No. 14-770

In the
Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF CONSTITUTIONAL LAW AND FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

EDWARD A. HARTNETT
SETON HALL UNIVERSITY
SCHOOL OF LAW
One Newark Center
Newark, NJ 07102
(973) 642-8842
edward.hartnett@shu.edu

ERIK R. ZIMMERMAN
Counsel of Record
ROBINSON, BRADSHAW &
HINSON, P.A.
1450 Raleigh Road
Suite 100
Chapel Hill, NC 27517
(919) 328-8826
ezimmerman@rbh.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write in the fields of constitutional law and federal courts, and they have an interest in the sound development of the law in those fields.

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law.

Edward A. Hartnett is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall University School of Law.

SUMMARY OF ARGUMENT

This Court's decision in *United States v. Klein*, 80 U.S. 128 (1872), has long puzzled scholars. It has been described as "confusing,"[2] "rais[ing] more questions than it answers,"[3] and even "sufficiently impenetrable that calling it opaque is a compliment."[4]

---

[1] Pursuant to this Court's Rule 37.3(a), *amici* state that this brief has been filed with the written consent of all parties, which have filed blanket consents to *amicus curiae* briefs with the Clerk of Court. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1193.

[3] Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 323 (7th ed. 2015).

[4] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 Geo. L.J. 1, 34 (2002).

As the late Professor Daniel J. Meltzer observed, "[m]uch that is said in the opinion is exaggerated if not dead wrong."[5]

Worse, the opinion in *Klein* is sufficiently delphic that some courts and scholars have developed "an uncritical devotion which resembles a cult of the *Klein* case," and which draws on the decision as a "source of principles protecting the judiciary from the other branches," often by stretching the opinion "extraordinarily beyond its facts."[6]

This case provides the Court with the happy opportunity to clarify *Klein* and strip the cult of some of its more dangerous tools. The Court should do so by confirming that—as scholars widely agree—*Klein* stands for the principle that Congress cannot prescribe an unconstitutional rule of decision. And the Court should disavow once and for all the broader interpretations of *Klein* advanced by petitioner and its *amici*.

The Court should also reject the alternative argument of petitioner and its *amici* that the Constitution prohibits Congress from legislating with respect to a single case. This supposed separation-of-powers principle cannot be squared with the Constitution's text, Congress's historical exercise of its legislative powers, or this Court's decisions. Like the many misunderstandings of *Klein* that have flourished over the past century and a half, this mistaken view of the separation of powers should also be laid to rest.

---

[5] Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2549 (1998).

[6] Young, *supra*, at 1195.

ARGUMENT

I. *United States v. Klein* is correctly understood to prohibit statutes that prescribe unconstitutional rules of decision.

Any sound understanding of *Klein*'s precedential effect should satisfy two basic requirements. First, the principle that is purported to be the holding of the case should explain the result in *Klein* itself. Second, that principle should be consistent with the remainder of this Court's jurisprudence.

The reason for the first requirement is obvious: A principle that does not explain the result in *Klein* cannot be the holding, and thus cannot have *stare decisis* effect. The reason for the second requirement is equally clear: If a principle is at odds with wide swaths of this Court's decisions, then that principle is a dead letter, and it makes no difference whether *Klein* purported to hold it or not.

Adopting a theory of *Klein* that fails to satisfy both criteria would have disturbing consequences. If *Klein* were misunderstood to rest on a principle that did not explain the outcome, it would also be misunderstood to reflect a binding application of that principle to the statute that was before the Court in *Klein*. The result would be to expand the precedential force of the decision beyond its proper bounds—and ultimately to rule that statutes are unconstitutional under *Klein*, even when *Klein* itself would not have viewed those statutes as unconstitutional. It would similarly contradict bedrock values of *stare decisis* and the consistent development of the law to invoke *Klein*, nearly 150 years after it was decided, to rule that a statute is invalid based on a principle

that the Court has squarely repudiated in numerous other cases in the meantime.

It follows from this framework that *Klein* should be understood to hold that Congress cannot prescribe an unconstitutional rule of decision. Although the decision is enigmatic, scholars broadly agree that the decision *at least* held that Congress exceeds its authority when it attempts to decree a result that would violate a principle of constitutional law.[7] That

---

[7] *See, e.g.*, Meltzer, *supra*, at 2549 ("[*Klein*] stand[s] for something general and important—that whatever the breadth of Congress's power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally."); Erwin Chemerinsky, Federal Jurisdiction § 3.2, at 193 (6th ed. 2012) (describing the understanding of many scholars that *Klein* "establishes only that Congress may not restrict Supreme Court jurisdiction in a manner that violates other constitutional provisions"); Fallon et al., *supra*, at 298 ("[*Klein*] may be best read as resting on distinctive substantive grounds—that the measure required courts to render decisions that conflicted with the President's power to pardon."); Frederic M. Bloom, *Unconstitutional Courses*, 83 Wash. U. L.Q. 1679, 1721 (2005) ("At its core, *Klein* teaches that Congress may not demand that federal courts reach unconstitutional decisions," and "federal courts should never be put in the position of reaching or validating unconstitutional outcomes." (internal quotation marks omitted)); Edward A. Hartnett, *Congress Clears Its Throat*, 22 Const. Comment. 553, 580 (2005) (similar); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 586 (2003) ("Perhaps the best understanding of *Klein*'s rule of judicial independence is that Congress cannot legislate so as to require courts to act unconstitutionally . . . ."); Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in Federal Courts Stories 87, 109 (Vicki C. Jackson & Judith Resnik eds., 2009) (*Klein* holds that Congress cannot "compel the courts to enforce an unconstitutional law or . . . be 'instrumental to that end'" (quoting 80 U.S. at 148)).

understanding both explains the result in *Klein* and conforms to this Court's decisions, including its deeply rooted precedent concerning judicial review. Moreover, when *Klein* is read in light of background principles that were well known at the time but are less familiar today, the no-unconstitutional-rules-of-decision approach can also solve some riddles about the decision, including the structure of the opinion.

