HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

CANDACE OWENS FARMER
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

DEFENDANTS' SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. On the four issues raised by the special case (**PS [2]**), the defendants (**Commonwealth**) submit that: (i) properly construed, s 501(6)(d)(iv) of the *Migration Act 1958* (Cth) (**Migration Act**) is only engaged by discord that causes harm; (ii) s 501(6)(d)(iv) is wholly valid on the construction advanced by either side, as it does not burden the implied freedom of political communication (or, alternatively, does so justifiably); (iii) the Minister's decision is valid, as the Minister did not adopt an incorrect construction of s 501(6)(d)(iv); and (iv) the plaintiff's application should be dismissed with costs.

PART III: SECTION 78B NOTICES

3. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

4. The plaintiff, a citizen and resident of the United States, intended to undertake a speaking tour in Australia in November 2024: **SC [2], [5]**. On 12 September 2024, she applied for a Temporary Activity (Class GG) visa: **SC [7]**. Leaving aside s 501 of the Migration Act and public interest criterion (**PIC**) 4001, the plaintiff met all the legal requirements to be issued with that visa: **SC [9]**. On 25 October 2024, the Minister decided to refuse the plaintiff a visa, relying on ss 501(3)(a) and 501(6)(d)(iv): **SC [8]**; **SCB 94**.

5. The Minister gave detailed reasons for his decision. He considered: (i) the plaintiff's publicly stated views and comments (including their influence on the perpetrator of the Christchurch mosque terrorist attacks, who described the plaintiff as "the person who ha[d] influenced [him] above all") (**SCB 98-101 [9]-[40]**); (ii) the current risk of discord in the Australian community, including the link between the promotion of extremist views and the undertaking of violent acts (**SCB 102-103 [41]-[50]**); and (iii) the risk posed in those circumstances by the plaintiff's proposed visit (**SCB 103-104 [51]-[59]**). The Minister concluded that the plaintiff did not pass the character test because, were she to be allowed to enter Australia, there was "a risk she would incite discord in the Australian community or a segment of the Australian community": **SCB 104 [57]-[59]**.

6. The Minister separately decided that the refusal of the plaintiff's visa would be in the

national interest (**SCB 110 [104]**), notwithstanding Australia's well-established tradition of free expression: see, eg, **SCB 105 [68]**, **108 [87]**, **109 [97]**. The Minister ultimately decided to exercise his discretion to refuse the plaintiff a visa: **SCB 114 [129]**. The plaintiff sought revocation of that decision, but no decision on revocation has been made.

PART V: ARGUMENT

A STATUTORY PROVISIONS

7. Section 65 of the Migration Act relevantly provides that, after considering a valid visa application, the Minister "is to grant the visa" if satisfied that the criteria prescribed by the Migration Act or *Migration Regulations 1994* (Cth) have been satisfied, and the grant is not prevented by s 501. One of the criteria for a Temporary Activity (Subclass GG) visa is that the applicant satisfies PIC 4001.[1] PIC 4001 will be satisfied if the Minister is satisfied that the person passes the character test, or, "after appropriate inquiries", there is nothing to indicate the person would fail to do so, or if the Minister has positively decided not to refuse a visa under s 501 of the Migration Act.

8. Section 501(3)(a) provides that the Minister may refuse to grant a visa if the Minister reasonably suspects that a person does not pass the character test, and the Minister is satisfied the refusal is in the national interest. Section 501(6)(d)(iv) provides that a person does not pass the character test if, "in the event that the person were allowed to enter or to remain in Australia, there is a risk that the person would … incite discord in the Australian community or in a segment of that community".

B CONSTRUCTION OF SECTION 501(6)(d)(iv)

9. The first issue is the proper construction of s 501(6)(d)(iv). For the reasons that follow, a person would "incite discord in the Australian community or in a segment of that community" within s 501(6)(d)(iv) only if the person were to rouse, stimulate, urge, spur on or stir up strife, dispute, disharmony or dissension within the Australian community (or a segment thereof) of a kind that involves harm to the Australian community (or a segment thereof) and, in that way, represents a danger to that community. It follows that the plaintiff's submission that the phrase must be construed as also applying to a person who would cause mere disagreement or debate in Australia should be rejected: cf **PS [7]**.

[1] *Migration Regulations 1994* (Cth), Sch 2, cl 408.216(1). PIC 4001 is set out in Sch 4, Pt 1, item 4001.

10. ***Text:*** It is common ground (**PS [8]-[9]**) that "discord" is a broad term capable of carrying a wide variety of meanings, ranging from the benign ("disagreement", "debate") to the serious ("war", "strife", "dissension").[2] The breadth of that word presents a constructional choice as to which of those meanings it carries. In making that choice, considerations of legislative history, purpose and statutory context all point in favour of the Commonwealth's construction. That construction does not involve "add[ing] an additional element" or "read[ing] words into" s 501(6)(d)(iv): cf **PS [9]**.[3] Rather, it fixes the meaning of "discord" by selecting – from within the range of its ordinary meanings – the meaning most consistent with the text, purpose and context of s 501(6)(d)(iv).[4]

10 11. That construction derives support from the coupling of "discord" with the verb "incite". The Commonwealth agrees that, in the present context, "incite" means "to rouse, to stimulate, to urge, to spur on, to stir up, to animate",[5] and that it does not include a requirement of intention: **PS [20]**. However, the concept is considerably narrower than simply "to cause" (cf **PS [20])**: to "incite", an act must be "one which could encourage or spur others"[6] to a particular reaction. Indeed, in other legal contexts where that verb is used (such as anti-discrimination and criminal law), the conduct incited is generally unlawful or at least harmful.[7] That lends weight to the conclusion that the phrase "incite discord" is concerned with harmful discord.

