speak loosely of challenges to state "statutes"—rather than challenges to particular executive action—are nevertheless best read as "as-applied" challenges. See *Warshak*, 532 F.3d 521, 531 (6th Cir. 2008) (en banc) (Sutton, J.) ("[I]n these cases, too, the Court reviewed applications of statutes in concrete settings—motions to suppress that sought to prevent the information obtained in a search from being used against the defendant.") (citing *Payton* v. *New York*, 445 U.S. 573, 576–79, 589–90 (1980); *Torres* v. *Puerto Rico*, 442 U.S. 465, 467, 474 (1979)).

It is executive officials who violate the first clause of the Fourth Amendment, by executing an unreasonable search. See, e.g., *Bivens*, 403 U.S. at 391 (elaborating the "Fourth Amendment's protection against unreasonable searches and seizures *by federal agents*") (emphasis added); *Wolf,* 338 U.S. at 27 (The Fourth Amendment secures "one's privacy against arbitrary intrusion *by the police*.") (emphasis added). An action—or "Act"—of a legislature cannot violate the Search and Seizures Clause; only an executive action can.

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[5] The only other possible example appears to be *Boyd* v. *United States*, 116 U.S. 616 (1886), but that case—no model of clarity—expressly conflates the Fourth and Fifth Amendments, and it does not clearly state which one forbade the making of the law at issue. See 116 U.S. at 630 ("[T]he Fourth and Fifth Amendments run almost into each other.").

This is why it is impossible to adjudicate a Fourth Amendment case when no actual search or seizure is before the Court. A constitutional claim under the first clause of the Fourth Amendment is never a "facial" challenge, because it is always and inherently a challenge to executive action.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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