UNITED STATES

REPORTS

576

OCT. TERM 2014

UNITED STATES REPORTS

VOLUME 576

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2014

JUNE 8 THROUGH OCTOBER 2, 2015

END OF TERM

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2020

Printed on Uncoated Permanent Printing Paper

For sale by the Superintendent of Documents, U. S. Government Publishing Office

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.
ELENA KAGAN, ASSOCIATE JUSTICE.

RETIRED

JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

LORETTA E. LYNCH, ATTORNEY GENERAL.
DONALD B. VERRILLI, JR., SOLICITOR GENERAL.
SCOTT S. HARRIS, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
LINDA S. MASLOW, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 28, 2010, viz.:

For the District of Columbia Circuit, John G. Roberts, Jr., Chief Justice.

For the First Circuit, Stephen Breyer, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

For the Third Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Fourth Circuit, John G. Roberts, Jr., Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

For the Eighth Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Ninth Circuit, Anthony M. Kennedy, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

For the Federal Circuit, John G. Roberts, Jr., Chief Justice.

September 28, 2010.

(For next previous allotment, see 561 U. S., p. vi.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2012 edition.

Cases reported before page 1001 are those decided with opinions of the Court. Cases reported on page 1001 *et seq.* are those in which orders were entered.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2014

ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ZIVOTOFSKY ET UX. *v.* KERRY, SECRETARY OF STATE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–628. Argued November 3, 2014—Decided June 8, 2015

Petitioner Zivotofsky was born to United States citizens living in Jerusalem. Pursuant to § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, his mother asked American Embassy officials to list his place of birth as "Israel" on, *inter alia*, his passport. Section 214(d) states for "purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." The Embassy officials refused to list Zivotofsky's place of birth as "Israel" on his passport, citing the Executive Branch's longstanding position that the United States does not recognize any country as having sovereignty over Jerusalem. Zivotofsky's parents brought suit on his behalf in federal court, seeking to enforce § 214(d). Ultimately, the D. C. Circuit held the statute unconstitutional, concluding that it contradicts the Executive Branch's exclusive power to recognize foreign sovereigns.

Held:

1. The President has the exclusive power to grant formal recognition to a foreign sovereign. Pp. 10–28.

(a) Where, as here, the President's action is "incompatible with the expressed or implied will of Congress," the President "can rely [for his

authority] only upon his own constitutional powers minus any constitutional powers of Congress over the matter," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (Jackson, J., concurring). His asserted power must be both "exclusive" and "conclusive" on the issue, *id.*, at 637–638, and he may rely solely on powers the Constitution grants to him alone, *id.*, at 638. To determine whether the President's power of recognition is exclusive, this Court examines the Constitution's text and structure and relevant precedent and history. P. 10.

(b) The Constitution's text and structure grant the President the power to recognize foreign nations and governments. The Reception Clause directs that the President "shall receive Ambassadors and other public Ministers," Art. II, § 3. And at the time of the founding, receiving an ambassador was considered tantamount to recognizing the sending state's sovereignty. It is thus logical and proper to infer that the Reception Clause would be understood to acknowledge the President's power to recognize other nations. This inference is further supported by the President's additional Article II powers: to negotiate treaties and to nominate the Nation's ambassadors and dispatch other diplomatic agents. Though ratifying a treaty and confirming an ambassador require congressional approval, Congress lacks authority to initiate the actions without the President's involvement. The President, unlike Congress, also has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President, not Congress, means to effect recognition on his own initiative.

Functional considerations also suggest that the President's recognition power is exclusive. The Nation must "speak . . . with one voice" regarding which governments are legitimate in the eyes of the United States and which are not, *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 424, and only the Executive has the characteristic of unity at all times. Unlike Congress, the President is also capable of engaging in the delicate and often secret diplomatic contacts that may lead to a recognition decision, see, *e. g.*, *United States* v. *Pink*, 315 U. S. 203, 229, and is better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. The President has also exercised unilateral recognition power since the founding, a practice endorsed by this Court, see, *e. g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410.

Under basic separation-of-powers principles, Congress, which has the central role in making laws, see Art. I, § 8, cl. 18, does have substantial authority regarding many policy determinations that precede and follow an act of recognition. The President's recognition determination is thus only one part of a political process. Pp. 11–17.

Syllabus

(c) A fair reading of relevant precedent illustrates that this Court has long considered recognition to be the exclusive prerogative of the Executive. See, *e. g.*, *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *United States* v. *Belmont*, 301 U. S. 324, 330; *United States* v. *Pink*, *supra*, at 229; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, at 410; *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320, does not support a broader definition of the Executive's power over foreign relations that would permit the President alone to determine the whole content of the Nation's foreign policy. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, *e. g.*, *Medellín* v. *Texas*, 552 U. S. 491, 523–532. Nonetheless, it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, and his position must be clear. Pp. 17–23.

(d) The weight of historical evidence also indicates Congress has accepted that the recognition power is exclusive to the Presidency. Cf. *NLRB* v. *Noel Canning*, 573 U. S. 513. Since the first administration, the President has claimed unilateral authority to recognize foreign sovereigns. And Congress, for the most part, has acquiesced, generally respecting the Executive's policies and positions on formal recognition and even defending the President's constitutional prerogative. Pp. 23–28.

2. Because the power to recognize foreign states resides in the President alone, § 214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443. The provision forces the President, through the Secretary of State, to identify, upon request, citizens born in Jerusalem as being born in Israel when, as a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem.

If the recognition power is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also may maintain that determination in his and his agent's statements. Under international law, recognition may be effected by written or oral declaration. In addition, an act of recognition must leave no doubt as to the intention to grant it. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power. An "exclusive" Presidential power "disabl[es] the Congress from acting upon the subject." *Youngstown*, *supra*, at 637–638 (Jackson, J., concurring). If Congress may not pass a law, speaking in its own voice, effecting formal recognition, then it may not force the Presi-

Syllabus

dent, through § 214(d), to contradict his prior recognition determination in an official document issued by the Secretary of State. See *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 698.

Section 214(d)'s flaw is further underscored by the fact that the statute's purpose was to infringe on the President's exclusive recognition power. While Congress may have power to enact passport legislation of wide scope, it may not "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict an earlier recognition determination in an official Executive Branch document. *Freytag* v. *Commissioner*, 501 U. S. 868, 878. Pp. 28–32.

725 F. 3d 197, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 32. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 32. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 61. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and ALITO, J., joined, *post*, p. 67.

Alyza D. Lewin argued the cause for petitioner. With her on the briefs were *Nathan Lewin* and *Chaim Z. Kagedan*.