12. ***Legislative history and purpose:*** Section 501(6)(d) was originally enacted in 1992 as
20 s 180A(1)(b) of the Migration Act. Before that, the *Migration Regulations* provided that applicants for various visas must meet "public interest criteria" as defined in reg 2, para (c) of which provided that the applicant "is not determined by the Minister … to be likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community". The Minister had

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[2] See, eg, *Macquarie Dictionary* (MacMillan, 2025), defn of "discord", it 3 ("strife; dispute; war"); *Oxford English Dictionary* (Oxford, 2013), defn of "discord", it 1.a ("mutual antagonism; dissension, contention, strife").
[3] Nor, it might be added, does it adopt a meaning of discord which is "wholly subjective": cf **PS [9]**. If the Minister misconstrues that term then, as Question 2 contemplates, their decision will likely be invalid.
[4] See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [36]-[44] (Gageler J).
[5] ***Sunol*** *v Collier (No 2)* (2012) 289 ALR 128 at [26] (Bathurst CJ), [55], [61] (Allsop P), [79] (Basten JA).
[6] *Sunol* (2012) 289 ALR 128 at [28] (Bathurst CJ); ***Catch the Fire*** *Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 at [16] (Nettle JA).
[7] See, eg, *Australian Law Dictionary* (3rd ed, Oxford, 2017), defn of "incitement" ("[u]rging another to commit a crime"); *Black's Law Dictionary* (12th ed, 2024), defn of "incite" ("[t]o provoke or stir up (someone to commit a criminal act, or the criminal act itself)"); *Racial Discrimination Act 1975* (Cth), s 17; *Catch the Fire* (2006) 15 VR 207 at [14] (Nettle JA); *Sunol* (2012) 289 ALR 128 at [28] (Bathurst CJ), [62] (Allsop P), [79] (Basten JA).

relied on that paragraph in refusing applications for visas by members of the Hells Angels Motorcycle Club. Those refusals were set aside by the Federal Court.[8] That led to "close scrutiny of the decision-making regime for the exclusion of persons … who may represent a danger to the Australian community or a segment of it".[9] The result was the 1992 amendments that inserted s 180A.[10] Those amendments put into the Act "the provision to deal with character issues that are presently covered by regulations".[11]

13. Section 180A(1)(b) empowered the Minister to refuse to grant or to cancel a visa or entry permit where the Minister was satisfied that, if a person were allowed to enter or to remain in Australia, the person would:

> (i) be likely to engage in criminal conduct in Australia; or
>
> (ii) vilify a segment of the Australian community; or
>
> (iii) incite discord in the Australian community or in a segment of that community; or
>
> (iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way.

14. As is apparent, s 180A(1)(b)(iv) substantially replicated the language previously found in the regulations, while making express that this language concerned persons who "represent a danger to the Australian community". That wide language was coupled with a more specific list of circumstances in ss 180A(1)(b)(i)-(iii). But the breadth of s 180A(1)(b)(iv), including its replication of language from the previous public interest criterion, and the addition of the words "or in any other way", made clear that Parliament did not intend that each paragraph of s 180A(1)(b) would have distinct operation. That follows because much of the conduct described in paras (i), (ii) and (iii) already fell within the language that Parliament re-enacted in para (iv). It is, for example, difficult to see how the vilification of a segment of the Australian community within para (ii) would not also be disruptive to that segment of the community within para (iv). That confirms that a purpose of s 180A(1)(b) was to render it unnecessary to determine whether cases that fell within the specific circumstances listed in paras (i) to (iii) also fell within the general words of para (iv). The contrary view would require the conclusion

[8] *Hand v **Hell's Angels** Motorcycle Club Inc* (1991) 25 ALD 667.
[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992 at 4121 (Minister Hand).
[10] By the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth), s 5.
[11] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992 at 4123 (Mr Ruddock).

that Parliament intended the re-enacted part of para (iv) to mean something different and narrower than what the same language meant when it was used in the public interest criterion in the prior regulations.

15. The proposition that the language re-enacted in para (iv) included situations that fell within the more specific terms of s 180A(1)(b)(i) to (iii) is confirmed by the authorities concerning the public interest criterion. For example, in the *Hell's Angels case*, the Full Federal Court said that a "person likely to foment hatred on account of religious or racial differences in the Australian community would quite clearly fall within" the language now found in para (iv).[12] That indicates that the general language of that paragraph included vilification of the kind later specifically referred to in para (ii).

16. Subsequently, in *Irving*,[13] French J upheld the denial of a visa to Mr Irving, a Holocaust denier whose visit to Australia was opposed by local Jewish organisations. In construing the old public interest criterion, French J held that "the concept of disruption … does not necessarily involve some irrevocable breakdown in social relationships" and "may range from heated and angry confrontation productive of lingering hurts and resentments to acute conflict giving rise to a real possibility of economic or physical retribution".[14] However, he also held that this criterion did not "provide a charter for denying entry to people wishing to visit Australia merely on the ground that they hold and are likely to express unpopular opinions, even if these opinions may attract vigorous expressions of disagreement and condemnation from some elements of the Australian community".[15]

17. While a Full Federal Court allowed Mr Irving's appeal, it agreed with French J's construction of the public interest criterion. Thus, Ryan J held that the criterion required "the activities to be likely to have the effect of polarising two sections of the Australian community … to an extent, beyond mere disagreement or controversy, which threatens, in a harmful way, the normal cohesiveness of the community".[16] His Honour also considered whether Mr Irving's "activities were likely to be disruptive to the Australian community because of the discord which they would engender".[17] In a similar vein, Lee J

[12] *Hell's Angels* (1991) 25 ALD 667 at 672 (the Court).
[13] ***Irving*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 115 ALR 125.
[14] *Irving* (1993) 115 ALR 125 at 139.
[15] *Irving* (1993) 115 ALR 125 at 139.
[16] *Irving* (1993) 44 FCR 540 at 543.
[17] *Irving* (1993) 44 FCR 540 at 544 (emphasis added).

held that the criterion directed attention to "actions designed to divide or to rend the cohesiveness of the community", and that it would not be satisfied by "showing that opinions held by that person would inspire the expression of supporting or opposing views by members of the Australian community".[18] Those observations indicate that the criterion re-enacted in s 180A(1)(b)(iv) was properly construed as including "incit[ing] discord", being the very conduct Parliament specifically included in s 180A(1)(b)(iii).

18. There is no warrant for interpreting s 180A(1)(b)(iv) as if Parliament intended to exclude matters that fell within the very words that it had re-enacted from the public interest criterion. The better view is that the re-enacted words continued to carry their original meaning. So understood, the purpose of paras (i) to (iii) was simply to put beyond doubt that the general words of para (iv) included the specific kinds of conduct referred to in paras (i) to (iii). The result is that s 180A(1)(b) as a whole was properly construed as providing that a person could be excluded from Australia if they represented a danger to the Australian community in any way, including because they would: be likely to engage in criminal conduct; vilify a segment of the Australian community; incite discord in the Australian community; become involved in activities that are disruptive to the Australian community; or become involved in violence threatening harm to the Australian community. That construction is re-enforced by the addition of the words "in any other way" at the end of para (iv) on the enactment of s 180A.