In contrast, the interpretations of *Klein* proposed by petitioner and its *amici* each fail to satisfy at least one of the necessary elements of a sound understanding of the decision. Petitioner's reading—that "Congress may not dictate the outcome of a pending case" (Pet. Br. 43)—fails the second requirement because it conflicts with numerous decisions of this Court. And in attempting to satisfy the second requirement, the reading proposed by petitioner's *amici*—that Congress cannot direct the outcome of a pending case unless it purports to amend the underlying law (*Amici* Br. 4-10)—runs headlong into the first. Congress did purport to amend the underlying law in the statute at issue in *Klein*, and the principle advocated by petitioner's *amici* therefore cannot explain the outcome of the case.

A. *Klein* held that Congress lacks authority to prescribe unconstitutional rules of decision.

1. *Klein* involved a claim for compensation in the Court of Claims in the wake of the Civil War. Union officers had seized and sold Victor Wilson's cotton after the fall of Vicksburg.[8] By statute, the owner of seized property could recover the proceeds of its sale in the Court of Claims "on proof . . . of his ownership

[8] Young, *supra*, at 1192, 1198.

. . . and that he ha[d] never given any aid or comfort to the present rebellion." Act of Mar. 12, 1863, ch. 120, § 3, 12 Stat. 820, 820 ("1863 statute"). John Klein, as the administrator of Wilson's estate, sought relief under this statute.[9]

Wilson had been a surety on the bonds of two Confederate officers.[10] In *United States v. Padelford*, 76 U.S. 531 (1870), the Supreme Court held that such a suretyship constituted "aid and comfort to the rebellion within the meaning of" the 1863 statute. *Id.* at 539. Both Wilson and Padelford, however, had been pardoned by President Lincoln in accordance with the presidential proclamation of December 8, 1863. *Klein*, 80 U.S. at 131-32. Upon taking an oath of allegiance, that proclamation granted to a wide range of rebels "a full pardon . . . with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened." Proclamation No. 11, 13 Stat. 737, 737 (Dec. 8, 1863). Although *Padelford* understood suretyship as giving comfort to the rebellion, it also held that the recipient of a presidential pardon—at least one who took the required oath prior to the seizure of his property—"was purged of whatever offence against the laws of the United States he had committed . . . and relieved from any penalty which he might have incurred." 76 U.S. at 543.

Consistent with *Padelford*, the Court of Claims held in *Klein* that Wilson's estate was entitled to recover. The government then appealed to the Supreme Court. *Klein*, 80 U.S. at 143. While the appeal was pending, Congress attempted to change the ef-

---

[9] Young, *supra*, at 1192.

[10] *Id.* at 1199.

fect of a presidential pardon by attaching a rider to an appropriations bill. *See id.* The rider made a pardon inadmissible in the Court of Claims to prove loyalty, made acceptance of a pardon (without protesting innocence) conclusive evidence of *disloyalty*, and provided that the Supreme Court, in cases in which the Court of Claims had already decided in favor of the claimant based on a pardon, "shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 ("1870 statute").

2. Invoking the 1870 statute, the government moved to remand *Klein* to the Court of Claims with instructions to dismiss. 80 U.S. at 134. This Court rejected that request. It held that the statute was unconstitutional, denied the government's motion, and affirmed the judgment of the Court of Claims granting recovery to Klein. *Id.* at 145-48.

Chief Justice Chase's opinion for the Court first analyzed "the rights of property, as affected by the late civil war, in the hands of citizens engaged in hostilities against the United States." 80 U.S. at 136. The Court concluded that, as a statutory matter, the seizure of rebel property did not divest the owners of their title to the proceeds from that property. *Id.* at 138. Instead, the government held the property as "trustee" for any owners who made the showing of loyalty required by the 1863 statute. *Id. Padelford* had already held that a pardon was sufficient evidence of loyalty to satisfy the statute, and *Klein* held that the effect of Wilson's pardon was thus to give him an "absolute right" to the "restoration of the proceeds" from his property. *Id.* at 142.

The Court then held that the 1870 statute, which ostensibly nullified Wilson's right to recover by re-

quiring the Court to dismiss, was unconstitutional. It explained that the statute withdrew the Court's jurisdiction "as a means to an end," and that its "great and controlling purpose [was] to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. The statute was not, therefore, "an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* at 146. The Court also explained that it could not dismiss the case "without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* As a result, "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

The Court next concluded that "[t]he rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." 80 U.S. at 147. "[T]he legislature cannot," the Court explained, "change the effect of . . . a pardon any more than the executive can change a law," but "this [was] attempted by the provision under consideration." *Id.* at 148. In the Court's view, a pardon "includes amnesty" and "blots out the offence pardoned and removes all its penal consequences." *Id.* at 147. Congress, however, had attempted to deny pardons "their legal effect" by requiring the Court "to receive special pardons as evidence of guilt and to treat them as null and void." *Id.* at 148. The statute therefore "impair[ed] the executive authority and direct[ed] the court to be instrumental to that end." *Id.*

Justice Miller dissented in an opinion joined by Justice Bradley. Justice Miller agreed with the Court

that the 1870 statute was "unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President." 80 U.S. at 148 (Miller, J., dissenting). He nevertheless disagreed with the Court's decision to affirm the Court of Claims. Justice Miller disputed the Court's conclusion that Wilson had maintained title to his property after it had been seized, and that he could therefore recover the proceeds based on his subsequent pardon. *See id.* at 148-49. In the dissent's view, title had passed to the government at the time of seizure, and the subsequent pardon could not "restore that which ha[d] thus completely passed away." *Id.* at 150.

