HIGH COURT OF AUSTRALIA

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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

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. There are four substantive issues in these proceedings: (a) **first**, the meaning of s 501(6)(d)(iv) of the *Migration Act 1958* (Cth) (**the Act**); (b) **secondly**, whether s 501(6)(d)(iv) is invalid because it unjustifiably burdens the implied freedom of political communication; (c) **thirdly**, if s 501(6)(d)(iv) is not invalid, whether the decision of the first defendant (**the Minister**) pursuant to s 501(3)(a) of the Act (**the decision**) to refuse to grant the plaintiff a Temporary Activity (Class GG) visa (**the visa**) is invalid on the ground that the Minister adopted an incorrect construction of s 501(6)(d)(iv); and (d) **fourthly**, the nature of the relief, if any, to be granted to the plaintiff.

3. The questions at **SCB 38 [17]** should be answered: (1) yes; (2) if necessary to answer, yes; (3) the relief sought in [1]-[4] of the plaintiff's amended application for constitutional writ; and (4) the defendants.

PART III: SECTION 78B

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

PART IV: DECISIONS BELOW

5. This proceeding is brought in the Court's original jurisdiction.

PART V: FACTS

6. The facts are set out from **SCB 35 [1]–38 [17]**.

PART VI: ARGUMENT

ISSUE 1: THE MEANING OF SECTION 501(6)(d)(iv)

7. Section 501(6)(d)(iv) means that a person does not pass the character test if, in the event the person were allowed to enter or remain in Australia, there is a risk that the person would cause disagreement or debate in the Australian community or in a segment of that community. That is because:

   (a) "*discord*" in s 501(6)(d)(iv) includes "*disagreement*" or "*debate*" (not, as the defendants submitted in their response to the application at [6], only "*strife, dispute, disharmony or dissension that causes harm to the Australian community or a segment of the Australian community*); and

   (b) "*incite*" in s 501(6)(d)(iv) must mean "*cause*" (not "*intentionally cause*").

Meaning of "*discord*"

8. The starting point is the natural and ordinary meaning of "*discord*" having regard to the context and purpose of s 501(6)(d)(iv).[1] It may be accepted that the ordinary meaning of "discord" when used to describe a condition amongst a community of people or a segment of a community of people can range from "*disagreement*" or "*debate*" to more serious "*dissension*" or "*strife*".[2] There are a number of features which indicate that the former is at least *within* the intended meaning, even if it extends also to the latter.

9. *First*, there is no bright line between what constitutes "disagreement or debate" on one hand or more serious "dissension or strife" on the other. What one person regards as

1 See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ)

2 See, eg, *Oxford English Dictionary* (2nd ed) vol IV p 747.

passionate and vigorous debate about an issue of fundamental importance to the Australian community or a segment of the community may readily be regarded by another as evidence of "dissension or strife", particularly if the people are from different segments of the community. It is evidently for that reason that the defendants seek to add an additional element that the strife, dispute, disharmony or dissension cause harm to the Australian community or a segment of the community. Yet that is to read words into the provision that are simply not there. As has been repeatedly held, "[*i*]*t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do*".[3] It is a particularly wrong thing to do in this case because of how often the drafter of the Act has included an explicit requirement of risk of causation of harm, including in the adjacent s 501(6)(d)(v).[4] It would have been easy for the drafter to do the same thing for s 501(6)(d)(iv). Once that additional element is rejected, there is no basis upon which to exclude from the reach of s 501(6)(d)(iv) disagreement or debate within the Australin community or a segment of the Australian community falling short of an imprecise, contestable and wholly subjective level described as "strife" or "dissension".

10. *Secondly*, the surrounding words of s 501 suggest that s 501(6)(d)(iv) must include disagreement or debate in order for it to have work to do – a result that the Court must strive to achieve.[5]

11. By s 501(6)(d)(v), a person fails the character test if there is a risk that the person would "*represent a danger to the Australian community or to a segment of that community*", which can be satisfied when a person is "*liable to become involved in activities that are disruptive to … that community or segment, or in any other way*". Two dimensions of s 501(6)(d)(v) are important. The first is that the "*danger*" referred to in s 501(6)(d)(v) can be physical or psychological. The second is that s 501(6)(d)(v) makes clear that the requisite risk of danger can be caused by involvement in activities that are relevantly "*disruptive*".

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3 *Thompson v Goold & Co* [1910] AC 409 at 420 (Lord Mersey), cited in, eg, *Minogue v Victoria* (2018) 264 CLR 252 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

4 See also, eg, ss 36(2)(aa), 76E(4)(b)(i), 233B and 245F(12) of the Act.

5 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [97] (Gummow, Hayne and Crennan and Bell JJ).