19. The above construction of s 180A(1)(b), whereby each sub-paragraph involves danger to the Australian community or a segment of it (whether of physical or psychological harm or violence), was confirmed by the second reading speech. There, the Minister said that s 180A(1)(b) was intended to replace the existing "decision-making regime for the exclusion of … persons generally who may represent a danger to the Australian community or a segment of it".[19] That construction is also confirmed by the explanatory memorandum, which described s 180A(1)(b)(iv) as applying where a person "otherwise represent[s] a danger to the Australian community or part of that community",[20] thereby

[18] *Irving* (1993) 44 FCR 540 at 551. See also 558-559 (Drummond J).
[19] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992 at 4121 (Minister Hand) (emphasis added). The plaintiff's submission based on this speech makes too much of a highly general comment about s 180A which offers no insight into the meaning of "discord": cf **PS [17]**.
[20] Explanatory Memorandum to the Migration (Offences and Undesirable Persons) Amendment Bill 1992 (Cth) at [16] (emphasis added).

implying that each preceding sub-paragraph concerned persons who represent a danger to the Australian community or a segment of it.

20. In 1994, s 180A was renumbered as s 501.[21] In 1998, it was re-enacted as part of a suite of amendments directed to giving the government "greater control over the entry into, and presence in, Australia of certain non-citizens who are unable to satisfy the Minister that they pass the 'character test'".[22] A number of changes were made in the re-enactment, including to adopt the language of "not satisfy[ing]" the Minister in ss 501(1)-(2),[23] so as to place the onus on the non-citizen rather than the Minister and thereby ensure that "the objective of protecting the Australian community [took] precedence".[24] That is consistent with continuing to construe the limbs of s 501(6)(d), like those of s 180A(1)(b), as concerning conduct that represents a danger to the Australian community.

21. ***Context:*** Section 501(6)(d) must be construed in the context of s 501 as a whole. That is significant because this Court and the Federal Court have long recognised: that "the protection of the Australian community lies at the heart of" s 501;[25] that the risk of harm to the Australian community is the mischief to which s 501 is directed;[26] and that the risk of harm is a mandatory relevant consideration for the Minister.[27] That focus of s 501 is not consistent with s 501(6)(d)(iv) being enlivened merely by debate and disagreement.

22. The immediate context provided by s 501(6)(d) further confirms that s 501(6)(d)(iv) is concerned with conduct representing a danger to the Australian community. Indeed, the common feature of all five limbs of s 501(6)(d) is that "each … involves protection of the Australian community … against some kind of harm, disadvantage or unacceptable or undesirable consequence".[28] Given the seriousness of the harms addressed in the

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[21] By the *Migration Legislation Amendment Act 1994* (Cth), s 83.
[22] Explanatory Memorandum to the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth) (**1998 Explanatory Memorandum**) at [1]. See also [52].
[23] *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth), Sch 1, item 23.
[24] Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998 at 60 (Senator Kemp) (emphasis added).
[25] ***ENT19*** *v Minister for Home Affairs* (2023) 278 CLR 75 at [69] (Gordon, Edelman, Steward and Gleeson JJ), approving ***Djalic*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at [68] (Court).
[26] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* (2021) 285 FCR 540 at [86] (Lee and Wheelahan JJ), referred in to in *ENT19* (2023) 278 CLR 75 at [69] fn 83 (Gordon, Edelman, Steward and Gleeson JJ); *Djalic* (2004) 139 FCR 292 at [71] (the Court).
[27] ***Moana*** *v Minister for Immigration and Border Protection* (2015) 230 FCR 367 at [1] (North J), [48]-[49], [58] (Rangiah J); *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424 at [154] (Mortimer J).
[28] *Moana* (2015) 230 FCR 367 at [1] (North J), [50], [58] (Rangiah J).

surrounding paragraphs,[29] it would be incongruous to construe s 501(6)(d)(iv) as providing that the character test can be failed by inciting "debate and disagreement".

23. The plaintiff in fact accepts that "the serious nature of the matters dealt with by sub-paras (i), (ii), (iii) and (v) … [might tend] in favour of a sterner construction of sub-para (iv)", but she contends that consideration should be dismissed because it would leave s 501(6)(d)(iv) with no work to do: **PS [10]-[13]**. But the presumption against "surplusage" is never "determinative"[30] and has been departed from on "many occasions".[31] Here, the legislative history indicates that Parliament included paras (i)-(iv) "to guard against the possibility that the general might be read as not including the particular".[32] That technique is common in complex and frequently amended statutes.[33] Indeed, the various sub-paragraphs in s 501(6)(d), like their equivalents in s 180A(1)(b), are akin to the components of an inclusive definition. Such definitions can be used to confirm, rather than to expand, the meaning of the words that are defined.[34]

24. ***Constitutionally valid construction to be preferred:*** Even if the Court would not otherwise accept the above submissions as to the proper construction of s 501(6)(d)(iv), the Commonwealth's construction is at least reasonably open (indeed, it accords with what the plaintiff accepts are some of the ordinary meanings of "discord": **PS [8]**). It must therefore be adopted if the plaintiff's construction would lead to invalidity.[35] For the reasons set out below, however, s 501(6)(d)(iv) is valid on either construction.

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[29] This feature of s 501(6)(d) likely explains why, upon inserting (ii) in the 1998 re-enactment, Parliament thought necessary to clarify in s 501(11) that harassment or molestation need not "involve violence, or threatened violence, to the person" and can include "damage, or threatened damage, to property", for otherwise the context of s 501(6)(d) may well have resulted in a construction of para (ii) that excluded those matters.
[30] *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [46] (French CJ).
[31] *Solutions 6 Holdings Ltd v Industrial Relations Commission (NSW)* (2004) 60 NSWLR 558 at [75] (Spigelman CJ). See also *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 13 (Mason CJ), describing the presumption as one "of limited application".
[32] *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 (Mason J; Barwick CJ and Aickin J agreeing).
[33] *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at [295]-[296] (O'Callaghan and Steward JJ). See also Migration Act, ss 118 and 501H(1).
[34] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at [32] (the Court); *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 207-208 (Mason ACJ, Wilson, Deane and Dawson JJ).
[35] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Acts Interpretation Act 1901* (Cth), s 15A. See also Migration Act, s 3A.

C IMPLIED FREEDOM OF POLITICAL COMMUNICATION

25. Section 501(6)(d)(iv) is wholly valid. It does not burden the implied freedom, however it is construed. Alternatively, any burden it occasions is justified.