3. There is widespread agreement among scholars that, although *Klein* is unclear in many respects, it at least stands for the principle that Congress lacks the authority to require the courts to apply an unconstitutional rule of decision.[11] In other words, "Congress may not compel the courts to speak a constitutional untruth."[12]

This understanding satisfies both requirements for a sound interpretation of the precedential effect of *Klein*. First, it explains the result of the case. The Court's opinion held that the 1870 statute was unconstitutional, and that holding is adequately supported by the reasoning that (1) Congress lacks authority to prescribe an unconstitutional rule of decision, and (2) Congress had attempted to prescribe an unconstitutional rule of decision by instructing the Court to dismiss the case and deny recovery to Wil-

---

[11] *See supra* note 7.

[12] Meltzer, *supra*, at 2540.

son's estate, a result that would have conflicted with the constitutional effect of Wilson's pardon.[13]

Second, this approach is consistent with the Court's foundational jurisprudence concerning judicial review.[14] As the Court explained in *Marbury v. Madison*, 5 U.S. 137 (1803), "the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature." *Id.* at 179-80. Accordingly, "an act of the legislature, repugnant to the constitution," does not "bind the courts, and oblige them to give it effect." *Id.* at 177. In other words, such a statute does not "constitute a rule" that is "operative" in the courts, which must not "close their eyes on the constitution" when they decide cases. *Id.* at 177-78. Indeed, it would be immoral to impose the oath of office on judges "if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support." *Id.* at 180.

B. *Klein* need not be understood to adopt any broader principle concerning Congress's authority to prescribe rules of decision.

1. Petitioner's *amici* do not dispute that *Klein* held that Congress has no power to instruct the courts to apply an unconstitutional rule of decision. Instead, they argue that *Klein* must also have held something more. That is because the opinion "raised

---

[13] *See, e.g.*, Fallon et al., *supra*, at 325 ("the Klein judgment is adequately supported by . . . the entirely plausible understanding that the rule of decision whose application Congress directed would have required the courts to abridge the President's pardon power").

[14] *See, e.g.*, Tyler, *supra*, at 109-10.

the pardon issue in the alternative" when it stated that the statute was "'*also* liable to just exception as impairing the effect of a pardon.'" *Amici* Br. 6 n.5 (quoting 80 U.S. at 147). The Court independently held, petitioner's *amici* assert, that the statute had "'passed the limit which separates the legislative from the judicial power'" (*id.* (quoting 80 U.S. at 147)), and it is therefore necessary to give meaning to that holding as well.

This argument undoubtedly has some force.[15] Even on its own terms, however, it has two important limitations. First, even accepting this argument as true, it does not contradict the conclusion that *Klein* at least held that Congress cannot prescribe an unconstitutional rule of decision, and that the 1870 statute violated that principle by prescribing a rule of decision that "impair[ed] the effect of a pardon." 80 U.S. at 147.

Second, this argument does not explain *why* Congress had "passed the limit which separates the legislative from the judicial power" in the 1870 statute. 80 U.S. at 147. It is still necessary to construct an understanding of that independent holding that both explains the result in *Klein* and is consistent with this Court's other decisions. For the reasons explained in section I.C, *infra*, the theories that petitioner and its *amici* advocate fail to satisfy these requirements. Thus, even assuming that *Klein* held "something" in addition to the principle that Congress cannot prescribe an unconstitutional rule of

---

[15] *See, e.g.*, Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 Geo. L.J. 2525, 2526 (1998) (making the "alternate ground" argument); Meltzer, *supra*, at 2539 n.12 (acknowledging the appeal of this argument); Hartnett, *supra*, at 573 (same).

decision, petitioner and its *amici* have not successfully identified what that "something" is.

2. In any event, the principle that Congress has no authority to prescribe an unconstitutional rule of decision ultimately explains *both* of the seemingly alternative holdings of *Klein*. That is because, properly understood, both of these alternative holdings rested on the principle that Congress cannot prescribe an unconstitutional rule of decision. The Court issued alternative holdings only because it found two different reasons *why* the 1870 statute prescribed an unconstitutional rule of decision.

As all agree, one of those reasons was that the statute impaired the effect of a pardon and therefore violated the President's constitutional authority. The Court also found, however, that the 1870 statute prescribed an unconstitutional rule of decision—and therefore "passed the limit which separates the legislative from the judicial power" (80 U.S. at 147)—because it violated the independent constitutional principle, extant at the time, that vested rights could not be destroyed.[16]

To understand why, it is helpful to consider the disagreement between the majority and the dissent. For the dissent, there was a critical distinction between a case such as *Padelford*, in which the rebel took the oath and was pardoned prior to the seizure of his property, and *Klein*, in which the rebel took the oath after the seizure of his property. Justice Miller's

---

[16] *See* Hartnett, *supra*, at 574-80; *cf.* Chemerinsky, *supra*, at 194 (explaining that the statute at issue in *Klein* could be understood both to infringe the pardon power and "unconstitutionally deprive[] [a person of] property without just compensation or due process," and thus to destroy a "vested right").

view was that, in *Padelford*, because "the possession or title of property remain[ed] in the party, the pardon or amnesty remit[ted] all right in the government to forfeit or confiscate it." 80 U.S. at 150 (Miller, J., dissenting). But he concluded that, in *Klein*, because the property had "already been seized and sold, and the proceeds paid into the treasury," and because that meant (in his view) that title had already passed to the government, it followed that "the pardon [did] not and [could not] restore that which ha[d] thus completely passed away." *Id.*

The majority disagreed that title to Wilson's cotton had ever passed to the government. It emphasized at the outset of its opinion that Wilson's cotton was defined by statute to be "captured and abandoned property," and that this statutory category of property was "known only in the recent war" and had no precedent in history. 80 U.S. at 136, 138. Unlike the dissent, the majority concluded that the title to this "peculiar" form of property was not "divested absolutely out of the original owners" when it was seized. *Id.* Rather, the property went "into the treasury without change of ownership," and the "government constituted itself the trustee for those . . . entitled to the proceeds" under the 1863 statute. *Id.* at 138.