12. The width of s 501(6)(d)(v) leaves a small window of operation to s 501(6)(d)(iv). That window must capture a risk of inciting "*discord*" in a way that means that there is *not* a risk that the person represents a physical or psychological danger to the Australian community or a segment thereof, including by being liable to become involved in activities that are disruptive to the Australian community or a segment thereof or in any other way. This excludes variant meanings of "*discord*" that are more extreme than "*disagreement*" or "*debate*", including the defendants' construction of "*discord*", especially if the requirement of causation of harm introduced by the defendants is included. Even the defendant's construction with this component removed would still render s 501(6)(d)(iv) inutile. "*Strife, dispute, disharmony or dissension*" are all states that imply antagonism between people, rather than people simply having different views about a particular subject. All of these states have a risk of at least creating psychological harm. Thus, to give s 501(6)(d)(iv) this meaning would again be to render s 501(6)(d)(iv) otiose. Only a meaning of "*discord*" as including "*disagreement*" or "*debate*" avoids this result. To be clear, the problem is not one of avoiding *overlap* between the various sub-paragraphs of s 501(6)(d): it may be accepted that they overlap. The problem is that, on the defendants' construction, s 501(6)(d)(iv) does no independent work.

13. Thus, while it might be thought that the serious nature of the matters dealt with by sub-paras (i), (ii), (iii) and (v) of s 501(6)(d) tends in favour of a sterner construction of sub-para (iv), that cannot be so if it is to be given work independent of sub-para (v).

14. *Thirdly*, the meaning for which the plaintiff contends is consistent with the purpose of s 501(6)(d)(iv) as revealed by its legislative history. That purpose extends to the prevention of the eroding of the "social cohesion" of the Australian community through disagreement and debate caused by the presence of certain non-citizens in Australia.

15. The impetus for the introduction of the predecessor to s 501(6)(d)(iv), s 180A(1)(b)(iii), was successful judicial review proceedings brought in the Federal Court in relation to the Minister's decision to refuse four members of the Hells Angels Motorcycle Club visas to enter Australia.[6] At that time, the Minister's personal determination that an applicant for a tourist visa was "*likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian*

6 See *Hell's Angels Motorcycle Club Inc v Hand* (1991) 25 ALD 659; *Hand v Hell's Angels Motorcycle Club Inc* (1991) 25 ALD 667.

community" meant that the applicant could not be issued with that visa.[7] In *Hand*, the Full Court found that the Minister had taken into account irrelevant considerations when taking into account evidence that made it "*impossible to conclude, on any reasonable basis*" that the requisite state of facts existed,[8] and thus dismissed the appeal from the primary judge's order quashing the decisions.[9] As the Minister later said, this decision led to "*close scrutiny*" of the underlying regime.[10]

16. The result was the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (***Undesirable Persons Act***). That Act introduced s 180A. Section 180A(1)(a) authorised the Minister to refuse to grant, or to cancel, a visa if the Minister was satisfied that the person was not of good character. Section 180A(1)(b) authorised the Minister to refuse to grant, or to cancel, a visa if the Minister was satisfied that, if the person were allowed to enter or 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*" in the same circumstances as that set out in present-day 501(6)(d)(v). Thus, s 180A(1)(b) drew the same distinction that is drawn by s 501(6)(d) today: one between a foreign entrant representing a "*danger*" and a foreign entrant not representing a "*danger*".

17. In the second reading speech in the House of Representative for the Bill that became the *Undesirable Persons Act*, the Minister for Immigration, Local Government and Ethnic Affairs stated that the bill would enable the Minister to exclude from Australia "*persons of bad character*" and "*other undesirable persons*".[11] The answer to the question of how someone who is not of bad character could be an "*undesirable*" person was provided in the Minister's comments about how the power in s 180A(1)(b) would be exercised. He said the power was intended to be used in line with "*well-accepted Australian values, such that it is aimed at those persons who may regard entry to this country as a means*

7 See *Hand* (1991) 25 ALD 667 at 668-669 (Black CJ, Lockhart and Ryan JJ).

8 *Hand* (1991) 25 ALD 667 at 674, 676 (Black CJ, Lockhart and Ryan JJ).

9 *Hand* (1991) 25 ALD 667 at 680 (Black CJ, Lockhart and Ryan JJ).

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121, Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs.

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121, Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs.

to attack those values".[12] That sentence suggests that the Minister was concerned with a concept of foreigners coming to Australia and "*attacking*" values that made the community "*Australian*". Plainly, that could include a person who — through no more than reasoned argument — sought to challenge firmly held beliefs of a large number of Australians, causing disagreement and debate among them. Indeed, it could include a person simply who has views that are perceived by some to be "*attack*" on "*Australian values*", thereby causing disagreement or debate through his or her presence. It is clear that the intention was to allow the Minister to exclude this kind of person from Australia.