Solicitor General Verrilli argued the cause for respondent. With him on the brief were *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Kneedler*, *Ginger D. Anders*, *Douglas N. Letter*, and *Dana Kaersvang*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Texas by *Greg Abbott*, Attorney General, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Andrew S. Oldham*, Deputy Solicitor General, and *Evan S. Greene* and *Douglas D. Geyser*, Assistant Solicitors General; for the American Jewish Committee by *Marc D. Stern* and *Gregory E. Ostfeld*; for the Anti-Defamation League et al. by *Michael S. Gardener*, *Jeffrey S. Robbins*, and *Steven M. Freeman*; for the Endowment for Middle East Truth by *Paul Kujawsky*; for the International Association of Jewish Lawyers and Jurists by *Sarah B. Biser* and *Robert N. Kravitz*; for the Louis D. Brandeis Center for Human Rights Under Law et al. by *Alan Gura*; for Members of the United States House of Representatives by *Theodore B. Olson* and *Randy M. Mastro*; for Public Citizen, Inc., by *Alan B. Morrison*, *Scott L. Nelson*, and *Allison M. Zieve*; for the United States Senate by *Morgan J. Frankel*, *Patricia Mack*

JUSTICE KENNEDY delivered the opinion of the Court.

A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation's foreign policies.

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is "Israel."

I

A

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy,

---

Bryan, *Grant R. Vinik*, and *Thomas E. Caballero*; and for the Zionist Organization of America by *Susan B. Tuchman* and *David I. Schoen*.

Briefs of *amici curiae* urging affirmance were filed for the American-Arab Anti-Discrimination Committee by *Abed A. Ayoub*; and for David Boyle by *Mr. Boyle*, *pro se*.

Briefs of *amici curiae* were filed for True Torah Jews Inc. by *Philip Fertik*; and for Louis Fisher by *Charles Tiefer*.

and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of "recognition." See Statement by the President Announcing Recognition of the State of Israel, Public Papers of the Presidents, May 14, 1948, p. 258 (1964). That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that "'the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned.'" United Nations Gen. Assembly Official Records, 5th Emergency Sess., 1554th Plenary Meetings, United Nations Doc. No. 1 A/PV.1554, p. 10 (July 14, 1967); see, *e. g.*, Remarks by President Obama in Address to the United Nations Gen. Assembly (Sept. 21, 2011), 2011 Daily Comp. of Pres. Doc. 00661, p. 4 ("Ultimately, it is the Israelis and the Palestinians, not us, who must reach agreement on the issues that divide them," including "Jerusalem"). In a letter to Congress then-Secretary of State Warren Christopher expressed the Executive's concern that "[t]here is no issue related to the Arab-Israeli negotiations that is more sensitive than Jerusalem." See 141 Cong. Rec. 28967 (1995) (letter to Robert Dole, Majority Leader (June 20, 1995)). He further noted the Executive's opinion that "any effort . . . to bring it to the forefront" could be "very damaging to the success of the peace process." *Ibid.*

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Depart-

ment's Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." Dept. of State, 7 Foreign Affairs Manual (FAM) § 1383.4 (1987). If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. See *id.*, § 1383.6. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. See generally *id.*, § 1383. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem." *Id.*, § 1383.5–6 (emphasis deleted).

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." *Id.*, at 1365. The subsection that lies at the heart of this case, § 214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel." Titled "Record of Place of Birth as Israel for Passport Purposes," § 214(d) states "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Id.*, at 1366.

When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would, "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." Statement on Signing the Foreign Relations Authorization

Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005). The President concluded, "U. S. policy regarding Jerusalem has not changed." *Ibid.*

Some parties were not reassured by the President's statement. A cable from the United States Consulate in Jerusalem noted that the Palestine Liberation Organization Executive Committee, Fatah Central Committee, and the Palestinian Authority Cabinet had all issued statements claiming that the Act "'undermines the role of the U. S. as a sponsor of the peace process.'" App. 231. In the Gaza Strip and elsewhere residents marched in protest. See The Associated Press and Reuters, Palestinians Stone Police Guarding Western Wall, The Seattle Times, Oct. 5, 2002, p. A7.

In response the Secretary of State advised diplomats to express their understanding of "Jerusalem's importance to both sides and to many others around the world." App. 228. He noted his belief that America's "policy towards Jerusalem" had not changed. *Ibid.*

B

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. App. 24–25. In December 2002, Zivotofsky's mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son. *Id.*, at 25. She asked that his place of birth be listed as "'Jerusalem, Israel.'" *Ibid.* The Embassy clerks explained that, pursuant to State Department policy, the passport would list only "Jerusalem." *Ibid.* Zivotofsky's parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce §214(d).

Pursuant to §214(d), Zivotofsky claims the right to have "Israel" recorded as his place of birth in his passport. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 193 (2012) ("[W]hile Zi-

votofsky had originally asked that 'Jerusalem, Israel,' be recorded on his passport, '[b]oth sides agree that the question now is whether § 214(d) entitles [him] to have just "Israel" listed' "). The arguments in Zivotofsky's brief center on his passport claim, as opposed to the consular report of birth abroad. Indeed, in the court below, Zivotofsky waived any argument that his consular report of birth abroad should be treated differently than his passport. *Zivotofsky* v. *Secretary of State*, 725 F. 3d 197, 203, n. 3 (CADC 2013). He has also waived the issue here by failing to differentiate between the two documents. As a result, the Court addresses Zivotofsky's passport arguments and need not engage in a separate analysis of the validity of § 214(d) as applied to consular reports of birth abroad.

After Zivotofsky brought suit, the District Court dismissed his case, reasoning that it presented a nonjusticiable political question and that Zivotofsky lacked standing. App. 28–39. The Court of Appeals for the District of Columbia Circuit reversed on the standing issue, *Zivotofsky* v. *Secretary of State*, 444 F. 3d 614, 617–619 (2006), but later affirmed the District Court's political question determination. See *Zivotofsky* v. *Secretary of State*, 571 F. 3d 1227, 1228 (2009).

This Court granted certiorari, vacated the judgment, and remanded the case. Whether § 214(d) is constitutional, the Court held, is not a question reserved for the political branches. In reference to Zivotofsky's claim the Court observed "the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional"—not whether Jerusalem is, in fact, part of Israel. *Zivotofsky* v. *Clinton*, *supra*, at 196.

On remand the Court of Appeals held the statute unconstitutional. It determined that "the President exclusively holds the power to determine whether to recognize a foreign sovereign," 725 F. 3d, at 214, and that "section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power," *id.*, at 217.

This Court again granted certiorari. 572 U. S. 1059 (2014).

II

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635–638 (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories: First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.*, at 635. Second, "in absence of either a congressional grant or denial of authority" there is a "zone of twilight in which he and Congress may have concurrent authority," and where "congressional inertia, indifference or quiescence may" invite the exercise of executive power. *Id.*, at 637. Finally, when "the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Ibid.* To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue. *Id.*, at 637–638.