From this perspective, once a property owner like Wilson took the required oath, "the pardon and its connected promises took full effect," and "[t]he restoration of the proceeds became the absolute right of the person[] pardoned." 80 U.S. at 142. Indeed, refusing to restore the proceeds as promised in the presidential proclamation would be a "breach of faith not less 'cruel and astounding' than to abandon the freed

people whom the Executive had promised to maintain in their freedom." *Id.*

This last reference was to the Emancipation Proclamation (Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863)), and it is revealing because it clarifies that the pardon played two distinct roles in the majority opinion in *Klein*. One role was to provide the basis for concluding that the 1870 statute "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." 80 U.S. at 147. The second role was to provide a mechanism by which a right was vested. In this role, there was nothing particularly distinctive about a pardon. Other legal instruments, such as the Emancipation Proclamation or a simple deed, also created vested rights.

The language of vested rights has largely fallen out of our federal constitutional discourse. But it was a dominant feature of the general constitutional law that federal courts developed in diversity cases during the nineteenth century.[17] For example, in *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court ruled that Georgia's attempt to rescind a land grant was unconstitutional. The Court explained: "[I]f an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, [and] those conveyances have vested legal estate." *Id.* at 135. As Chancellor Kent put it, "[a] retrospective statute, affecting and changing vested rights, is very generally considered, in this country as founded on unconstitu-

---

[17] *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 Tul. L. Rev. 1263, 1264-66, 1268-82 (2000).

tional principles, and consequently inoperative and void."[18]

With this background in mind, it becomes clear that *Klein* held that the 1870 statute prescribed a result that was unconstitutional not only because it impaired the effect of a pardon, but also because it abrogated vested rights. Under more modern doctrine, this second violation might also be understood in due process terms, and *Klein* could be viewed as holding that the statute violated the Fifth Amendment because it purported to deprive a person of property without due process of law.[19] However the second violation is framed, it explains the Court's reasoning that Congress had "passed the limit which separates the legislative from the judicial power" by "prescrib[ing] a rule for the decision of a cause in a particular way." 80 U.S. at 146-47. As explained in section I.C, *infra*, this language cannot be interpreted literally to mean that Congress can *never* prescribe a rule of decision for a pending case. Rather, the problem in *Klein* was a narrower one: Congress had prescribed an "*arbitrary* rule of decision" (*id.* at 146 (emphasis added)), *viz.*, a rule of decision that violated the general constitutional law principle of vested rights.

The "vested rights" approach is further illustrated by the contrast that *Klein* drew with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). *Klein* explained that *Wheeling Bridge* did not

---

[18] 1 James Kent, Commentaries on American Law 455 (O.W. Holmes, Jr. ed., 12th ed. 1873).

[19] *See, e.g.*, Chemerinsky, *supra* at 194 (describing this second aspect of *Klein* in terms of both due process and vested rights); Young, *supra*, at 1213-14 & n.136 (describing the vested rights problem in due process terms).

involve a statute that prescribed an "arbitrary rule of decision." 80 U.S. at 146. In *Wheeling Bridge*, the Court had employed traditional vested rights language to explain that, when a "private right[] [has] passed into judgment the right becomes absolute." 59 U.S. at 431. The Court held, however, that the rights at stake in *Wheeling Bridge* were public rights, and Congress could therefore prescribe a rule of decision that contradicted the Court's previous decision concerning those rights. *Id.*; *see also Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1171 (10th Cir. 2004) (McConnell, J.) (explaining the distinction between *Klein* and *Wheeling Bridge* in terms of the difference between public and private rights). Because the statute in *Wheeling Bridge* did not destroy any vested private rights, *Klein* concluded that the rule of decision in *Wheeling Bridge* was not an "arbitrary" one.

The vested rights approach also helps to solve another puzzle posed by *Klein*. The case involved a claim against the United States, and some rationale is needed to justify affirming a judgment against the United States despite its sovereign immunity and a stated congressional policy to deny recovery.[20] The vested rights view provides that rationale: Because the claimant had a vested property right, and because Congress constituted the United States as trustee of the property, it seems to follow that Congress could not (or at least could not be understood to) subsequently divest that vested right by denying a forum in which to assert it.[21] This understanding is consistent with *Klein*'s statement that it is "not entirely accurate" to say that "the right to sue the gov-

---

[20] *See* Meltzer, *supra*, at 2539 n.12; Hartnett, *supra*, at 573.

[21] *See* Hartnett, *supra*, at 577.

ernment in the Court of Claims is a matter of favor," and that "[i]t is as much the duty of the government as of individuals to fulfil its obligations." 80 U.S. at 144.