C.1 Section 501(6)(d)(iv) does not burden the implied freedom

26. For the following reasons, s 501(6)(d)(iv) does not "burden the implied freedom in its terms, operation or effect".[36]

27. *First*, s 501(6)(d)(iv) is definitional. It is one part of a provision that defines, "[f]or the purposes of" s 501, when a person does not pass the character test. Definitional provisions "do not enact 'substantive' law", and may be challenged only insofar as they contribute to the invalidity of relevant operative provisions.[37] Here, the relevant substantive provision is s 501(3)(a), which confers a discretion to refuse a visa that is enlivened if, inter alia, the Minister reasonably suspects that a non-citizen does not pass the character test. Of course, the plaintiff does not challenge the validity of s 501(3)(a). Had she done so, she would have needed to confront the fact that no burden would arise absent an adverse exercise of discretion:[38] cf **PS [26]**. By attacking one discrete part of a definition, in isolation from the substantive provisions that give it operative effect, the plaintiff both: (i) challenges a provision that is incapable of burdening political communication; and (ii) leaves out of account matters that would need to be considered in ascertaining the nature and extent of any burden caused by the substantive provisions.

28. *Second*, s 501(6)(d)(iv) – even if read with s 501(3)(a) – does not "prohibit, or put some limitation on, the making or the content of political communications".[39] It does no more than provide for a circumstance in which the Minister may refuse to grant a non-citizen a visa. As a matter of both principle and authority, that is incapable of amounting to a burden on the implied freedom. That follows because an alien has no right or liberty to

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[36] ***Clubb*** *v Edwards* (2019) 267 CLR 171 at [5] (Kiefel CJ, Bell and Keane JJ); ***Farm Transparency*** *International Ltd v New South Wales* (2022) 277 CLR 537 at [154] (Gordon J).
[37] See ***LibertyWorks*** *Inc v Commonwealth* (2021) 274 CLR 1 at [185] (Gordon J).
[38] Being a discretion that, if necessary, could be read down to "permit only those exercises of discretion that are within constitutional limits": *Palmer v Western Australia* (2021) 272 CLR 505 at [122] (Gageler J); ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [19] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [170]-[171] (Edelman J), [327] (Beech-Jones J); *Wotton v Queensland* (2012) 246 CLR 1 at [10], [21]-[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[39] *McCloy v New South Wales* (2015) 257 CLR 178 at [126] (Gageler J); ***Brown*** *v Tasmania* (2017) 261 CLR 328 at [180] (Gageler J), [395] (Gordon J); *LibertyWorks* (2021) 274 CLR 1 at [136] (Gordon J).

enter Australia that exists independently of the grant of a visa: cf **PS [26(a)]**.[40] As s 4(2) of the Migration Act states, "this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain". Section 501(6)(d)(iv) specifies one basis on which the Minister may (under, relevantly, s 501(3)(a)), and in some circumstances a delegate must (by reason of PIC 4001), refuse to grant a visa. It thereby conditions or defines the scope of any entitlement an alien may have under the Migration Act to enter Australia for any purpose, including to engage in political communication. But it does not derogate from any right or liberty existing independently of the Migration Act.

10 29. The implied freedom is a limit on legislative power, not a personal right.[41] As an alien has no right or liberty to enter Australia without a visa, Parliament's enactment of a law that specifies circumstances in which a visa may be refused cannot burden the implied freedom. Such a law, by definition, does not detract from any right or liberty to engage in political communication that exists independently of the impugned Act.

30. *Mulholland* is clear authority for the above proposition. There, the appellant challenged conditions on the eligibility of registration of political parties. Only registered parties and their candidates could communicate party affiliation to voters on the ballot paper. A majority of the Court held that the impugned conditions did not burden the implied freedom, because there was no right or liberty to have a party name printed on the ballot
20 paper arising independently of the impugned Act.[42] Parliament could therefore modify the conditions for party registration, with consequences for whether a candidate's affiliation with that party would appear on the ballot, without burdening political communication. That reasoning was endorsed by a majority of the Court in *Ruddick*.[43]

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[40] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [30] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ); *CZA19 v Commonwealth* [2025] HCA 8 at [41] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [29] (the Court); *East India Co v Sandys* (1684) 10 State Trials 371 at 530-1 (Jeffreys LCJ); Blackstone, *Commentaries on the Laws of England* (1765) bk 1 at 251-2; *Musgrove v Toy* [1891] AC 272 at 282-3; *Johnstone v Pedlar* [1921] 2 AC 262 at 276 (Viscount Cave), 283 (Lord Atkinson), 296 (Lord Philimore); Migration Act, s 42(1).

[41] *Brown* (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ), [185] (Gageler J), [262] (Nettle J), [313] (Gordon J), [559] (Edelman J); *LibertyWorks* (2021) 274 CLR 1 at [44] (Kiefel CJ, Keane and Gleeson JJ), [257] (Steward J).

[42] ***Mulholland*** *v Australian Electoral Commission* (2004) 220 CLR 181 at [105]-[107], [110] (McHugh J), [186]-[187], [192] (Gummow and Hayne JJ), [337] (Callinan J), [354] (Heydon J).

[43] ***Ruddick*** *v Commonwealth* (2022) 275 CLR 333 at [171]-[172] (Gordon, Edelman and Gleeson JJ), [174] (Steward J). That reasoning is also entirely consistent with ***Levy*** *v Victoria* (1997) 189 CLR 579 at 625-626

It is dispositive of the present case.

31. *Mulholland* is not distinguishable on any of the bases suggested by the plaintiff. The Migration Act does not confer a "statutory right" to enter Australia which "exists independently" of s 501(6)(d)(iv): cf **PS [33], [35]**. Rather, as is made clear by the reference to s 501 in s 65(1)(a)(iii), s 501(6)(d)(iv) defines or conditions any statutory entitlement to be granted a visa.[44] That entitlement is no more "independent" of s 501(6)(d)(iv) than the ballot paper entitlement in *Mulholland* was "independent" of the conditions governing party registration. The plaintiff is wrong to attach significance to the "pre-existing" nature of the claimed entitlement: cf **PS [33]-[34]**. *Mulholland* and *Ruddick* both involved challenges to registration conditions that had been inserted into a scheme that already contained the statutory entitlement to communicate on the ballot paper.[45] What mattered was that the right said to be burdened did not exist independently of the impugned conditions governing the conferral of that right. Nor did *Mulholland* (or *Ruddick*) turn on a finding that the relevant statutory entitlement was "inseverable" from the impugned conditions: cf **PS [35]**. It clearly was not – there being no suggestion that, had the impugned provisions been invalid, the whole scheme for the registration of political parties would have been invalid – and no such finding was made.