18. Consistent with the above, the explanatory memorandum did not try to limit the meaning of "*discord*" as the defendants now seek to limit it. After reciting the words of s 180A(1)(b) – including explicitly referring to "*discord*" – the explanatory memorandum noted that "*[t]he ordinary meaning of the words is imported and there is no intention to limit their ordinary usage"*.[13] The explanatory memorandum also stated that "*represent a danger*" in s 180A(1)(b)(iv) "*must not be narrowly interpreted*" and that the enumerated examples of what may represent a danger were not intended to be comprehensive.[14]

19. Section 180A was ultimately replaced by s 501 through the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1994* (Cth).[15] Section 501(6)(d)(iv) and (v) were the same as they are today, except that they required that the requisite risk be "*significant*". No subsequent legislative development gives cause to doubt that s 501(6)(d)(iv) has the same purpose as that of s 180A.

Meaning of "*incite*"

20. It is well-established that the word "incite" means "to rouse, to stimulate, to urge, to spur on, to stir up, to animate"[16] — in other words "*cause*". It is *not* necessarily the case that

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12 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121, Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs.

13 Explanatory Memorandum, Migration (Offences and Undesirable Persons) Amendment Bill 1992 (Cth) 4 [16].

14 Explanatory Memorandum, Migration (Offences and Undesirable Persons) Amendment Bill 1992 (Cth) 4 [16].

15 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1994* (Cth) sch 1 item 23.

16 *Young v Cassells* (1914) 33 NZLR 852 at 854, quoted in *Sunol v Collier (No 2)* (2012) 289 ALR 128 at [26]. See also *Oxford English Dictionary* (2nd ed) vol VII p 796.

the result must be intended.[17] "*Incite*" in s 501(6)(d)(iv) means "*cause*", not "*intentionally cause*". That is the natural and ordinary meaning of the term when used in the context of a certain state in a community. In particular, the term "*incite*" is often used without implying that the person doing the "*inciting*" intends to bring about a certain result. An unpopular government decision may "*incite public outrage*" even if the government did not intend it to do so. It is also consistent with the mischief of the provision, which was the perceived need to exclude certain people who may provoke a certain response from the community. In addition, the explanatory memorandum makes clear that words including "*incite*" were to take their ordinary meaning. Finally, to read into "*incite*" a requirement of intention would be again to read words in that are simply not there.

21. All of this being said, as explained further below, even if "*incite*" means "intentionally cause", s 501(6)(d)(iv) is still invalid as it extends to the intentional causing of nothing more than disagreement or debate.

ISSUE 2: INVALIDITY OF SECTION 501(6)(d)(iv)

22. Section 501(6)(d)(iv) violates the implied freedom of political communication under the *Constitution* and is therefore invalid. The test to be applied to determine whether a law is invalid because it infringes the implied freedom was set out in full in *Clubb*.[18]

Burden

23. Section 501(6)(d)(iv) of the Act effectively burdens the freedom. To explain why, it is necessary to explain why s 501(6)(d)(iv) limits political communication occurring in Australia, and then why this limitation amounts to an effective burden on the freedom.

Political communication

24. The implied freedom protects from executive and legislative interference the "*freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors*.[19] Because the

17 *Sunol v Collier (No 2)* (2012) 289 ALR 128 at [30]–[31].

18 *Clubb v Edwards* (2019) 267 CLR 171 at [5] (Kiefel CJ, Bell and Keane JJ).

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (the Court).

freedom is not a personal right, the focus of the inquiry is the terms, operation and effect of the law generally, not the facts of the case in which a challenge is made.[20]

25. The freedom protects the discussion of political matters that "*might bear on the choice that the people have to make in federal elections, or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their Departments*".[21] Since "*[s]ocial, economic and political matters in Australia are increasingly integrated*",[22] it is necessary to take a "*wide view*" of the range of political communication protected by the freedom.[23] That being so, to use the plaintiff's planned speech topics as an example, communication about "*freedom of speech, government policy, and social dynamics*" (**SCB 65**) would all fall within the freedom.[24] The subjects of the plaintiff's previous statements referred to in the Minister's reasons (**SCB 98–101**) are plainly within the freedom.

26. In the present case, s 501(6)(d)(iv) limits at least two categories of political communication within the scope of the freedom:

    (a) The *first* category is political communication by a non-resident, non-citizen who, but for s 501(6)(d)(iv) of the Act, has a lawful right to be issued with a visa that allows that person to enter and remain in Australia for long enough to engage in political communication in Australian. Such a person satisfies all mandatory criteria for a visa of that kind under the Act and does not enliven any lawful basis for exercising a discretion under the Act to refuse that person a visa of that kind. If necessary, that person can enforce his or her lawful right to a visa of the requisite kind through seeking a constitutional writ. Examples of political communication made by this kind of person include that by public figures (such as political commentators, ex-politicians, authors and comedians) who, but for s 501(6)(d)(iv), would be able to come to Australia to engage in political communication on speaking tours held around the country in large venues. Other examples include

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20 *Clubb* (2019) 267 CLR 171 at [35] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at [77] (Kiefel CJ, Keane and Gleeson JJ), [135] (Gordon J).

21 *Lange* (1997) 189 CLR 520 at 571 (the Court).