Viewed through the lens of general constitutional law and the principle of vested rights, *Klein* is strikingly similar to a case decided a few years earlier, *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864). In *Gelpcke*, the city of Dubuque had issued municipal bonds based on then-current understandings of Iowa law. The Iowa Supreme Court subsequently overruled its earlier decisions and held that Dubuque had no authority to issue the bonds. *See id.* at 205. This Court nevertheless held that the bondholders must be paid because the state-court decision could "have no effect upon the past." *Id.* at 206. Under "the law of this court," which "rest[ed] upon the plainest principles of justice," the Court concluded that destruction of rights acquired under a contract, valid when made, "would be as unjust as to hold that the rights acquired under a statute may be lost by its repeal." *Id.* Although state-court rules of decision regarding state laws and constitutions were ordinarily to be followed in federal court, this Court declared that it "shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07.

Thus, in both *Klein* and *Gelpcke*, this Court refused to be bound by rules of decision, whether prescribed by Congress (*Klein*) or the state courts (*Gelpcke*), that violated the principle of general constitutional law that vested rights could not be destroyed. And, in *Klein*, this violation was an alternative reason why the 1870 statute prescribed an un-

constitutional rule of decision, in addition to its infringement of the pardon power.

Ultimately, therefore, this Court's reasoning in *Klein* took the following form: (1) Congress lacks the authority to bind courts to apply an unconstitutional rule of decision; and (2) the 1870 statute improperly sought to bind courts to apply an unconstitutional rule of decision (a) because it violated the general constitutional law principle of vested rights (or more modern principles of due process), and (b) because it also impaired the effect of a pardon. In other words, *Klein* issued alternative holdings only with respect to the reason why the statute violated the principle that Congress cannot prescribe an unconstitutional rule of decision. It did not issue a holding that was an alternative to that principle itself. The opinion therefore need not be interpreted to adopt any other, broader principle concerning Congress's authority to prescribe rules of decision.

C. The contrary understandings advanced by petitioner and its *amici* are flawed.

Petitioner and its *amici* nevertheless urge the Court to adopt broader interpretations of *Klein*. Each of these interpretations would, on separation-of-powers grounds, limit Congress's authority to prescribe rules of decision in pending cases, even if those rules of decision would not violate any independent constitutional principle. Neither of these proposed interpretations, however, can withstand scrutiny. Each fails at least one of the basic requirements that are necessary to a sound understanding of the precedential effect of *Klein*.

1. Petitioner argues that *Klein* "held that Congress may not dictate the outcome of a pending case." Pet. Br. 43. Petitioner grounds that argument in *Klein*'s statement that Congress had improperly "'prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it.'" *Id.* (quoting 80 U.S. at 146).

Petitioner's argument, however, cannot be squared with this Court's decisions. It has been clear since *United States v. Schooner Peggy*, 5 U.S. 103 (1801), that a court must apply the law as it finds it at the time of decision, including statutory changes made while the case is pending. *See id.* at 110. Numerous decisions of this Court have followed this deeply rooted requirement and applied new statutes to pending cases, even when the statutes effectively dictated the outcome.[22] As scholars have concluded, therefore, *Klein* cannot be read literally to stand for the principle that Congress lacks the authority to prescribe a rule of decision that would dictate the outcome of a pending case.[23] In fact, petitioner's own *amici* disavow this broad interpretation of *Klein* because it conflicts with this Court's decisions. *See Amici* Br. 7.

2. Petitioner's *amici* attempt to avoid this conflict with the Court's decisions by reading *Klein* more

---

[22] *See, e.g.*, *Miller v. French*, 530 U.S. 327, 344, 349 (2000); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 434-35, 441 (1992); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 27 (1940); *Wheeling Bridge*, 59 U.S. at 429-31.

[23] *See* Fallon et al., *supra*, at 324 ("It is doubtful that this language can be taken at face value, for congressional power to make valid statutes retroactively applicable to pending cases has often been recognized."); *see also, e.g.*, Tyler, *supra*, at 105-06; Hartnett, *supra*, at 578.

narrowly than petitioner. According to them, *Klein* stands for the principle that Congress cannot direct the outcome of a pending case unless it at least purports to "amend[] the underlying law." *Amici* Br. 4.[24]

The problem with this argument is that, in attempting to satisfy the second requirement for a successful understanding of *Klein*, petitioner's *amici* lose sight of the first: The principle that they identify as the holding cannot explain the result in *Klein*. Congress *did* purport to amend the underlying law in the 1870 statute at issue in *Klein*. Thus, the Court's ruling that the statute was unconstitutional cannot have rested on the principle that purporting to amend the law is a necessary condition for a statute to be valid.

On its face, the 1870 statute unambiguously purported to amend the law in numerous respects. For example:

- It provided that "no pardon or amnesty granted by the President . . . , shall be

---

[24] This appears to be the position of petitioner's *amici*, even though it is not exactly what they say. *Amici* state that, under *Klein*, "Congress may not direct the result in a pending case without amending the underlying law." *Amici* Br. 4. But if the problem in *Klein* was only that Congress did not "amend the law," that problem would be fully explained by the no-unconstitutional-rules-of-decision approach advocated here. Because Congress has no authority to prescribe an unconstitutional rule of decision, Congress *could not* have amended the law through the 1870 statute, and therefore necessarily failed to do so. *Cf.* Resp. Br. 29. We understand petitioner's *amici*, however, to be making a different, broader point—that the statute in *Klein* was unconstitutional not only because it failed to amend the law due to a lack of congressional authority, but also because it did not even *purport to* amend the law.

admissible in evidence . . . in support of any claim against the United States."

- It provided that the proof of loyalty required by prior statutes must be made "irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion."
- It provided that, in cases in which the Court of Claims had already entered judgment in favor of a claimant "on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning" of the prior statutes, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."
- It provided that, if a person accepted a pardon for participating in the rebellion without an express disclaimer of guilt, the "pardon and acceptance shall be taken and deemed . . . conclusive evidence" of disloyalty.