In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." Brief for Respondent 48. In so doing the Secretary acknowledges the President's power is "at its lowest ebb." *Youngstown*, 343 U. S., at 637. Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone. *Id.*, at 638.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

A

Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." Restatement (Third) of Foreign Relations Law of the United States § 203, Comment *a*, p. 84 (1986). It may also involve the determination of a state's territorial bounds. See 2 M. Whiteman, Digest of International Law § 1, p. 1 (1963) (Whiteman) ("[S]tates may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other states"). Recognition is often effected by an express "written or oral declaration." 1 J. Moore, Digest of International Law § 27, p. 73 (1906) (Moore). It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. *Ibid.*; I. Brownlie, Principles of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, see *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137 (1938), and may benefit from sovereign immunity when they are sued, see *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358–359 (1955). The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. See *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302–303 (1918). Recognition at international law, furthermore, is a precondition of regular diplomatic relations. 1 Moore § 27, at 72. Recognition is thus "useful, even necessary," to the existence of a state. *Ibid.*

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers."

Art. II, § 3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. See Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. Rich. L. Rev. 801, 860–862 (2011). In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was "more a matter of dignity than of authority," a ministerial duty largely "without consequence." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, The Law of Nations § 78, p. 461 (1758) (J. Chitty ed. 1853) ("[E]very state, truly possessed of sovereignty, has a right to send ambassadors" and "to contest their right in this instance" is equivalent to "contesting their sovereign dignity"); see also 2 C. van Bynkershoek, On Questions of Public Law 156–157 (1737) (T. Frank ed. 1930) ("Among writers on public law it is usually agreed that only a sovereign power has a right to send ambassadors"); 2 H. Grotius, On the Law of War and Peace 440–441 (1625) (F. Kelsey ed. 1925) (discussing the duty to admit ambassadors of sovereign powers). It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation's history when President Washington recognized the French Revolutionary Government by receiving its ambassador. See A. Hamilton, Pacificus No. 1, in The Letters of Pacificus and Helvidius 5, 13–14 (1845) (reprint 1976) (President "acknowledged the republic of France, by the reception of its minister"). After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause "includes th[e power] of

judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not." See *id.*, at 12; see also 3 J. Story, Commentaries on the Constitution of the United States § 1560, p. 416 (1833) ("If the executive receives an ambassador, or other minister, as the representative of a new nation . . . it is an acknowledgment of the sovereign authority *de facto* of such new nation, or party"). As a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, "by and with the Advice and Consent of the Senate," to "make Treaties, provided two thirds of the Senators present concur." Art. II, § 2, cl. 2. In addition, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" as well as "other public Ministers and Consuls." *Ibid.*

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador. Brownlie 93; see also 1 Moore § 27, at 73. The President has the sole power to negotiate treaties, see *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by

engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the "executive Power" shall be vested in the President, provides further support for the President's action here. Art. II, § 1, cl. 1.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must "'speak . . . with one voice.'" *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 424 (2003) (quoting *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 381 (2000)). That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70, p. 424 (A. Hamilton). The President is

capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. See, *e. g.*, *United States* v. *Pink*, 315 U. S. 203, 229 (1942). He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. 1 Oppenheim's International Law § 50, p. 169 (R. Jennings & A. Watts eds., 9th ed. 1992) (act of recognition must "leave no doubt as to the intention to grant it"). These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410 (1964); *Pink*, *supra*, at 229; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Texts and treatises on international law treat the President's word as the final word on recognition. See, *e. g.*, Restatement (Third) of Foreign Relations Law § 204, at 89 ("Under the Constitution of the United States the President has exclusive authority to recognize or not to recognize a foreign state or government"); see also L. Henkin, Foreign Affairs and the U. S. Constitution 43 (2d ed. 1996) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government"). In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power. See 725 F. 3d, at 214 ("[W]e conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign"); *Zivotofsky*, 571 F. 3d, at 1231 ("That this power belongs solely to the President has been clear from the earliest days of the

Republic"); *id.*, at 1240 (Edwards, J., concurring) ("The Executive has exclusive and unreviewable authority to recognize foreign sovereigns").

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. § 8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, see, *e. g.*, *Pink*, 315 U. S. 203, or between the courts and the political branches, see, *e. g.*, *Banco Nacional de Cuba*, 376 U. S., at 410—not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the

recognition process. In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive.

During the administration of President Van Buren, in a case involving a dispute over the status of the Falkland Islands, the Court noted that "when the executive branch of the government" assumes "a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams*, 13 Pet., at 420. Once the President has made his determination, it "is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union." *Ibid.*

Later, during the 1930's and 1940's, the Court addressed issues surrounding President Roosevelt's decision to recognize the Soviet Government of Russia. In *United States* v. *Belmont*, 301 U. S. 324 (1937), and *Pink*, *supra*, New York state courts declined to give full effect to the terms of executive agreements the President had concluded in negotiations over recognition of the Soviet regime. In particular the state courts, based on New York public policy, did not treat assets that had been seized by the Soviet Government as property of Russia and declined to turn those assets over to the United States. The Court stated that it "may not be doubted" that "recognition, establishment of diplomatic relations, . . . and agreements with respect thereto" are "within the competence of the President." *Belmont*, 301 U. S., at 330. In these matters, "the Executive ha[s] authority to speak as the sole organ of th[e] government." *Ibid.* The Court added that the President's authority "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, *supra*, at 229; see also *Guaranty Trust Co.*, 304 U. S., at 137–138 (The "political department['s] . . . action in recognizing a for-

eign government and in receiving its diplomatic representatives is conclusive on all domestic courts"). Thus, New York state courts were required to respect the executive agreements.

It is true, of course, that *Belmont* and *Pink* are not direct holdings that the recognition power is exclusive. Those cases considered the validity of executive agreements, not the initial act of recognition. The President's determination in those cases did not contradict an Act of Congress. And the primary issue was whether the executive agreements could supersede state law. Still, the language in *Pink* and *Belmont*, which confirms the President's competence to determine questions of recognition, is strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate.

Banco Nacional de Cuba contains even stronger statements regarding the President's authority over recognition. There, the status of Cuba's Government and its acts as a sovereign were at issue. As the Court explained, "Political recognition is exclusively a function of the Executive." 376 U. S., at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the "act of state" doctrine. See also *Baker* v. *Carr*, 369 U. S. 186, 213 (1962) ("[I]t is the executive that determines a person's status as representative of a foreign government"); *National City Bank of N. Y.*, 348 U. S., at 358 ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court"). As these cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." Brief for Re-

spondent 18, 16. In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States* v. *Curtiss-Wright Export Corp.*, which described the President as "the sole organ of the federal government in the field of international relations." 299 U. S., at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

The *Curtiss-Wright* case does not extend so far as the Secretary suggests. In *Curtiss-Wright*, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided criminal penalties for violation of those orders. *Id.*, at 311–312. The Court held that the delegation was constitutional, reasoning that Congress may grant the President substantial authority and discretion in the field of foreign affairs. *Id.*, at 315–329. Describing why such broad delegation may be appropriate, the opinion stated:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' [10 Annals of Cong.] 613." *Id.*, at 319.