32. For the above reason, the plaintiff's proposed counterfactual cannot be accepted. She compares "a world where s 501(6)(d)(iv) exists and a world where it does not", purportedly in order to identify political communication that would have occurred "but for" that single paragraph: **PS [26], [28(a)], [33], [36]**. Indeed, **PS [34]** appears to treat a hypothetical statute – the Migration Act without s 501(6)(d)(iv) – as conferring the "pre-existing legal entitlement" to communicate that is said to be burdened, and as constituting the "constitutionally valid baseline" (ie, of "valid, existing laws"[46]) against which the burden is to be measured. But a hypothetical statute confers no rights or liberties. And, as *Mulholland* and *Ruddick* hold, the conditions in a real statute that confine the conferral of a benefit cannot be shown to impose a burden by comparison with a hypothetical statute that confers the same benefit without those conditions.

33. The plaintiff's attempt to circumvent the above reasoning by asserting a burden on

(McHugh J): cf **PS [34]**.
[44] This also follows from PIC 4001, which engages s 65(1)(a)(ii) of the Migration Act.
[45] See *Mulholland* (2004) 220 CLR 181 at [1]; *Ruddick* (2022) 275 CLR 333 at [2].
[46] *Ruddick* (2022) 275 CLR 333, [155] (Gordon, Edelman and Gleeson JJ), [174] (Steward J) (emphasis added).

political communication by citizens or lawful residents of Australia should be rejected: cf **PS [26(b)]**. It is true that citizens or lawful residents are at liberty to engage in political speech at common law, and to do so at in-person gatherings: **PS [36]**. However, as aliens have no right or liberty to enter Australia absent a visa, citizens or lawful residents can have no right or liberty to engage in political communication with aliens in Australia (or consequent upon their presence) unless and until those aliens are granted permission to enter. Plainly the common law does not confer a positive right on citizens or lawful residents to require aliens to be granted permission to enter Australia to attend (or to provide the occasion for) in-person political gatherings. It follows that s 501(6)(d)(iv) does not burden any right or liberty of Australian citizens' or lawful residents' to engage in political communication with, or consequent upon, the presence of aliens in Australia, because such a right or liberty exists only to the extent that those aliens have already been granted permission to enter.

34. The assertion that s 501(6)(d)(iv) burdens political communication by Australian citizens or lawful residents should be rejected for the further reasons that the special case provides no factual foundation for the claim that s 501(6)(d)(iv) (as opposed to s 501 generally, or s 501(6)(d) more specifically) causes fewer in-person gatherings to occur, or for the asserted "flow-on effects" on political communication involving impacts upon discussion at "events or protests, or with family and friends": cf **PS [26(b)]** and **[36]**. It also provides no factual foundation for the further claim that such discussions would be materially impacted if, for example, the plaintiff: (i) spoke at the planned events remotely (including responding to questions or engaging in discussions); or (ii) communicated with potential attendees by other means (ie, those she frequently uses to communicate her political views to very large audiences: **SCB 62, 84, 103 [52]-[53]**).[47]

C.2 Alternatively, any burden occasioned by s 501(6)(d)(iv) is justified

35. ***Burden:*** If s 501(6)(d)(iv) burdens the implied freedom, for the following reasons it occasions at most a slight and indirect burden "on political communication *as a whole*."[48]

36. *First*, s 501(6)(d)(iv) can impose no burden on political communications by Australian

[47] See, eg, *Irving* (1993) 115 ALR 125 at 140, where French J treated as relevant the fact that, even if Mr Irving was denied a visa, his books would remain available in Australia.
[48] *Comcare v Banerji* (2019) 267 CLR 373 at [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (original emphasis). See also *LibertyWorks* (2021) 274 CLR 1 at [77] (Kiefel CJ, Keane and Gleeson JJ), [135] (Gordon J); *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

citizens, for the simple reason that they do not require visas. It therefore has no effect at all on a vast amount of political communication.

37. *Second*, political communication by non-citizens will be unaffected by s 501(6)(d)(iv) unless it would be open to the Minister reasonably to suspect that there is a risk of an identified non-citizen "incit[ing] discord" in Australia. It can be inferred that this condition would rarely be satisfied: in the roughly 32 years since those words were enacted, there have been only 2 published cases in which their use has been challenged.[49]

38. *Third*, even when s 501(6)(d)(iv) applies, it has no effect on communications that occur from outside Australia. There are a range of means by which non-citizens may engage in political communication with people inside Australia, including through the use of social media platforms (as the plaintiff herself has repeatedly demonstrated). Further, it is plainly now a matter for judicial notice that modern communications systems allow a person who is outside Australia to speak at an event in Australia by audio-visual link, and to take and respond to questions in real time, as in fact occurs in contexts that include political conventions and conferences. It is a matter for speculation whether or not that is a materially less effective form of political communication than in-person communication: cf **PS [28]**. But, even if it is not a perfect substitute, on any view s 501(6)(d)(iv) leaves unaffected avenues for engaging in communication that closely resemble what could occur in person (as well as other channels of communication that are effective, even if less closely analogous to in-person communication). In those circumstances, if s 501(6)(d)(iv) imposes a burden at all, it could at most be a burden reflecting the difference between in-person and remote communication (and, even then, only on communications by the subset of non-citizens identified above).

39. *Fourth*, even when s 501(6)(d)(iv) applies, it does not require a non-citizen to be excluded from Australia. Instead, it enlivens a wide discretionary power which, if not exercised, would occasion no burden on political communication.

40. *Finally*, s 501(6)(d)(iv) applies neutrally whether or not the anticipated inciting act involves political communication: cf **PS [30]**. To the extent that the expression of "non-

[49] See *Re Morales and Minister for Immigration and Ethnic Affairs* (1995) 38 ALD 727 (set aside on judicial review: (1995) 60 FCR 550); *Mundzic v Minister for Immigration and Citizenship* [2010] AATA 399.

mainstream" (including extremist) ideas may attract the operation of s 501(6)(d)(iv), that is solely because of their capacity to have harmful consequences.[50] It therefore does not operate as a direct "prohibition or restriction of [political] communications": cf **PS [29]**.

41. ***Legitimate purpose:*** The purpose of a law is what it "can be seen to be designed to achieve in fact".[51] It is ascertained from the "whole text and context" of the law,[52] as it presently stands.[53] A purpose is legitimate if it is "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government".[54]

42. Section 501(6)(d)(iv) has a legitimate purpose. It is to protect the Australian community from non-citizens whose presence in Australia would represent a danger to that community because of the risk that they would rouse, stimulate, urge, spur on or stir up strife, dispute, disharmony or dissension within the Australian community (or a segment thereof) of a kind that involves harm to that community. The relevant forms of harm include, at least, harm that may be caused by a non-citizen inciting other persons to engage in extremist, disruptive or violent behaviour towards the Australian community or a segment of that community, thereby risking the safety or wellbeing of that community or segment. That purpose is legitimate.[55] **PS [40]-[42]**, which are predicated on the plaintiff's construction of s 501(6)(d)(iv), do not suggest otherwise.