22 *Unions NSW* (2013) 252 CLR 530 at [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

23 *Unions NSW* (2013) 252 CLR 530 at [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

24 See further, eg, **SCB 36 [6]**.

that by lesser-known people who, but for s 501(6)(d)(iv), would engage in lawful political protests in Australia.

(b) The *second* category is political communication by citizens or lawful residents of Australia that would have occurred in Australia but for the application of s 501(6)(d)(iv) of the Act to the kind of person described in category (a). Examples of this kind of political communication include discussion of political matters at speaking events or protests, or with family and friends after those events or protests, that did not occur because the kind of person described in category (a) – the speaker at a large event, the protestor and so on – was not permitted into Australia. This category of political communication is more expansive than the former, because of common flow-on effects of having the kind of person described in category (a) speaking about political matters in Australia. Those flow-on effects can include media reporting of that person's political commentary to large audiences in Australia, which triggers a significant amount of further political communication.

27. The limitation placed on political communication in Australia by s 501(6)(d)(iv) is substantial, direct and discriminatory.

28. Substantial*:* Section 501(6)(d)(iv) imposes a substantial limitation on political communication. The word "*substantial*" directs attention to the likely effect of the impugned law on the political communication under consideration.[25] Here, the limitation is properly described as "*substantial*" because the provision enables the political communication within its reach to be precluded completely. In most cases where s 501(6)(d)(iv) alone is relied upon to refuse a visa, political communication that would have occurred in Australia will never occur. It is no answer that those prevented from engaging in in-person political communication because of s 501(6)(d)(iv) may be able to communicate into Australia from outside Australia, via video appearance or otherwise, using the internet:

(a) *First*, in both a world where s 501(6)(d)(iv) exists and a world where it does not, people can engage in online political communication. The point is that in a world where s 501(6)(d)(iv) exists, people are unable to engage in a certain kind of in-

25 See *Brown v Tasmania* (2017) 261 CLR 328 at [94] (Kiefel CJ, Bell and Keane JJ).

person communication that they could engage in without 501(6)(d)(iv). Just as it would have been no answer to the protestors' successful reliance on the implied freedom in *Brown* that they could have taken their environmental protests in the Lapoinya Forest onto an online Zoom session, it is no answer to the plaintiff's challenge that she and others like her can communicate with Australians online.

(b) *Secondly*, referring to the capacity for online communication makes highly dubious assumptions about the substitutability of in-person and online communications. It is not safe to assume that the same or greater number of people would or could gather online to engage in political communication than if those people were gathered in person with the entrant. It is contrary to common experience to think that, in light of technical limitations and different interpersonal dynamics, the content and mode of in-person political communication is the same as it is online. Participants in the Australian political process, such as politicians, have not abandoned in-person meetings with electors.

29. Direct: Section 501(6)(d)(iv) imposes a direct limitation on political communication. The word "*direct*" is concerned with the distinction between a law "*with respect to the prohibition or restriction of [political] communications*" and a law "*with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications*".[26] On all parties' constructions, s 501(6)(d)(iv) is an example of the former. On the plaintiff's construction, s 501(6)(d)(iv) is designed to prevent disagreement or debate caused by a person's presence in Australia. That disagreement or debate will almost always involve communication about the governmental decision to admit the person in the first place**,** or the person's political views. On the defendants' construction, s 501(6)(d)(iv) is designed to prevent a certain kind of "*strife, dispute, disharmony or dissension*". On this construction, the predicate of all of those states is a person's expression of their views on political matters, or why that person was admitted into Australia – both political matters.

26 *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ) as quoted in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ).

30. Discriminatory: Section 501(6)(d)(iv) imposes a discriminatory limitation on political communication. The word "*discriminatory*" directs attention to whether the impugned provision operates differentially towards different political points of view.[27] In this case, s 501(6)(d)(iv), by its nature, is more likely to be used to exclude those who are apprehended by the Minister to have expressed, or be likely to express, non-mainstream political ideas. That is the kind of political point of view that, in the aggregate, the Minister is likely to reasonably suspect has a risk of inciting "*discord*".

Effective burden

31. The limit on political communication by s 501(6)(d)(iv) is a burden on the freedom.

32. In their response to the application at [8], the defendants resisted this conclusion on the basis that s 501(6)(d)(iv) "*does not prevent non-citizens from engaging in political communication in any form in which they were otherwise lawfully entitled to engage*". This argument raises whether it is a precondition to proof of a burden on political communication that "*the challenged law burdens a freedom that exists independently of that law*"[28] and whether the freedom can be conferred by the same statute containing the challenged law. Both of these issues were substantively argued before the Court in *Babet*, including to the extent of an attempt to reopen *Mulholland*. The Court has yet to publish reasons in *Babet*. These submissions thus proceed by reference to the law as it was before *Babet*. On that understanding, the defendants' response is misconceived at two levels.