This description of the President's exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. See 10 Annals of Cong. 613 (1800) (cited in *Curtiss-Wright*, *supra*, at 319). But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, *e. g.*, *Medellín* v. *Texas*, 552 U. S. 491, 523–532 (2008); *Youngstown*, 343 U. S., at 589; *Little* v. *Barreme*, 2 Cranch 170, 177–179 (1804); Glennon, Two Views of Presidential Foreign Affairs Power: *Little* v. *Barreme* or *Curtiss-Wright*? 13 Yale J. Int'l L. 5, 19–20 (1988); cf. *Dames & Moore* v. *Regan*, 453 U. S. 654, 680–681 (1981). It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

Zivotofsky's contrary arguments are unconvincing. The decisions he relies upon are largely inapposite. This Court's cases do not hold that the recognition power is shared. *Jones* v. *United States*, 137 U. S. 202 (1890), and *Boumediene* v. *Bush*, 553 U. S. 723 (2008), each addressed the status of territories controlled or acquired by the United States—not whether a province ought to be recognized as part of a foreign country. See also *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380 (1948) ("[D]etermination of [American] sovereignty over an area is for the legislative and executive departments"). And no one disputes that Congress has a role in determining the status of United States territories. See U. S. Const., Art. IV, § 3, cl. 2 (Congress may "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Other cases describing a shared power address the recognition of Indian tribes—which is, similarly, a distinct issue from the recognition of foreign countries. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831).

To be sure, the Court has mentioned both of the political branches in discussing international recognition, but it has done so primarily in affirming that the Judiciary is not responsible for recognizing foreign nations. See *Oetjen*, 246 U. S., at 302 ("'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges'" (quoting *Jones*, *supra*, at 212)); *United States* v. *Palmer*, 3 Wheat. 610, 643 (1818) ("[T]he courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States"). This is consistent with the fact that Congress, in the ordinary course, does support the President's recognition policy, for instance by confirming an ambassador to the recognized foreign government. Those cases do not cast doubt on the view that the Executive

Branch determines whether the United States will recognize foreign states and governments and their territorial bounds.

C

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often "put significant weight upon historical practice." *NLRB* v. *Noel Canning*, 573 U. S. 513, 524 (2014) (emphasis deleted). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

The briefs of the parties and *amici*, which have been of considerable assistance to the Court, give a more complete account of the relevant history, as do the works of scholars in this field. See, *e. g.*, Brief for Respondent 26–39; Brief for Petitioner 34–57; Brief for American Jewish Committee as *Amicus Curiae* 6–24; J. Goebel, The Recognition Policy of the United States 97–170 (1915) (Goebel); 1 Moore §§28–58, 74–164; Reinstein, Is the President's Recognition Power Exclusive? 86 Temp. L. Rev. 1, 3–50 (2013). But even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult

and coordinate with Congress. As Judge Tatel noted in this case, however, "the most striking thing" about the history of recognition "is what is absent from it: a situation like this one," where Congress has enacted a statute contrary to the President's formal and considered statement concerning recognition. 725 F. 3d, at 221 (concurring opinion).

The first debate over the recognition power arose in 1793, after France had been torn by revolution. See Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 312 (2001). Once the Revolutionary Government was established, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American Ambassador to resume relations with the new regime. See Letter to G. Morris (Mar. 12, 1793), in 25 Papers of Thomas Jefferson 367, 367–368 (J. Catanzariti ed. 1992); Goebel 99–104. Soon thereafter, the new French Government proposed to send an ambassador, Citizen Genet, to the United States. See *id.*, at 105. Members of the President's Cabinet agreed that receiving Genet would be a binding and public act of recognition. See Opinion on the Treaties With France (Apr. 28, 1793), in 25 Papers of Thomas Jefferson, at 608, 612 ("The reception of the Minister at all . . . is an ackno[w]le[d]gement of the legitimacy of their government"); see also Letter from A. Hamilton to G. Washington (Cabinet Paper) (Apr. 1793), in 4 Works of Alexander Hamilton 369, 369–396 (H. Lodge ed. 1904). They decided, however, both that Genet should be received and that consultation with Congress was not necessary. See T. Jefferson, Anas (Apr. 18, 1793), in 1 Writings of Thomas Jefferson 226, 227 (P. Ford ed. 1892); Cabinet Opinion on Washington's Questions on Neutrality and the Alliance With France (Apr. 19, 1793), in 25 Papers of Thomas Jefferson, at 570. Congress expressed no disagreement with this position, and Genet's reception marked the Nation's first act of recognition—one made by the President alone. See Prakash, *supra*, at 312–313.

The recognition power again became relevant when yet another revolution took place—this time, in South America, as several colonies rose against Spain. In 1818, Speaker of the House Henry Clay announced he "intended moving the recognition of Buenos Ayres and probably of Chile." Goebel 121. Clay thus sought to appropriate money "'[f]or one year's salary'" for "'a Minister'" to present-day Argentina. 32 Annals of Cong. 1500 (1818). President Monroe, however, did not share that view. Although Clay gave "one of the most remarkable speeches of his career," his proposed bill was defeated. Goebel 123; 32 Annals of Cong. 1655. That action has been attributed, in part, to the fact that Congress agreed the recognition power rested solely with the President. Goebel 124; see, *e. g.*, 32 Annals of Cong. 1570 (statement of Rep. Alexander Smyth) ("[T]he acknowledgment of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation"). Four years later, after the President had decided to recognize the South American republics, Congress did pass a resolution, on his request, appropriating funds for "such missions to the independent nations on the American continent, as the President of the United States may deem proper." Act of May 4, 1822, ch. 52, 3 Stat. 678.

A decade later, President Jackson faced a recognition crisis over Texas. In 1835, Texas rebelled against Mexico and formed its own government. See Goebel 144–147. But the President feared that recognizing the new government could ignite a war. See A. Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), in 3 Messages and Papers of the Presidents 265, 266–267 (J. Richardson ed. 1899). After Congress urged him to recognize Texas, see Cong. Globe, 24th Cong., 1st Sess., 453 (1836); H. R. Rep. No. 854, 24th Cong., 1st Sess. (1836), the President delivered a message to the Legislature. He concluded there had not been a "deliberate inquiry" into whether the Presi-

dent or Congress possessed the recognition power. See A. Jackson, in 3 Messages and Papers of the Presidents, at 267. He stated, however, "on the ground of expediency, I am disposed to concur" with Congress' preference regarding Texas. *Ibid.* In response Congress appropriated funds for a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States . . . shall deem it expedient to appoint such minister." Act of Mar. 3, 1837, 5 Stat. 170. Thus, although he cooperated with Congress, the President was left to execute the formal act of recognition.

President Lincoln, too, sought to coordinate with Congress when he requested support for his recognition of Liberia and Haiti. In his first annual message to Congress he said he could see no reason "why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia." Lincoln's First Annual Message to Congress (Dec. 3, 1861), in 6 Messages and Papers of the Presidents 44, 47. Nonetheless, he was "[u]nwilling" to "inaugurate a novel policy in regard to them without the approbation of Congress." *Ibid.* In response Congress concurred in the President's recognition determination and enacted a law appropriating funds to appoint diplomatic representatives to the two countries—leaving, as usual, the actual dispatch of ambassadors and formal statement of recognition to the President. Act of June 5, 1862, 12 Stat. 421.