16 Stat. 235.

Although much of the statute employed the language of evidence, that is not itself constitutionally problematic because "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Moreover, it has long been recognized that conclusive presumptions are rules of law. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110,

119 (1989) (plurality op.) ("While § 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law.").[25] Indeed, so long as no independent constitutional barrier is crossed, a rule of law is no less valid because it defines words (such as "loyalty") in unusual ways.[26] Perhaps petitioner's *amici*, like other commentators, object to achieving substantive results through the language of evidence and procedure, or through the use of unorthodox definitions.[27] But their preferred approach would be a departure from this Court's decisions.[28]

---

[25] *See also, e.g.*, 9 J. Wigmore, Evidence § 2492 (3d ed. 1940) (explaining that a "conclusive presumption" is, in fact, a "rule of substantive law").

[26] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) (rejecting the argument that "Congress' choice of statutory language can invalidate [an] enactment when its operation and effect are clearly permissible"); *see also, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (observing that the Court has "applied the Anti-Injunction Act to statutorily described 'taxes' even where that label was inaccurate"); *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (like Humpty Dumpty, legislatures "are free to be unorthodox" in their use of language); *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("Of course, statutory definitions of terms used therein prevail over colloquial meanings.").

[27] *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 717 (1995) ("If government wishes to attain a particular public policy, our constitutional democratic theory dictates that government do so openly . . . ."); *see also* Sager, *supra*, at 2529 (interpreting *Klein* to mean that "[t]he judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community").

[28] *See* Redish, *supra*, at 716-18 (arguing that, on his view, the Court was "incorrect" in *Michael H.* when it treated a conclu-

Petitioner's *amici* offer no other explanation for their position that the statute in *Klein* did not purport to amend the law. Nor do they identify any support for that position in *Klein* or elsewhere in this Court's cases. They mention the passage in *Klein* in which the Court observed that the statute in *Wheeling Bridge* had created "new circumstances," whereas "no new circumstances" were created by the 1870 statute. 80 U.S. at 147; *see Amici* Br. 8. But that was a statement about the legal *effect* of the statute, not what it purported to do. The reason that the 1870 statute failed to create "new circumstances" was because "Congress had no authority to create any." Resp. Br. 29.

Petitioner's *amici* also rely on this Court's decision in *Robertson*. *Amici* Br. 8-9. *Robertson*, however, did not suggest that the statute in *Klein* was an example of a statute that failed to purport to amend the law, or that *Klein* was decided on that basis. Instead, as petitioner's *amici* acknowledge (*id.* at 9-10), *Robertson* assumed without deciding that the Ninth Circuit correctly interpreted *Klein* to require that the law be amended. 503 U.S. at 441. This Court proceeded to reverse the Ninth Circuit on the ground that the statute in *Robertson* did amend the law. *See id.* The Court therefore declined to reach the question whether *Klein* stands for the conclusion that petitioner's *amici* attribute to it here—namely, that the 1870 statute was unconstitutional because it did not purport to amend the law.

---

sive presumption as a legal rule); Sager, *supra*, at 2533 (concluding that *Klein* is "a good and sufficient reason to invalidate RFRA").

To be clear, we do not take issue with the abstract principle advocated by petitioner's *amici*—that Congress cannot dictate the outcome of a pending case without purporting to amend the underlying law. Nor do we disagree that, at least in theory, this principle might "serve[] important separation of powers values." *Amici* Br. 10. We do think, however, that respect for Congress and the President, as well as principles of constitutional avoidance, counsel in favor of interpreting a statute to amend the underlying law whenever fairly possible. *See Robertson*, 503 U.S. at 441. And we ultimately part company with petitioner's *amici* when they take the position that the statute in *Klein* is an *example* of a statute that did not purport to amend the underlying law. That position is incorrect, *Klein* did not hold it, and petitioner's *amici* fail to offer any support for it.

Although this disagreement might seem (literally) academic, it has significant consequences. When the statute in *Klein* is treated as an example of a statute that did not purport to amend the law, it follows that any statute that is similar to the statute in *Klein* also does not purport to amend the law, and thus is equally unconstitutional. The danger, therefore, is that courts will erroneously conclude that statutes are invalid solely on the basis of *Klein*, even if *Klein* itself would have viewed those statutes as valid. That would give *Klein* a far broader sweep than it warrants as a matter of *stare decisis*, and would give rise to unnecessary constitutional confrontations between the courts and Congress—including in this case.

A counterfactual that is based on *Klein* illustrates the point. Suppose that, in 1870, Congress had been controlled by the Democrats rather than the

Republicans. Suppose further that the Democrats believed, contrary to *Padelford*, that persons who had merely signed surety bonds for Confederate officers should not be treated as disloyal on that ground alone. If Congress had amended the law while cases brought by such persons were pending to declare that they were loyal for purposes of recovering under the 1863 statute, is it conceivable that this Court would have found that statute unconstitutional and denied recovery?

Certainly not. Yet petitioner's *amici* would view this statute as having the same constitutional flaw as the statute in *Klein*. Under a correct interpretation of *Klein*, in contrast, there is no constitutional problem with this counterfactual statute because it does not prescribe an unconstitutional result. It does not attempt to force this Court to decide a case notwithstanding its view of the pardon power, to destroy vested rights, or to violate the Due Process Clause. This hypothetical illustrates that the true problem in *Klein* was not that the 1870 statute failed to purport to amend the law. It was instead that it purported to amend the law in a manner that prescribed an unconstitutional rule of decision.