33. *First*, as explained at paragraph 25(a) of these submissions, s 501(6)(d)(iv) prevents political communication in Australia by a class of non-citizens who, but for that provision, had a lawful entitlement to propagate. A pre-existing statutory right, even one conferred by a different provision of the statute containing the impugned law, is sufficient to engage the requirement that there be "*proof that the challenged law burdens a freedom that exists independently of that law*".[29]

34. To deny that proposition is to seek to extend the law beyond its current state. In *Levy*, McHugh J held that unless "*common law or Victorian statute law*" gave the protestors

27 See *McCloy v New South Wales* (2015) 257 CLR 178 at [137] (Gageler J), [257] (Nettle J).

28 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [107] (McHugh J).

29 *Mulholland* (2004) 220 CLR 181 at [107] (McHugh J).

under consideration the right to enter the relevant area, it was not the regulations under challenge that destroyed the opportunity for political protest, but the lack of a pre-existing right.[30] Nothing in McHugh J's reasons suggested that where a provision of statute was alleged to be in breach of the implied freedom, the challenger could not rely on a pre-existing legal entitlement conferred by a different provision of that statute. According to the majority in *Ruddick*, five judges in *Mulholland* expressly approved the reasoning of McHugh J in *Levy*.[31] Only two members of that majority in *Mulholland* made comments suggesting that in that case, the requisite pre-existing legal entitlement could not derive from the statutory source of the provisions being challenged.[32] Concomitantly in *Ruddick*, the majority did not appear to condition the requisite pre-existing legal entitlement on a need to derive from a different statutory source to that of legislative provisions on challenge. Rather, the statement of principle endorsed by the majority appears to be that "*any burden upon the freedom of political communication must be measured against the valid, existing laws which form a 'constitutionally valid baseline*'"[33] – without excluding from "*valid, existing laws*" a legal entitlement flowing from the statute containing the challenged provisions.

35. It may be accepted that where the impugned provision is the very provision which confers the right said to be burdened, the requirement to identify a "constitutionally valid baseline" is unsatisfied. The same would be so if the impugned provision is inseverable from the provision which confers the right said to be burdened. That may have justified the outcome in *Mulholland*.[34] The reasoning does not apply here where s 501(6)(d)(iv) is plainly severable from provisions of the Act which would otherwise confer a right to enter Australia.

36. *Secondly*, the submission ignores another class of political communications prevented by s 501(6)(d)(iv): political communication by Australian citizens and residents that would have occurred in Australia but for the application of s 501(6)(d)(iv) of the Act to a foreign entrant. The people engaging in this political communication have freedom of speech at

30 *Levy v Victoria* (1997) 189 CLR 579 at 626 (McHugh J).

31 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at [172] (Gordon, Edelman and Gleeson JJ; Steward J).

32 *Mulholland* (2004) 220 CLR 181 at [110] (McHugh J), [337] (Callinan J).

33 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at [155] (Gordon, Edelman and Gleeson JJ; Steward J).

34 *Mulholland* (2004) 220 CLR 181 at [138] (Gummow and Hayne JJ).

common law.[35] But for s 501(6)(d)(iv), those people would exercise that freedom to engage in certain political communication with each other at in-person gatherings and with other people subsequently. However, because of s 501(6)(d)(iv), fewer of those in-person gatherings occur (for example, because the reason for the event, the foreign speaker, is not there) or occur with less political communication. That being so, s 501(6)(d)(iv) has the effect of limiting political communication within the common law freedom of speech that would have happened without the provision. That is sufficient for an effective burden.

37. The Court should conclude that s 501(6)(d)(iv) places a substantial, direct and discriminatory effective burden on the implied freedom. That means the onus falls on the defendants to justify s 501(6)(d)(iv).[36]

Legitimate purpose

38. The purpose of s 501(6)(d)(iv) is not legitimate.

39. The purpose of a law in this context is the mischief to which it is directed.[37] This purpose is ascertained using the process of statutory construction.[38] In stating the purpose, the usual approach is to connect the operation of the law to the mischief.[39]

40. As explained above from paragraphs 14 to 19, 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 in Australia.

41. A purpose is legitimate if it is compatible with the system of representative government provided for by the Constitution, which is to say "*that the purpose does not impede the functioning of that system and all that it entails*".[40]

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35 See *Monis v The Queen* (2013) 249 CLR 92 at [28] (French CJ).

36 *Unions NSW v New South Wales* (2023) 277 CLR 627 at [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

37 See *Brown* (2017) 261 CLR 328 at[101] (Kiefel CJ, Bell and Keane JJ).

38 *Unions NSW* (2013) 252 CLR 530 at [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

39 See, eg, *Brown* (2017) 261 CLR 328 at [101] (Kiefel CJ, Bell and Keane JJ); *Comcare v Banerji* (2019) 267 CLR 373 at [30] (Kiefel CJ, Bell, Keane and Nettle JJ); *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at [58] (Kiefel CJ, Keane and Gleeson JJ).

40 *McCloy* (2015) 257 CLR 178 at [31] (French CJ, Kiefel, Bell and Keane JJ).