Three decades later, the branches again were able to reach an accord, this time with regard to Cuba. In 1898, an insurgency against the Spanish colonial government was raging in Cuba. President McKinley determined to ask Congress for authorization to send armed forces to Cuba to help quell the violence. See 31 Cong. Rec. 3699–3702 (1898). Although McKinley thought Spain was to blame for the strife, he opposed recognizing either Cuba or its insurgent government. *Id.*, at 3701. At first, the House proposed a resolution consistent with McKinley's wishes. *Id.*, at 3810. The Senate countered with a resolution that authorized the use

of force but that did recognize both Cuban independence and the insurgent government. *Id.*, at 3993. When the Senate's version reached the House, the House again rejected the language recognizing Cuban independence. *Id.*, at 4017. The resolution went to Conference, which, after debate, reached a compromise. See Reinstein, 86 Temp. L. Rev., at 40–41. The final resolution stated "the people of the Island of Cuba are, and of right ought to be, free and independent," but made no mention of recognizing a new Cuban Government. Act of Apr. 20, 1898, 30 Stat. 738. Accepting the compromise, the President signed the joint resolution. See Reinstein, 86 Temp. L. Rev., at 41.

For the next 80 years, "[P]residents consistently recognized new states and governments without any serious opposition from, or activity in, Congress." *Ibid.*; see 2 Whiteman §§ 6–60, at 133–242 (detailing over 50 recognition decisions made by the Executive). The next debate over recognition did not occur until the late 1970's. It concerned China.

President Carter recognized the People's Republic of China (PRC) as the government of China, and derecognized the Republic of China, located on Taiwan. See S. Kan, Cong. Research Serv., China/Taiwan: Evolution of the "One China" Policy—Key Statements from Washington, Beijing, and Taipei 1, 10 (Oct. 10, 2014). As to the status of Taiwan, the President "acknowledge[d] the Chinese position" that "Taiwan is part of China," *id.*, at 39 (text of U. S.–PRC Joint Communique on the Establishment of Diplomatic Relations (Jan. 1, 1979)), but he did not accept that claim. The President proposed a new law defining how the United States would conduct business with Taiwan. See Hearings on Taiwan Legislation before the House Committee on Foreign Affairs, 96th Cong., 1st Sess., 2–6 (1979) (statement of Warren Christopher, Deputy Secretary of State). After extensive revisions, Congress passed, and the President signed, the Taiwan Relations Act, 93 Stat. 14 (1979) (codified as amended at 22 U. S. C. §§ 3301–3316). The Act (in a simpli-

fied summary) treated Taiwan as if it were a legally distinct entity from China—an entity with which the United States intended to maintain strong ties. See, *e. g.*, §§ 3301, 3303(a), (b)(1), (b)(7).

Throughout the legislative process, however, no one raised a serious question regarding the President's exclusive authority to recognize the PRC—or to decline to grant formal recognition to Taiwan. See, *e. g.*, 125 Cong. Rec. 6709 (1979) (statement of Sen. Jacob Javits) ("Neither bill [proposed by either Chamber] sought to reestablish official relations between the United States and the Republic of China on Taiwan; Congress . . . does not have the authority to do that even if it wanted to do so"). Rather, Congress accepted the President's recognition determination as a completed, lawful act; and it proceeded to outline the trade and policy provisions that, in its judgment, were appropriate in light of that decision.

This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone. For the most part, Congress has respected the Executive's policies and positions as to formal recognition. At times, Congress itself has defended the President's constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President's power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking "with one voice." *Crosby*, 530 U. S., at 381. The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive's consistent decision to withhold

recognition with respect to Jerusalem. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977) (action unlawful when it "prevents the Executive Branch from accomplishing its constitutionally assigned functions").

Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city of Jerusalem." 116 Stat. 1366. That is, §214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, §214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." 725 F. 3d, at 217, 216.

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination. Under international law, recognition may be effected by "written or oral declaration of the recognizing state." 1 Moore §27, at 73. In addition an act of recognition must "leave no doubt as to the intention to grant it." 1 Oppenheim's International Law §50, at 169. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in *Youngstown*, when a Presidential power is "exclusive," it "disabl[es] the Congress from

acting upon the subject." 343 U. S., at 637–638 (concurring opinion). Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. See *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699 (1835) (a passport "from its nature and object, is addressed to foreign powers" and "is to be considered . . . in the character of a political document"). As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition. See 725 F. 3d, at 224 (Tatel, J., concurring). The Secretary's position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President's recognition policy. See 7 FAM § 1383. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. See *id.*, § 1383.6. But the Secretary will not list a sovereign that contradicts the President's recognition policy in a passport.

Thus, the Secretary will not list "Israel" in a passport as the country containing Jerusalem.

The flaw in §214(d) is further underscored by the undoubted fact that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." §214, 116 Stat. 1365. The House Conference Report proclaimed that §214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." H. R. Conf. Rep. No. 107–671, p. 123 (2002). And, indeed, observers interpreted §214 as altering United States policy regarding Jerusalem—which led to protests across the region. See *supra*, at 8. From the face of §214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. See *Haig* v. *Agee*, 453 U. S. 280 (1981); *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Kent* v. *Dulles*, 357 U. S. 116 (1958). The Court does not question the power of Congress to enact passport legislation of wide scope. In *Kent* v. *Dulles*, for example, the Court held that if a person's "'liberty'" to travel "is to be regulated" through a passport, "it must be pursuant to the law-making functions of the Congress." *Id.*, at 129. Later cases, such as *Zemel* v. *Rusk* and *Haig* v. *Agee*, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. See *Zemel*, *supra*, at 7–13; *Haig*, *supra*, at 289–306. This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation's foreign affairs.

The problem with §214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandiz[e] its power at the expense of

another branch" by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. *Freytag* v. *Commissioner*, 501 U. S. 868, 878 (1991). To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

* * *

In holding § 214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

The judgment of the Court of Appeals for the District of Columbia Circuit is

Affirmed.

JUSTICE BREYER, concurring.

I continue to believe that this case presents a political question inappropriate for judicial resolution. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 212 (2012) (BREYER, J., dissenting). But because precedent precludes resolving this case on political question grounds, see *id.*, at 191 (majority opinion), I join the Court's opinion.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

Our Constitution allocates the powers of the Federal Government over foreign affairs in two ways. First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly.

Second, it vests the residual foreign affairs powers of the Federal Government—*i. e.*, those not specifically enumerated in the Constitution—in the President by way of Article II's Vesting Clause.

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, ignores that constitutional allocation of power insofar as it directs the President, contrary to his wishes, to list "Israel" as the place of birth of Jerusalem-born citizens on their passports. The President has long regulated passports under his residual foreign affairs power, and this portion of § 214(d) does not fall within any of Congress' enumerated powers.

By contrast, § 214(d) poses no such problem insofar as it regulates consular reports of birth abroad. Unlike passports, these reports were developed to effectuate the naturalization laws, and they continue to serve the role of identifying persons who need not be naturalized to obtain U. S. citizenship. The regulation of these reports does not fall within the President's foreign affairs powers, but within Congress' enumerated powers under the Naturalization and Necessary and Proper Clauses.