43. Even if the purpose of s 501(6)(d)(iv) is "the prevention of the eroding of social cohesion of the Australian community through disagreement and debate caused by the presence of certain non-citizens" (as is submitted in **PS [40]**), that would still be a legitimate purpose for which Parliament may provide for the exclusion of aliens seeking to enter Australia.[56] The plaintiff appears to acknowledge this.[57] The Constitution assigns to the legislative

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[50] As to which see, eg, the recent statements of the Director-General of Security at **SCB 272-273**.
[51] *Spence v Queensland* (2019) 268 CLR 355 at [60] (Kiefel CJ, Bell, Gageler and Keane JJ); *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court).
[52] *YBFZ* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[53] P Herzfeld and T Prince, *Interpretation* (3rd ed, 2024) at [11.50]; *Acts Interpretation Act 1901* (Cth), s 11B; *Comptroller General of Customs v Zappia* (2018) 265 CLR 416 at [6] (Kiefel CJ, Bell, Gageler and Gordon JJ).
[54] *Clubb* (2019) 267 CLR 171 at [5] (Kiefel CJ, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at [104] (Kiefel CJ, Bell and Keane JJ), [156] (Gageler J), [277] (Nettle J); [481] (Gordon J).
[55] See, eg, *Brown* (2017) 261 CLR 328 at [101]-[102] (Kiefel CJ, Bell and Keane JJ), [275] (Nettle J), [303], [413], [416] (Gordon J); *Clubb* (2019) 267 CLR 171 at [47], [51] (Kiefel CJ, Bell and Keane JJ), [197] (Gageler J), [258] (Nettle J), [380] (Gordon J), [459] (Edelman J); ***Coleman** v Power* (2004) 220 CLR 1 at [198] (Gummow and Hayne JJ).
[56] Cf, eg, *Coleman* (2004) 220 CLR 1 at [81], [105] (McHugh J), [197] (Gummow and Hayne JJ), [239] (Kirby J).
[57] **PS [42]** is about the <u>means</u> adopted to that end, rather than the end itself.

branch a wide power to determine the circumstances in which an alien should be permitted to enter Australia, by the grants of plenary legislative authority with respect to aliens and immigration in ss 51(xix) and 51(xxvii). Those grants have long been held to confer an "absolute and unqualified" power to make such laws as Parliament "may think fit" for the exclusion of aliens from the Australian community.[58] A "supreme power" of that kind is an important incident of sovereignty.[59] Its proper exercise is "largely a political question" that will involve a weighing of societal costs and benefits best suited to the legislature and executive.[60] Were the Court to find that preventing the erosion of social cohesion is not a legitimate purpose for the exclusion of aliens (such that a law that pursues that purpose is invalid, irrespective of the justification for it), that would constitute a substantial and unprecedented confinement of that broad sovereign power.

44. It may be accepted that "[d]isagreement and debate about political matters within a community are inherent incidents" of our system of responsible and representative government: **PS [42]**. But that system operates for the benefit of, and presupposes the existence of, that political community.[61] An alien outside Australia who applies for a visa is not a member of that community but is, rather, seeking to enter it.[62] The choice whether to admit them is ultimately one for the community itself, through its elected representatives: "the people, through the structures of representative democracy for which the Constitution provides… may determine who will or will not enter Australia."[63]

45. ***Reasonably appropriate and adapted:*** The nature and extent of the burden affects the level of justification required.[64] Where a law imposes only an indirect and insubstantial

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[58] See, eg, ***Robtelmes*** *v Brenan* (1906) 4 CLR 395 at 400-1, 404 (Griffith CJ), 413-15 (Barton J); *Ex parte Walsh and Johnson; In re* ***Yates*** (1925) 37 CLR 36 at 94 (Isaacs J), 132-3 (Starke J); ***Pochi*** *v Macphee* (1982) 151 CLR 101 at 106 (Gibbs CJ), 112 (Mason J), 116 (Wilson J); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [52] (Kiefel CJ, Bell, Keane and Edelman JJ), [89] (Gageler and Gordon JJ), [92], [94] (Nettle J).

[59] *Lim* (1992) 176 CLR 1 at 29-30 (Brennan, Deane and Dawson JJ); *Re Wooley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [18] (Gleeson CJ); *Robtelmes* (1906) 4 CLR 395 at 400 (Griffith CJ), 411-12 (Barton J); *Love* (2020) 270 CLR 152 at [74] (Bell J), [130] (Gageler J), [167] (Keane J), [244]-[245] (Nettle J).

[60] *ENT19* (2023) 278 CLR 75 at [10]-[11] (Kiefel CJ, Gageler and Jagot JJ); *R v Governor of Pentonville Prison; Ex parte Azam* [1973] 2 WLR 949 at 960, 962-3 (Lord Denning MR).

[61] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571 (the Court); *Unions No 1* (2013) 252 CLR 530 at [28], [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *LibertyWorks* (2021) 274 CLR 1 at [132] (Gordon J); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 139 (Mason CJ), 231 (McHugh J).

[62] Cf *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 299 (Mason CJ), regarding aliens "actually present within this country". See also at 327-328 (Brennan J), 335-336 (Deane J, Gaudron J relevantly agreeing).

[63] *Ruddock v Vadarlis* (2001) 110 FCR 491 at [192] (French J). See also *Yates* (1925) 37 CLR 36 at 94 (Isaacs J).

[64] *Brown* (2017) 261 CLR 328 at [118] (Kiefel CJ, Bell and Keane JJ), [201] (Gageler J), [325] (Gordon J); ***Tajjour***

burden on the implied freedom, it is readily justified.[65] That is particularly true in the present context, because the justification analysis should not be applied so as to derogate from Parliament's wide latitude of choice in empowering the executive to decide when non-citizens may enter Australia.[66]

46. Section 501(6)(d)(iv) adopts means which are rationally connected to its purpose. It is therefore "suitable", as the plaintiff implicitly accepts: cf **PS [43]**.

47. Section 501(6)(d)(iv) is reasonably necessary to achieve the identified purpose. Neither alternative proposed by the plaintiff is an obvious and compelling alternative that would achieve that purpose to the same extent in a manner less restrictive of the freedom. The
10 *first*, s 501(6)(d)(v), is not less restrictive of the freedom. To the contrary, it is "wider, more general, [and] less targeted":[67] cf **PS [45]**. The *second*, reverting to a requirement for a positive finding that a person "would" incite discord, as opposed to there being a risk of that occurring, would not achieve the purpose of s 501(6)(d)(iv) to the same extent, "probability-wise".[68] It would expose the Australian community to an appreciably greater prospect of harmful discord, contrary to Parliament's clear intention in lowering that requirement over time (in a way that acknowledges the difficulty of proving that a risk would eventuate in the future).[69] **PS [46]** is also wrong to suggest s 501(6)(d)(iv) applies where there is "no real risk" of discord.[70] The Court would not construe the provision in that way, that being a construction designed to produce invalidity.