* * *

Properly understood, *Klein* does not cast doubt on the constitutionality of the statute at issue in this case. Petitioner and its *amici* do not argue that 22 U.S.C. § 8772 prescribes an unconstitutional rule of decision by directing an outcome that would violate an independent constitutional principle. And, unlike the statute in *Klein*, Section 8772 does not interfere with vested rights because it concerns remedies, not

rights.[29] Petitioner therefore cannot prevail under *Klein*.

II. There is no freestanding constitutional rule against legislating with respect to a single case.

Petitioner's *amici* also argue that, even if Section 8772 is consistent with *Klein*, it still violates the separation of powers because it purports to "legislate with respect to a single case." *Amici* Br. 20. That argument fails because the principle invoked by petitioner's *amici* cannot be squared with the constitutional text, historical evidence of its meaning, or this Court's decisions.

Text. The Constitution's text is sharply at odds with the proposition that Congress cannot legislate with respect to a single case. Unlike the constitutions of many of the States, the U.S. Constitution does not contain any wholesale prohibition on special or retroactive legislation. *See Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 380 (1940).[30] The U.S. Constitution instead rules out only particular (and particularly harsh) categories of such legislation.

For example, the *Ex Post Facto* Clause applies only in the criminal context—it prohibits "retroactively alter[ing] the definition of crimes or in-

---

[29] *See* Hartnett, *supra*, at 580 n.146 ("Even in the heyday of vested rights jurisprudence, the Supreme Court distinguished between laws that affected the right and laws that affected the remedy, permitting retroactive remedial laws."); *id.* (citing decisions).

[30] *See also id.* at 380 n.24 (observing that there were "restrictions against the enactment of special legislation in the constitutions of all the states except Connecticut, Massachusetts, New Hampshire and Vermont").

creas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). The Bill of Attainder Clause has a similarly limited scope—it "prohibit[s] legislatures from singling out disfavored persons and meting out summary *punishment* for past conduct." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (emphasis added). Moreover, the Equal Protection Clause limits Congress's power to legislate with respect to particular persons or subjects, but only if it lacks a legitimate reason for doing so. *Cf. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300-01 (1990) (Scalia, J., concurring). None of these clauses, nor any other provision of the Constitution, limits Congress's power to legislate on grounds of specificity alone.

Petitioner's *amici* nevertheless argue that these constitutional provisions "do[] not exhaust the requirement of legislative generality." *Amici* Br. 20. In their view, because these provisions are motivated by separation-of-powers concerns, and because those concerns are "no less salient" in other circumstances in which Congress legislates with specificity (*id.* at 21), Congress also violates the separation of powers by legislating with specificity even if it does not violate any of these particular textual provisions. *See id.* at 20-22.

That argument turns the proper understanding of these constitutional provisions on its head. The fact that the Constitution explicitly prohibits particular kinds of specific legislation is powerful evidence that it does *not* prohibit *other* kinds of specific legislation, not evidence that the Constitution *does* prohibit other kinds of specific legislation. Indeed, if the Constitution imposed a freestanding limitation on legislating with respect to a single case, there

would be no need for the Constitution even to contain a Bill of Attainder Clause, much less for courts to have developed an "extensive jurisprudence" concerning its limitations. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995); *see also* Resp. Br. 39-40.

Amici's invocation of the separation-of-powers concerns that motivate these constitutional provisions also does not support their conclusion. It is no doubt true that specific legislation might sometimes present a separation-of-powers concern even when it is not an *ex post facto* law or a bill of attainder. By expressly precluding only some types of specific legislation, however, the Constitution reflects a judgment that only those types of specific legislation present sufficiently serious separation-of-powers concerns to warrant limiting Congress's authority. It would overrule that judgment to conclude that other types of specific legislation present separation-of-powers concerns of the same magnitude and should therefore be unconstitutional as well. Ultimately, that would be no different from the "penumbras and emanations" approach to constitutional interpretation: treating the clauses prohibiting bills of attainder and *ex post facto* laws as having emanations that cast penumbras, thereby creating a broad right to general laws.

History. Consistent with the constitutional text, Congress has regularly enacted special or private legislation from the founding to the present day. *See, e.g.*, *Plaut*, 514 U.S. at 239 n.9 ("Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court.").[31]

---

[31] *See also, e.g.*, 6 Stat. (1846) (entire volume devoted to private laws); Act of Apr. 5, 1800, ch. 20, 6 Stat. 40 (discharging Robert

Indeed, many congressional powers have long been understood to authorize individualized legislation. For example, Congress's historical exercise of its authority confirms that the power to "pay the Debts" of the United States is the power to pay particular debts; the power to "establish Post Offices and post Roads" is the power to establish particular offices and roads; and the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" is the power to issue particular patents and copyrights.[32] Similarly, the power to "declare War" is the power to declare particular wars between the United States and particular enemies,[33] and Congress is therefore undoubtedly free to treat particular foreign nations differently based on whether the United States is on "good terms" with them. *Contra Amici* Br. 23.

Sturgeon from prison); *INS v. Chadha*, 462 U.S. 919, 954 (1983) (noting Congress's "long experience" with the "private bill procedure"); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative to a Judicial Model of Payment*, 45 La. L. Rev. 625, 644 (1985) ("By 1832, half of Congress' time was consumed with such private business—Friday and Saturday being fully set aside for such purposes.").