Rather than adhere to the Constitution's division of powers, the Court relies on a distortion of the President's recognition power to hold both of these parts of § 214(d) unconstitutional. Because I cannot join this faulty analysis, I concur only in the portion of the Court's judgment holding § 214(d) unconstitutional as applied to passports. I respectfully dissent from the remainder of the Court's judgment.

I

A

The Constitution specifies a number of foreign affairs powers and divides them between the political branches. Among others, Article I allocates to Congress the powers "[t]o regulate Commerce with foreign Nations," "[t]o establish an uniform Rule of Naturalization," "[t]o define and pun-

ish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Art. I, § 8. For his part, the President has certain express powers relating to foreign affairs, including the powers, "by and with the Advice and Consent of the Senate," to "appoint Ambassadors," and "to make Treaties, provided two thirds of the Senators present concur." Art. II, § 2. He is also assigned certain duties with respect to foreign affairs, including serving as "Commander in Chief of the Army and Navy of the United States," *ibid.*, and "receiv[ing] Ambassadors and other public Ministers," Art. II, § 3.

These specific allocations, however, cannot account for the entirety of the foreign affairs powers exercised by the Federal Government. Neither of the political branches is expressly authorized, for instance, to communicate with foreign ministers, to issue passports, or to repel sudden attacks. Yet the President has engaged in such conduct, with the support of Congress, since the earliest days of the Republic. Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 298–346 (2001) (Prakash & Ramsey).

The President's longstanding practice of exercising unenumerated foreign affairs powers reflects a constitutional directive that "the President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 580 (2004) (THOMAS, J., dissenting). Specifically, the Vesting Clause of Article II provides that "[t]he executive Power shall be vested in a President of the United States." Art. II, § 1. This Clause is notably different from the Vesting Clause of Article I, which provides only that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States," Art. I, § 1 (emphasis added). By omitting the words "herein granted" in Article

II, the Constitution indicates that the "executive Power" vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the "executive Power" of the Federal Government.

B

Founding-era evidence reveals that the "executive Power" included the foreign affairs powers of a sovereign State. See Prakash & Ramsey 253. John Locke's 17th-century writings laid the groundwork for this understanding of executive power. Locke described foreign affairs powers—including the powers of "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth"—as "federative" power. Second Treatise of Civil Government § 146, p. 73 (J. Gough ed. 1947). He defined the "executive" power as "comprehending the execution of the municipal laws of the society within itself upon all that are parts of it." *Id.*, § 147, at 73. Importantly, however, Locke explained that the federative and executive powers must be lodged together, lest "disorder and ruin" erupt from the division of the "force of the public." *Id.*, § 148, at 73–74.

Subsequent thinkers began to refer to both of these powers as aspects of "executive power." William Blackstone, for example, described the executive power in England as including foreign affairs powers, such as the "power of sending embassadors to foreign states, and receiving embassadors at home"; making "treaties, leagues, and alliances with foreign states and princes"; "making war and peace"; and "issu[ing] letters of marque and reprisal." 1 Commentaries on the Laws of England 245, 249, 250, 242–252 (1765) (Blackstone). Baron de Montesquieu similarly described executive power as including the power to "mak[e] peace or war, sen[d] or receiv[e] embassies, establis[h] the public

security, and provid[e] against invasions." The Spirit of the Laws bk. XI, ch. 6, p. 151 (O. Piest ed., T. Nugent transl. 1949). In fact, "most writers of [Montesquieu's] tim[e] w[ere] inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs." W. Gwyn, The Meaning of the Separation of Powers 103 (1965).

That understanding of executive power prevailed in America. Following independence, Congress assumed control over foreign affairs under the Articles of Confederation. See, *e. g.*, Articles of Confederation, Art. IX, cl. 1. At that time, many understood that control to be an exercise of executive power. See Prakash & Ramsey 272, 275–278. Letters among Members of the Continental Congress, for instance, repeatedly referred to the Department of Foreign Affairs, established under the control of the Continental Congress, as an "Executive departmen[t]" and to its officers as "'Executives or Ministers.'" *Id.*, at 276, and nn. 194–196. Similarly, the Essex Result of 1778—an influential report on the proposed Constitution for Massachusetts—described executive power as including both "external" and "internal" powers: The external executive power "comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state," while the internal executive power "is employed in the peace, security and protection of the subject and his property." Essex Result, in The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, pp. 324, 337 (O. Handlin & M. Handlin eds. 1966).

This view of executive power was widespread at the time of the framing of the Constitution. Thomas Rutherforth's Institutes of Natural Law—a treatise routinely cited by the Founders, McDowell, The Limits of Natural Law: Thomas Rutherforth and the American Legal Tradition, 37 Am. J. Juris. 57, 59, and n. 10 (1992)—explained that "external exec-

utive power" includes "not only what is properly called military power, but the power likewise of making war or peace, the power of engaging in alliances for an encrease of strength, . . . the power of entering into treaties, and of making leagues to restore peace . . . and the power of adjusting the rights of a nation in respect of navigation, trade, etc.," 2 Institutes of Natural Law 55–56, 54–61 (1756). During the ratification debates, James Wilson likewise referred to the "executive powers of government" as including the external powers of a nation. 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 500–502 (1863). And Alexander Hamilton, writing as Publius, asserted that "[t]he actual conduct of foreign negotiations," "the arrangement of the army and navy, the directions of the operations of war . . . and other matters of a like nature" are "executive details" that "fal[l] peculiarly within the province of the executive department." The Federalist No. 72, pp. 435–436 (C. Rossiter ed. 1961).

Given this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the "executive Power" vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution. James Iredell, for example, told the North Carolina ratifying convention that, under the new Constitution, the President would "regulate all intercourse with foreign powers" and act as the "primary agent" of the United States, though no specific allocation of foreign affairs powers in the document so provided. 4 Elliot, *supra*, at 127, 128. And Alexander Hamilton presumed as much when he argued that the "[e]nergy" created in the Constitution's Executive would be "essential to the protection of the community against foreign attacks," even though no specific allocation of foreign affairs powers provided for the Executive to repel such assaults. See The Federalist No. 70, p. 423. These statements confirm that the "executive Power" vested in the President by Article II includes the residual foreign affairs

powers of the Federal Government not otherwise allocated by the Constitution.[1]

C

Early practice of the founding generation also supports this understanding of the "executive Power." Upon taking office, President Washington assumed the role of chief diplomat; began to direct the Secretary of Foreign Affairs who, under the Articles of Confederation, had reported to the Congress; and established the foreign policy of the United States. Prakash & Ramsey 296–297. At the same time, he respected Congress' prerogatives to declare war, regulate foreign commerce, and appropriate funds. *Id.*, at 296.