42. The purpose of s 501(6)(d)(iv) is not legitimate. It may be accepted that promoting social cohesion is a goal compatible with the Constitution's system of representative government. The problem in the present case is that s 501(6)(d)(iv) is designed to maintain social cohesion by targeting disagreement or debate that almost always will be about political matters. Disagreement and debate about political matters within a community are inherent incidents of a society that lives under the Constitution's system of representative government. The freedom protects that kind of political communication, just as it has been held to protect even more unpleasant communication — offensive and insulting political communication.[41] It is not legitimate for Parliament to seek to promote social cohesion by preventing the presence in Australia of those who stimulate — even those who intentionally stimulate — disagreement and debate.

Proportionality

43. Section 501(6)(d)(iv) also fails the "necessity" and "adequacy in the balance" aspects of the proportionality test. This is so even if the purpose of the provision is that for which the defendants contend, namely preventing harm to the Australian community from strife, dispute, disharmony or dissension caused by the presence of certain non-citizens in Australia (which is assumed in the analysis below).

Necessity

44. A law is not necessary if there is an "*alternative, reasonably practicable, means of achieving the same object*" but which has "*a less restrictive effect on the freedom*".[42] There are at least two such alternatives.

45. The *first* of these alternatives is simply s 501 without s 501(6)(d)(iv). The section would still have s 501(6)(d)(v) which, as explained above, is sufficient to prevent harm to the Australian community from strife, dispute, disharmony and dissension, without the burden on the freedom entailed by s 501(6)(d)(iv).

46. The *second* of these alternatives is in substance the original formulation of s 180A(1)(b)(iii), which was in the same form as the current s 501(6)(d)(iv) save that it

41 *Coleman v Power* (2004) 220 CLR 1 at [81] (McHugh J), [197] (Gummow and Hayne JJ) and [239] (Kirby J).

42 *Brown* (2017) 261 CLR 328 at [139] (Kiefel CJ, Bell and Keane JJ).

required the Minister to be satisfied that the person *would* incite discord in the Australin community or a segment of that community, not merely that that there is a *risk* that the person would do so. The present threshold of "*risk*" introduces a significant amount of unnecessary burden onto the freedom. It means that political communication that is not likely to cause strife, dispute, disharmony or dissension — but has a risk of causing these states — can be and is curbed under the provision. More insidiously, the reality is that a decisionmaker who is inherently conscious of public opinion can apply the provision to curb political communication that has no real risk of causing the requisite states, but is simply political communication that enough of the public will not like. Given how low "*risk*" is pitched, it is easy for a decisionmaker to believe that the anticipated political communication meets the threshold.

Adequacy of balance

47. A law is adequate in its balance "*unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom*".[43]

48. Given the features of s 501(6)(d)(iv) avoided in the alternatives described above – the low threshold of probability of discord and the overlap with s 501(6)(d)(v) – s 501(6)(d)(iv) is not adequate in its balance.

49. The gross disproportion is revealed by another feature. The present provision places a significant unnecessary burden on political communication by people who do not intend to incite, or even are not reckless or negligent as to inciting, the requisite discord. The provision is such that the uncontrollable reaction of others can and does cause a person to fail the character test. The provision allows the Minister to stop a person from coming to Australia to engage in political communication simply because those with *opposing* views threaten to react sufficiently strongly, irrespective of the steps taken by the person to encourage civility and respectful disagreement.

ISSUE 3: INVALIDITY OF THE DECISION

50. If, contrary to the above, s 501(6)(d)(iv) is found to be valid, the issue of whether the decision is nonetheless invalid arises. The decision is nonetheless invalid because the

43 *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

Minister adopted an incorrect construction of s 501(6)(d)(iv) assuming, as must be so if the provision is valid, that it is to be construed as the defendants contend.

Misconstruction

51. The Minister's construction of s 501(6)(d)(iv) in the decision differed from the defendants' construction in two ways.

52. *First*, the Minister did not construe "*discord*" as needing to be in the nature of "*strife, dispute, disharmony or dissension*". The Minister did not use the words "*strife*", "*dispute*" and "*dissension*" at all in his reasons, and he only used the word "*disharmony*" (**SCB 75 [94]**) once (and not in the section dealing with s 501(6)(d)(iv)). The Minister also did not clearly identify which individuals or groups were participants in the required "*strife, dispute, disharmony or dissension*".

53. The Minister also included a significant amount of material that suggests that the Minister thought that "*discord*" meant "*disagreement*" or "*debate*". In the section dealing with s 501(6)(d)(iv), the Minister focused on his perception of the plaintiff as a "*controversial*" figure with "*controversial*" views: see, eg, **SCB 98 [8], 103 [51], 103 [52], 103 [54]**, **104 [55]** and **104 [57]**. If that descriptor were linked to other facts, then perhaps a use of that descriptor could be consistent with thinking that "*discord*" means what the defendants say it means. However, in the Minister's reasons, the descriptor often just floats free: see, eg, **SCB 98 [8], 103 [51]** and **103 [54]**. That indicates that the Minister was concerned with what he thought would cause disagreement and debate, rather than something more. That is consistent with the Minister referring to a number of alleged past statements of the plaintiff that have no rational connection to "*strife, dispute, disharmony or dissension*" in Australia, but are simply matters that might cause disagreement or debate – for example, the plaintiff's statement about the #metoo movement (**SCB 101 [33]**) or her statement about abortion (**SCB 101 [34]**).