20 48. Section 501(6)(d)(iv) is adequate in its balance.[71] Gross disproportion does not arise from the absence of a requirement that the non-citizen intend to incite discord in the Australian community: cf **PS [49]**. Indeed, the absence of an intent element is irrelevant at the balancing stage. That stage is reached only if the impugned provision pursues a

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v NSW (2014) 254 CLR 508 at [151] (Gageler J); *ACTV* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ).
[65] *Farm Transparency* (2022) 277 CLR 537 at [177] (Gordon J); *Clubb* (2019) 267 CLR 171 at [176] (Gageler J), [389] (Gordon J); *Brown* (2017) 261 CLR 328 at [426]-[428] (Gordon J).
[66] As has been recognised by US courts in the context of the justification for excluding aliens: see *Kleindienst v Mandel*, 408 US 753 (1972) at 755, 765-770, requiring only a "facially legitimate and bona fide reason" for denying entry to an alien who advocated, wrote or published doctrines of world communism.
[67] Cf *Brown* (2017) 261 CLR 328 at [427] (Gordon J). **PS [45]** is premised on the Commonwealth's construction: **PS [43]**. But, if the plaintiff is right to construe s 501(6)(d)(iv) as capturing less serious conduct than (v), that would demonstrate that s 501(6)(d)(v) would not achieve the former's purpose to the same extent.
[68] Cf *Tajjour* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).
[69] See 1998 Explanatory Memorandum at [52]; Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) (**2014 Explanatory Memorandum**) at [46].
[70] Cf 2014 Explanatory Memorandum at [46].
[71] *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

legitimate purpose by means that are suitable and necessary. Thus, the premise is that s 501(6)(d)(iv) is a necessary means of protecting the Australian community from harmful discord (being a risk that, on the material, is a serious one): see **SCB 267-234 [13]**, **[17]-[18]**; **SCB 271-274**; **SCB 280-281 [21]-[24]**. The other side of the balance is the (at most) slight burden that s 501(6)(d)(iv) imposes on political communication. Such a slight burden cannot outweigh – let alone manifestly outweigh – its legitimate purpose.

D CHALLENGE TO DECISION

49. The plaintiff challenges the validity of the Minister's decision to refuse her a visa on the single (non-constitutional) ground that the Minister incorrectly construed s 501(6)(d)(iv). The premise for that challenge is that s 501(6)(d)(iv) is valid, and has the construction contended for by the Commonwealth: **PS [50]**. The plaintiff contends that the Minister construed "discord" to mean disagreement or debate: **PS [53]**. The argument relies on the Minister not using the specific words "strife, dispute, disharmony or dissension", and his references to the plaintiff as "controversial", which the plaintiff says "indicates that the Minister was concerned with what he thought would cause disagreement and debate, rather than something more": **PS [52]-[53]**. Read fairly and as a whole, no such reading of the Minister's reasons is open. The steps in the Minister's reasons were as follows.

50. *First*, the Minister "turned his mind to [the plaintiff's] profile as a political commentator, author and activist known for her controversial and conspiratorial views", and "examine[d] some of those views and her comments in detail": **SCB 98-101 [8]-[40]**. He found that they amounted to "extremist and inflammatory comments towards Muslim, Black, Jewish and LGBTQIA+ communities which generate controversy and hatred": **SCB 102 [41]**. The Minister did not find that the "controversy", or even "hatred", that could be generated by the plaintiff's expression of those views in Australia was sufficient to amount to discord. That suggests he did not think "discord" means "disagreement" or "debate": cf **PS [53]**. Instead, he went on to consider the graver matters below.

51. *Second*, the Minister examined material from a range of sources concerning the harmful consequences of the kinds of extremist and inflammatory comments he found that the plaintiff had made. This included recent statements by the Director-General of Security that: "[m]ore Australians are embracing a more diverse range of extreme ideologies and … are willing to use violence to advance their cause"; that ASIO was "seeing spikes in political polarisation and intolerance, uncivil debate and unpeaceful protests"; and that

"inflamed language could lead to inflamed community tensions": **SCB 102 [42]-[44]**. It also included statements by the former Race Commissioner that "[h]ate speech leads to political violence if you allow it escalate", and by an academic to similar effect: **SCB 102-103 [48]-[49]**. The Minister found that this material was "credible", and "collectively describe[d] the causal link between individuals who promote and encourage right wing extremism via online platforms and how this supports greater intent and capacity to undertake violent acts": **SCB 103 [50]**. The Minister was satisfied that this material "provide[d] well evidenced and consistent assessments of the potential for persons who espouse ideologically motivated extremist views to pose a risk of inciting discord in the Australian community": **SCB 103 [50]**; see also **106 [76]**. Those findings explicitly link "discord" to "extremism" and "violent acts". They refute any suggestion the Minister thought "discord" meant simply disagreement or debate or was just "concerned with what he thought would cause disagreement and debate": cf **PS [53]**. Indeed, he based those findings on material which expressly disclaimed any concern about mere "political differences, political debates and political protests": **SCB 102 [44]**.

52. *Third*, the Minister considered the risk posed by the plaintiff's planned visit. He found that the plaintiff "uses various online platforms to spread misinformation and promote her controversial views and ideologies", and that such "use of platforms for inflammatory rhetoric can lead to increased hate crimes, radicalisation of individuals and heightened tensions in communities": **SCB 103 [52]**. Against that background, the Minister considered whether the plaintiff's proposed visit to Australia would give rise to "a risk that [she] would incite discord in the Australian community": **SCB 103 [53]**. He concluded that it would. His central findings were (**SCB 104 [57]**; see also **113 [125]**):

> In the current environment where the Australian community is experiencing heightened community tensions, as per the advice of Australia's security apparatus, I find that there is a risk that Ms FARMER's controversial views will amplify grievances among communities and lead to hostility and violent or radical action. … [H]er physical presence in Australia at this time, when there are community tensions, would have the potential to galvanise discord than it otherwise may, in particular because her events would attract onshore media attention… and her shows would garner interest. I consider that the normalisation of controversial rhetoric that dehumanises and targets specific communities has the propensity to galvanise individuals and incite discord in the community.