For its part, Congress recognized a broad Presidential role in foreign affairs. *Id.*, at 297–298. It created an "Executive department" called the "Department of Foreign Affairs," with a Secretary wholly subordinate to the President. An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, 1 Stat. 28. The enabling Act provided that the Secretary was to "perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President," including those "relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs." § 1, *id.*, at 29. By referring to those duties as those "the President of the United States shall assign to the said department," *ibid.*, the Act presumed the President inherently possessed power to engage in those tasks.

[1] This discussion of the allocation of *federal* foreign affairs powers should not be understood to address the allocation of foreign affairs powers between the Federal Government and the States. The extent to which the States retained foreign affairs powers following ratification is not before us today.

Subsequent interactions between President Washington and Congress indicated that the parties involved believed the Constitution vested the President with authority to regulate dealings with foreign nations. In his first State of the Union Address, President Washington told Congress that "[t]he interests of the United States require, that our intercourse with other nations should be facilitated by such provisions as will enable me to fulfil my duty in that respect." First Annual Message (Jan. 8, 1790), in George Washington: A Collection 467, 468 (W. Allen ed. 1988). To that end, he asked for compensation for employees and a fund designated for "defraying the expenses incident to the conduct of our foreign affairs." *Ibid.* Congress responded by passing "An Act providing the means of intercourse between the United States and foreign nations." Ch. 22, 1 Stat. 128.

During the congressional debate over that bill, the President sought an opinion from Thomas Jefferson—at that time, Secretary of State—about the scope of the Senate's power in this area. Jefferson responded that "[t]he transaction of business with foreign nations is executive altogether." Opinion on the Powers of the Senate (Apr. 24, 1790), in 5 Writings of Thomas Jefferson 161 (P. Ford ed. 1895). As such, Jefferson concluded that it properly belonged "to the head" of the executive department, "except as to such portions of it as are specially submitted to the senate." *Ibid.* According to Washington's diaries, he received similar advice from John Jay and James Madison about "the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls." 6 The Diaries of George Washington 68 (D. Jackson & D. Twohig eds. 1979). All agreed that the Senate lacked a "Constitutional right to interfere with either, & that it might be impolitic to draw it into a precedent their powers extending no farther than to an approbation or disapprobation of the person nominated by the President all the rest being

Executive and vested in the President by the Constitution." *Ibid.*

Washington followed this advice. He corresponded directly with U. S. ministers, moved them among countries, and removed them from their positions at will. Prakash & Ramsey 308–309. He also corresponded with foreign leaders, representing that his role as the "'supreme executive authority'" authorized him to receive and respond to their letters on behalf of the United States. *Id.*, at 317. When foreign ministers addressed their communications to Congress, he informed them of their error. *Id.*, at 321.

Washington's control over foreign affairs extended beyond communications with other governments. When confronted with the question whether to recognize the French Republic as the lawful government of France, he received the French Republic's emissary without the involvement of Congress. *Id.*, at 312. When he later concluded that the emissary had acted inappropriately, he again acted without the involvement of Congress to ask the French executive to recall him. *Id.*, at 314–315. Washington also declared neutrality on behalf of the United States during the war between England and France in 1793, see Proclamation of Neutrality (Apr. 22, 1793), an action Hamilton pseudonymously defended as a proper exercise of the power vested in the President by the "general grant" of executive power in the Vesting Clause. Pacificus No. 1 (June 29, 1793), Letters of Pacificus and Helvidius 10 (1845); *id.*, at 3. For its part, Congress applauded the President's decision. 4 Annals of Cong. 18, 138 (1793).

In short, the practices of the Washington administration and First Congress confirm that Article II's Vesting Clause was originally understood to include a grant of residual foreign affairs power to the Executive.

II

The statutory provision at issue implicates the President's residual foreign affairs power. Section 214(d) instructs the Secretary of State, upon request of a citizen born in Jerusa-

lem (or that citizen's legal guardian), to list that citizen's place of birth as Israel on his passport and consular report of birth abroad, even though it is the undisputed position of the United States that Jerusalem is not a part of Israel. The President argues that this provision violates his foreign affairs powers generally and his recognition power specifically. Zivotofsky rejoins that Congress passed § 214(d) pursuant to its enumerated powers and its action must therefore take precedence.

Neither has it quite right. The President is not constitutionally compelled to implement § 214(d) as it applies to passports because passport regulation falls squarely within his residual foreign affairs power and Zivotofsky has identified no source of congressional power to require the President to list Israel as the place of birth for a citizen born in Jerusalem on that citizen's passport. Section 214(d) can, however, be constitutionally applied to consular reports of birth abroad because those documents do not fall within the President's foreign affairs authority but do fall within Congress' enumerated powers over naturalization.[2]

A

1

In the Anglo-American legal tradition, passports have consistently been issued and controlled by the body exercising executive power—in England, by the King; in the Colonies,

[2] The majority asserts that Zivotofsky "waived any argument that his consular report of birth abroad should be treated differently than his passport" in the court below and in this Court because he "fail[ed] to differentiate between the two documents." *Ante*, at 9. But at every stage of the proceedings, Zivotofsky has pressed his claim that he is entitled to have his place of birth listed as "Israel" on *both* his passport and his consular report of birth abroad, and the consular report issue is fairly included in the question presented. Parties cannot waive the correct interpretation of the law simply by failing to invoke it. See, *e. g.*, *EEOC* v. *FLRA*, 476 U. S. 19, 23 (1986) (*per curiam*). That the parties have argued the case as if the same analysis should apply to both documents does not relieve this Court of its responsibility to interpret the law correctly.

by the Continental Congress; and in the United States, by President Washington and every President since.

Historically, "passports were classed with those documents known as safe conducts or letters of protection, by which the person of an enemy might be rendered safe and inviolable." Dept. of State, G. Hunt, The American Passport: Its History 3 (1898). Letters of safe conduct and passports performed different functions in England, but both grew out of the King's prerogative to regulate the "nation's intercourse with foreign nations," see 1 Blackstone 251–253. The King issued letters of safe conduct during times of war, *id.*, at 252, whereas passports were heirs to a tradition of requiring the King's license to depart the country, see, *e. g.*, Richard II, Feb. 26, 1383, 2 Calendar of Close Rolls, pp. 281–282 (1920); 1 E. Turner, The Privy Council of England in the Seventeenth and Eighteenth Centuries 1603–1784, p. 151 (1927); see also K. Diplock, Passports and Protection in International Law, in 32 The Grotius Society, Transactions for the Year 1946, Problems of Public and Private International Law 42, 44 (1947).

Both safe conducts and passports were in use at the time of the founding. Passports were given "for . . . greater security" "on ordinary occasions [to] persons who meet with no special interference in going and coming," whereas "safe-conduct[s]" were "given to persons who could not otherwise enter with safety the dominions of the sovereign granting it." 3 E. de Vattel, The Law of Nations § 265, p. 331 (1758 ed. C. Fenwick transl. 1916) (emphasis deleted). Both were issued by the person exercising the external sovereign power of a state. See *id.*, §§ 162, 275, at 69, 332. In the absence of a separate executive branch of government, the Continental Congress issued passports during the American Revolution, see, *e. g.*, Resolution (May 9, 1776), in 4 Journals of the Continental Congress 340–341; Resolution (May 24, 1776), in *id.*, at 385; as did the Congress under the Articles of Confederation, see, *e. g.*, 25 *id.*, at 859 (Jan. 24, 1783) (dis-

cussing its authority to issue passports under the war power).