54. *Secondly*, the Minister did not construe the requisite risk of incitement of discord in 501(6)(d)(iv) as containing a requirement that this discord be such as to cause harm to the Australian community or a segment thereof. That is made plain by the Minister's *equating* of discord and harm in the statement that "*harm is about a risk of inciting discord*": **SCB 105 [66]**. It is also made plain by the Minister's omission to find in the

section of the reasons dealing with s 501(6)(d)(iv) (**SCB 97 [7] – 104 [58])** that the discord was such as to cause harm, or to identify that harm or who would suffer it.

55. It is also the case that if "*incite*" in s 501(6)(d)(iv) were construed in these proceedings as "*intentionally cause*", or as involving some element of recklessness, then the Minister misconstrued the provision in this respect as well. Twice, the Minister expressly stated that in making the decision, he was not limited to considering the plaintiff's "*personal behaviour"* and could consider the effect "*her presence may have on others in the community*": **SCB 104 [56], 109 [94]**. At no time did the Minister address whether the plaintiff would intend to cause discord or be reckless as to whether she did so.

Materiality

56. Each of the preceding misconstructions of s 501 was material to the decision. That conclusion only requires the plaintiff to show that the decision could realistically have been different without a given error.[44] The analysis of the counterfactual assumes that the decisionmaker acts "*fairly and reasonably, with a mind open to persuasion*".[45]

57. *First*, if the Minister had construed "*discord*" correctly, it is realistically possible that he could have found that there was no risk that the plaintiff's presence in Australia could have caused "*strife, dispute, disharmony or dissension*". It is "*improper speculation*"[46] to devise a hypothetical causal path from the plaintiff's prior conduct to these conditions amongst specified members or groups in the Australian community in circumstances where the Minister did not do so.

58. *Secondly*, if the Minister had limited "*discord*" to that which causes harm to the Australian community or a segment of the Australian community, it is realistically possible that he could have found that there was no risk that the plaintiff's presence could have caused this kind of discord. Though the Minister found in the section of the reasons dealing with the national interest that "*Ms Farmer's conduct*" had the potential to incite discord that caused harm (**SCB 106 [76]**), that was based on an ambit of "*discord*" which (on the defendants' construction) was overbroad. Further, the Minister's consideration

44 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 418 ALR 152 at [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

45 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181 at [174] (Kerr and Mortimer JJ; Allsop CJ agreeing).

46 *LPDT* (2024) 418 ALR 152 at [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

of harm was not always focussed on the harm *caused by* discord. For instance, at **SCB 107 [78]**, the Minister focussed on the harm said to be caused by influential nature of the plaintiff's public profile. At **SCB 109 [91]**, the Minster referred to the harm caused by conduct the plaintiff might engage in as in fact being "*discord, hatred and racism*".

59. *Thirdly*, if the Minister had construed "*incite*" as "*intentionally cause*", or as involving an element of recklessness, it is realistically possible that he could have found that the plaintiff would not engage in any relevant conduct with this state of mind.

60. *Fourthly*, if the ambit of the "*discord*" which the Minister could properly consider were narrower than that which the Minister considered, the Minster's exercise of discretion may well have been different. If causation of harm as a result of "*strife, dispute, disharmony or dissension*" is an essential integer to failure of the character test, the Minister may well have looked differently, at least as a matter of discretion, at the multiple links in the causal chain involved in his reasons concerning the plaintiff.

ISSUE 4: RELIEF

61. If s 501(6)(d)(iv) is found to be valid, but the decision is found to be invalid, then it is appropriate to issue a writ of certiorari quashing the decision and a writ of mandamus commanding consideration of the plaintiff's application in accordance with law. If s 501(6)(d)(iv) is invalid, then it follows that the issuance of a writ of certiorari quashing the decision is appropriate. If s 501(6)(d)(iv) is found to be invalid, it is also appropriate, in the circumstances of this case, that a peremptory writ of mandamus commanding the first defendant to grant the plaintiff the visa forthwith be issued.