53. Those findings cannot be read as indicating any misapprehension on the Minister's part that "discord" simply means disagreement or debate. They describe a state of affairs involving "hostility and violent or radical action", incited by the plaintiff expressing views whilst in Australia that target and dehumanise specific communities.

54. A significant thread running through the Minister's reasons concerns the 2019 Christchurch terror attack, in which 51 people were killed and 35 injured, and which "continues to be drawn on for inspiration by right-wing extremists, both in Australia in internationally": **SCB 102 [45]**. The perpetrator of that attack published a "manifesto" in which he identified the plaintiff as "[t]he person who ha[d] influenced [him] above all", her views having "helped [him] push further and further into the belief of violence over meekness": **SCB 99 [17]**. The Minister took into account that the plaintiff's "controversial views" had been "significant enough to influence the perpetrator of" that attack: **SCB 104 [55]**. This underscores that the Minister's concern about the plaintiff expressing her views in Australia was that this could lead not merely to disagreement or debate but, as he put it, to "violent or radical action": **SCB 104 [57]**.

55. The Minister did not, in the section of his reasons dealing with the national interest, "equat[e] … discord and harm": cf **PS [54]**. To the contrary, after referring to "protecting the Australian community from harm", he then said that "with Ms FARMER that harm is about a risk of inciting discord": **SCB 105 [66]**; see also **107 [78]-[79]**. That refutes the plaintiff's argument, as it confirms that the Minister considered "inciting discord" to be "serious conduct" capable of causing harm to the Australian community.

E RELIEF

56. For the foregoing reasons, both s 501(6)(d)(iv) and the Minister's decision are valid, and the plaintiff's application should therefore be dismissed with costs. If, however, s 501(6)(d)(iv) is valid but the Minister's decision is invalid, certiorari should issue to quash the decision and mandamus could also appropriately issue commanding the Minister to make a decision under s 65(1) in accordance with law.

57. If s 501(6)(d)(iv) is invalid then, contrary to **PS [61]**, peremptory mandamus should not issue. *Plaintiff S297* provides no support to the plaintiff: cf **PS [62]-[66]**. There, the Court issued peremptory mandamus to "enforce compliance with" a prior mandamus, because there was a "legally insufficient" return to the prior writ. "It [wa]s that insufficiency which ground[ed] the peremptory mandamus."[72] The Minister having failed twice to make a valid decision, and been given "in his return to the writ, … the

[72] ***Plaintiff S297****/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [39] (the Court).

opportunity to identify some other reason" for refusing a visa, the Court decided he "should not be given a further opportunity".[73] That is patently not this case.

58. If the Minister's decision is quashed, his duty is to make a decision under s 65(1) of the Migration Act according to law. If he reasonably suspects that the plaintiff does not pass the character test then s 65(1)(b) – in combination with PIC 4001 – requires the Minister to refuse the visa unless he positively decides not to exercise his discretion in s 501. The special case records that the parties disagree as to whether the plaintiff satisfies PIC 4001 and s 501: **SCB 37 [11]**. The plaintiff is therefore seeking to have the Court order the Minister to grant her a visa, despite an unresolved dispute about whether all the criteria for that visa are satisfied (and despite the Minister's findings raising at least a question as to whether ss 501(6)(d)(iii) or (v) are enlivened). In those circumstances, the claim for peremptory mandamus must fail. Nineteenth century English practice does not support it: cf **PS [67]**. Indeed, it shows that peremptory mandamus was "seldom awarded in the first instance",[74] and that it was "absolutely inappropriate" where, as here, "questions of fact are still in debate", having not yet been decided by "the appropriate tribunal".[75] Finally, even if the matters relied on in **PS [66]** were sufficient to establish prejudgment by the Minister (which they are not[76]), that would not justify peremptory mandamus. Otherwise, that writ could issue whenever apprehended bias is shown.

PART VI: ORDERS SOUGHT

59. The questions stated by the Special Case should be answered: (1) No; (2) No; (3) Not necessary to answer; (4) The plaintiff.

PART VII:

60. Up to 2.25 hours will be required to present the First Respondent's oral argument.

Dated: 10 April 2025

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[73] *Plaintiff S297* (2015) 255 CLR 231 at [40]-[41] (the Court).
[74] T Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus* (1853) at 444.
[75] *Pritchard v Mayor of Bangor* (1888) 13 App Cas 241 at 246 (Lord Halsbury); *Halsbury's Laws of England* (1st ed, 1907), vol 10 at [234].
[76] Cf generally, eg, *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **CANDACE OWENS FARMER**
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO DEFENDANT' SUBMISSIONS

No	Description	Version	Provisions	Reasons for providing this version	Applicable dates (to what events, if any, this version applies)
	Constitutional provisions				
1.	*Commonwealth Constitution*	Current	Sections 51(xix), 51(xxvii)	In force at all relevant times	All relevant times
	Statutory provisions				
2.	*Migration Act 1958* (Cth)	Comp 162 (14 Oct 2024 to 4 Dec 2024)	Sections 3A, 4, 42, 65, 118, 501, 501H	Act in force on date of Minister's decision	25 Oct 2024: date of Minister's decision
3.	*Migration Act 1958* (Cth)	24 Dec 1992 to 28 Feb 1993	Section 180A	Predecessor to s 501(6)(d)	24 Dec 1992: date of enactment
4.	*Migration Regulations 1994* (Cth)	Comp 265 (16 Oct 2024 to 6 Nov 2024)	Sch 2, cl 408.216 Sch 4, pt 1	Regulations in force on date of Minister's decision	25 Oct 2024: date of Minister's decision

No	Description	Version	Provisions	Reasons for providing this version	Applicable dates (to what events, if any, this version applies)
5.	*Migration Regulations 1989* (Cth)	Reprint 2 (as at 1 Oct 1991)	Reg 2(1), defn of "public interest criteria", para (c)	Contains para (c) as in force immediately before s 180A enacted	23 Dec 1992: date immediately prior to insertion of 180A
6.	*Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth)	As made	Sch 1, item 23	Re-enacted s 501 of the Act	11 Dec 1998: date of enactment
7.	*Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth)	As made	Section 5	Inserted s 180A into the Act	24 Dec 1992: date of enactment
8.	*Migration Legislation Amendment Act 1994* (Cth)	As made	Section 83	Renumbered s 180A to s 501	7 Dec 1992: date of enactment
9.	*Racial Discrimination Act 1975* (Cth)	Comp 19 (current)	Section 17	For illustrative purposes	All relevant times
10.	*Acts Interpretation Act 1901* (Cth)	Comp 38 (current)	Sections 11B, 15A	For illustrative purposes	All relevant times