[32] U.S. Const. art. I, § 8; *see, e.g.*, Act of Mar. 3, 1821, ch. 60, 6 Stat. 262 (directing payment to Robert Buntin); Act of Feb. 20, 1792, ch. 7, 1 Stat. 232 (establishing various postal roads, including one from "Wisscassett in the district of Maine, to Savannah in Georgia," and specifying the route); Act of Mar. 3, 1821, ch. 57, 6 Stat. 261 (authorizing the Secretary of State to issue a patent to Thomas Oxley for his invention, "The American Land Clearing Machine and Land Clearing Engine").

[33] U.S. Const. art. I, § 8; *see, e.g.*, Act of Apr. 6, 1917, ch. 1, 40 Stat. 1 (declaring a state of war between the United States and the Imperial German Government).

The same is true for the canonical example of an implied power of Congress—the power to create a corporation. *See McCulloch v. Maryland*, 17 U.S. 316 (1819). Congress has never passed a general incorporation law, and instead has incorporated particular corporations, ranging from the Bank of the United States (Act of Feb. 25, 1791, ch. 10, 1 Stat. 191) to the American Red Cross (Act of Feb. 5, 1905, ch. 23, 33 Stat. 599).

Contrary to the argument of petitioner's *amici*, these examples of Congress's express and implied powers to enact specific legislation are not limited to "Congress's Article IV power to 'dispose' of government property or its general implicit authority to regulate the United States' own conduct in litigation." *Amici* Br. 24. Nor are they limited to "public rights." *Id.* Congress's power to issue particular patents and copyrights, for example, implicates private rights. *See* Resp. Br. 41. Thus, contrary to *amici*'s position, these examples reflect that Congress has historically exercised its "general legislative power" in ways that were "directed at particular individuals or entities." *Amici* Br. 24. The supposed principle against legislating with respect to a specific case is fundamentally inconsistent with this history.

Precedent. The theory that Congress cannot legislate with respect to a single case also has no basis in this Court's decisions. Petitioner's *amici* invoke *United States v. Brown*, 381 U.S. 437 (1965). *Amici* Br. 19-20. But *Brown* merely explained that the Bill of Attainder Clause should be interpreted in light of the separation-of-powers purposes that it was meant to serve, including the objective of safeguarding against "trial by legislature." 381 U.S. at 442. *Brown* did not suggest that those separation-of-powers con-

cerns also justified imposing an independent, atextual restraint on other types of specific legislation.

Petitioner's *amici* also rely on several concurring opinions. *Amici* Br. 21-22 & nn.20-21. To be sure, Justice Powell expressed concern about legislative specificity in *Chadha*, and would have ruled that the House of Representatives had violated the separation of powers because it had acted judicially rather than legislatively in resolving that "six specific persons" should be deported. 462 U.S. at 964-66 (Powell, J., concurring in the judgment). The *Chadha* majority, however, squarely rejected Justice Powell's view. The Court found it "clear" that the House's action "was an exercise of legislative power" because it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." *Id.* at 952, 957 (majority op.). Indeed, the Court observed that Congress presumably had the power to "mandat[e] a particular alien's deportation, unless, of course, other constitutional principles place substantive limitations on such action." *Id.* at 935 n.8.

Similarly, in *Plaut*, the majority expressly disputed the concurrence's position that specific legislation poses separation-of-powers concerns—or at least concerns sufficient to render such legislation unconstitutional. *See* 514 U.S. at 239 & n.9; *id.* at 241-43 (Breyer, J., concurring in the judgment). "[L]aws that impose a duty or liability upon a single individual or firm," the Court explained, "are not on that account invalid." *Id.* at 239 n.9 (majority op.). In fact, "Congress may legislate 'a legitimate class of one.'" *Id.* (quoting *Nixon v. Admin. of Gen. Servs.,* 433 U.S. 425, 472 (1977)).

Finally, petitioner's *amici* cite Justice Scalia's concurring opinion in *Cruzan*. *Amici* Br. 22. But that opinion could not have more clearly explained that it viewed the Equal Protection Clause—not an unenumerated constitutional right against statutory specificity—as individual citizens' principal protection against oppressive laws. *See* 497 U.S. at 300-01 (Scalia, J., concurring).

* * *

Because the position advocated by petitioner's *amici* lacks legal or historical support, it is not surprising that it would also produce absurd results. Two examples suffice to make this clear.

First, imagine that, in 1952, Congress had acted swiftly in response to President Truman's seizure of the steel mills, and had explicitly ratified that seizure—thereby providing precisely the authorization that this Court found was necessary but lacking. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952); *see also id.* at 635-38 (Jackson, J., concurring).

Second, suppose that President Obama had confiscated the Iranian assets involved in this case based on 50 U.S.C. § 1702(a)(1)(C),[34] but petitioner disputed whether the requirements of that statute were satisfied. And suppose that, before this Court ruled, Congress ratified that presidential action by

---

[34] "[W]hen the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, [the President may] confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States." 50 U.S.C. § 1702(a)(1)(C).

declaring it consistent with Section 1702. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

The statutes in both examples are squarely governed by the rule proposed by petitioner's *amici*: "A law confined to a single pending case is a legislative trial, and therefore unconstitutional." *Amici* Br. 27. But can it be true that, in either example, the correct result would be to refuse to follow the statute because it applies only to a single case, rather than to deem the statute to justify the President's action? We think not. It follows that the rule proposed by petitioner's *amici* cannot be correct, and cannot cast constitutional doubt on Section 8772.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD A. HARTNETT
SETON HALL UNIVERSITY
SCHOOL OF LAW
One Newark Center
Newark, NJ 07102
(973) 642-8842
edward.hartnett@shu.edu

ERIK R. ZIMMERMAN
Counsel of Record
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road
Suite 100
Chapel Hill, NC 27517
(919) 328-8826
ezimmerman@rbh.com

Counsel for Amici Curiae

December 23, 2015