62. In *Plaintiff S297/2013*, this Court issued a peremptory writ of mandamus commanding the Minister to grant the plaintiff a permanent protection visa forthwith.[47] In that case, this Court had issued a writ of mandamus directing the Minister to consider and determine the plaintiff's application for the permanent protection visa according to law.[48] On the return, the Minister had refused the plaintiff's application for the permanent protection visa, and had only identified one basis for doing so.[49] The Court found that

47 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [47] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

48 *Plaintiff S297/2013* (2015) 255 CLR 231 at [12] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

49 *Plaintiff S297/2013* (2015) 255 CLR 231 at [13] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

reason to be legally wrong.[50] The Court considered that "*the Minister should not be given a further opportunity to identify some reason for not granting the plaintiff the visa which is sought*".[51] The Court thus issued the writ sought by the plaintiff, sourcing its power and obligation to do so in s 32 of the *Judiciary Act 1903* (Cth), which facilitates the Court granting "*all such remedies whatsoever as any of the parties thereto are entitled … so that as far as possible all matters in the controversy between the parties regarding the cause of action … may be completely and finally determined*".

63. In this case, the controversy between the parties for the purpose of s 32 is whether the plaintiff is lawfully entitled to the visa. The controversy for the purpose of s 32 includes those controversies before the Court and "*the wider controversy of which they form part*".[52] In deciding what remedy to grant to quell the wider controversy, the prevention of further legal proceedings is a relevant consideration.[53]

64. In the reasons, the Minister identified a single ground upon which a condition necessary to the lawful refusal of the plaintiff had been satisfied. If s 501(6)(d)(iv) is found to be invalid, the Minister erred at law in relying on that ground, and will not be able to rely on that ground again. At the time of her application, the plaintiff otherwise satisfied all legal requirements to be issued with the visa. That is common ground, except the defendants have not provided their position one way or the other on whether the plaintiff would have failed the character test on another ground and therefore have failed to meet public interest criterion (**PIC 4001**) as required by cl 408.216(1) of Schedule 2 to the *Migration Regulations 1994* (Cth): see **SCB 37 [9]**. However, in circumstances where the plaintiff is a highly successful New York Times bestselling author (**SCB 41**), has no criminal history (**SCB 35 [2]**), and in the last six years has been admitted into a number of countries with robust immigration systems (**SCB 336**), it is not realistic that the Minister could reasonably suspect that the plaintiff would fail the character test on another ground, or that PIC 4001 would not be satisfied.

65. The plaintiff continues to satisfy all legal requirements to be granted the visa, with the one exception of needing to provide a letter setting out the dates and locations of her tour:

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50 *Plaintiff S297/2013* (2015) 255 CLR 231 at [40] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

51 *Plaintiff S297/2013* (2015) 255 CLR 231 at [40] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

52 *Edwards v Santos Ltd* (2011) 242 CLR 421 at [66] (Heydon J; French CJ, Gummow, Crennan, Kiefel and Bell JJ).

53 *Edwards* (2011) 242 CLR 421 at [66] (Heydon J; French CJ, Gummow, Crennan, Kiefel and Bell JJ).

see **SCB 37 [10]**. That can be provided swiftly if it is known that the plaintiff is likely to be granted entry to Australia (**SCB 37 [10]**) and in any event, there is no problem with making the command in the writ conditional on provision of that letter.

66. Given the absence of true, legal obstacles to the plaintiff being granted the visa, "*the Minister should not be given a further opportunity to identify some reason for not granting the plaintiff the visa which is sought*".[54] That is reinforced by the Minister's conduct in this matter to date. Prior to the plaintiff even applying for the visa, the Minister told the media that he had committed to personally reviewing the plaintiff's application, and that he hoped she had a "*good refunds policy*": **SCB 301 [5(a)**]. Consistent with that indication, the Minister produced reasons that, for the reasons fully set out in the plaintiff's representations (**SCB 334–343**), are backwards-reasoned and strewn with error. He then continued to denigrate the plaintiff in the media: **SCB 335 [5(e)]**. In light of this, there is an abnormally high risk that the Minister's return to an ordinary writ of mandamus will be insufficient, and the parties will come before the Court again.

67. Issuing a writ of peremptory mandamus in the absence of a previous writ of mandamus is not new. By the nineteenth century, English courts had done so when the conduct of a decisionmaker suggested that an ordinary writ of mandamus may not be an effective remedy.[55] More than a century later, the wisdom of that approach persists.

PART VII: ORDERS SOUGHT BY PLAINTIFF

68. The plaintiff seeks the orders in her application at **SCB 16**.

PART VIII: ESTIMATE FOR PLAINTIFF'S ORAL SUBMISSIONS

69. It is estimated that the plaintiff's oral submissions will take 2.5 hours.

Dated: 20 March 2025

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54 *Plaintiff S297/2013* (2015) 255 CLR 231 at [40] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

55 See, eg, *In the matter of John Long* (1844) 14 LJNS 23; *In Re Jewison* 5 Jur 989. See generally Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus* (London, 1848) 444.

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Migration Act 1958* (Cth)	Comp C162 (14 Oct 2024 to 4 Dec 2024)	Section 501	Act in force on date of Minister's decision	25 October 2024: date of Minister's decision
2	*Migration (Offences and Undesirable Persons) Amendment Act 1992*	As made	Section 5	Inserted 180A into the Act (referred to at [16] of the submissions)	24 December 1992 – 28 February 1993