After the ratification of the Constitution, President Washington immediately took responsibility for issuing passports. Hunt, *supra*, at 3. Although "'[p]ast practice does not, by itself, create power,'" "a governmental practice [that] has been open, widespread, and unchallenged since the early days of the Republic . . . should guide our interpretation of an ambiguous constitutional provision." *NLRB* v. *Noel Canning*, 573 U. S. 513, 572–573 (2014) (SCALIA, J., concurring in judgment) (alteration in original; some internal quotation marks omitted). The history of the President's passport regulation in this country is one such practice. From the ratification until the end of the Civil War, the President issued passports without any authorization from Congress. As the Department of State later remarked, "In the absence of any law upon the subject, the issuing of passports to Americans going abroad naturally fell to the Department of State, as one of its manifestly proper functions." Hunt, *supra*, at 37. To that end, the Secretary's authority was "entirely discretionary." *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699 (1835). Congress acted in support of that authority by criminalizing the "violat[ion] [of] any safe-conduct or passport duly obtained and issued under the authority of the United States." An Act for the Punishment of certain Crimes against the United States, § 28, 1 Stat. 118.[3] Congress only purported to authorize the President to issue such passports in 1856, and even under that statute, it provided that passports should be issued "under such rules as the President shall designate and prescribe for and on behalf of the United States." An Act to regulate the Diplomatic and Consular Systems of the United States, § 23, 11 Stat. 60. The President has continued to designate and prescribe the rules for passports ever since.

[3] Until 1978, passports were not generally required to enter or exit the country except during wartime. § 707, 92 Stat. 993.

2

That the President has the power to regulate passports under his residual foreign affairs powers does not, however, end the matter, for Congress has repeatedly legislated on the subject of passports. These laws have always been narrow in scope. For example, Congress enacted laws prohibiting the issuance of passports to noncitizens, *id.*, at 61, created an exception to that rule for "persons liable to military duty," Act of Mar. 3, 1863, § 23, 12 Stat. 754, and then eliminated that exception, Act of May 30, 1866, ch. 102, 14 Stat. 54. It passed laws regulating the fees that the State Department should impose for issuance of the passports. Act of May 16, 1932, ch. 187, 47 Stat. 157; Act of June 4, 1920, § 1, 41 Stat. 750; Act of June 15, 1917, ch. 30, Title IX, § 1, 40 Stat. 227; Act of Aug. 18, 1856, § 23, 11 Stat. 60; Act of Mar. 1, 1855, § 12, 10 Stat. 624. It also enacted legislation addressing the duration for which passports may remain valid. § 116, 96 Stat. 279; Pub. L. 90–428, 82 Stat. 446; Pub. L. 86–267, 73 Stat. 552; Act of July 3, 1926, 44 Stat. 887. And it passed laws imposing criminal penalties for false statements made when applying for passports, along with misuse of passports and counterfeiting or forgery of them. Act of June 25, 1948, 62 Stat. 771; Act of Mar. 28, 1940, § 7, 54 Stat. 80; 40 Stat. 227.[4]

As with any congressional action, however, such legislation is constitutionally permissible only insofar as it is promulgated pursuant to one of Congress' enumerated powers. I must therefore address whether Congress had constitutional authority to enact § 214(d)'s regulation of passports.

a

Zivotofsky and congressional *amici* identify three potential sources of congressional power to enact the portion of

[4] JUSTICE SCALIA, in his dissent, faults me for failing to identify the enumerated power under which these laws were permissible, but the question presented in *this* case is whether § 214(d) is a constitutional exercise of Congress' power, and that is the question I address.

§ 214(d) dealing with passports. Zivotofsky first argues that it falls within Congress' power "to regulate the issuance and content of United States passports." Brief for Petitioner 17. The U. S. Senate, as *amicus curiae*, likewise contends that it can be justified under Congress' "plenary authority over passports," which it derives from the penumbras of its powers "'[t]o regulate Commerce with foreign Nations'" and "'[t]o establish an uniform Rule of Naturalization.'" Brief for United States Senate 3 (quoting U. S. Const., Art. I, § 8, cls. 3, 4). None of these arguments withstands scrutiny.

The Constitution contains no Passport Clause, nor does it explicitly vest Congress with "plenary authority over passports." Because our Government is one of enumerated powers, "Congress has no power to act unless the Constitution authorizes it to do so." *United States* v. *Comstock*, 560 U. S. 126, 159 (2010) (THOMAS, J., dissenting). And "[t]he Constitution plainly sets forth the 'few and defined' powers that Congress may exercise." *Ibid.* A "passport power" is not one of them.

Section 214(d)'s passport directive fares no better under those powers actually included in Article I. To start, it does not fall within the power "[t]o regulate Commerce with foreign Nations." "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States* v. *Lopez*, 514 U. S. 549, 585 (1995) (THOMAS, J., concurring). The listing of the place of birth of an applicant—whether born in Jerusalem or not—does not involve selling, buying, bartering, or transporting for those purposes. Cf. *United States* v. *Morrison*, 529 U. S. 598, 613 (2000) ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity [under the power to regulate commerce among the several States] only where that activity is economic in nature").

True, a passport is frequently used by persons who may intend to engage in commerce abroad, but that use is insuffi-

cient to bring § 214(d)'s passport directive within the scope of this power. The specific conduct at issue here—the listing of the birthplace of a U. S. citizen born in Jerusalem on a passport by the President—is not a commercial activity. Any commercial activities subsequently undertaken by the bearer of a passport are yet further removed from that regulation.

The power "[t]o establish an uniform Rule of Naturalization" is similarly unavailing. At the founding, the word "naturalization" meant "[t]he act of investing aliens with the privileges of native subjects." 2 S. Johnson, A Dictionary of the English Language 1293 (4th ed. 1773); see also T. Dyche & W. Pardon, A New General English Dictionary (1771) ("the making a foreigner or alien, a denizen or freeman of any kingdom or city, and so becoming, as it were, both a subject and a native of a king or country, that by nature he did not belong to"). A passport has never been issued as part of the naturalization process. It is—and has always been—a "travel document," Dept. of State, 7 Foreign Affairs Manual (or FAM) § 1311(b) (2013), issued for the same purpose it has always served: a request from one sovereign to another for the protection of the bearer. See *supra*, at 41–43.

b

For similar reasons, the Necessary and Proper Clause gives Congress no authority here. That Clause provides, "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U. S. Const., Art. I, § 8, cl. 18. As an initial matter, "Congress lacks authority to legislate [under this provision] if the objective is anything other than 'carrying into Execution' one or more of the Federal Government's enumerated powers." *Comstock*, *supra*, at 161 (THOMAS, J., dissenting). The "end [must] be legiti-

mate" under our constitutional structure. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819).

But even if the objective of a law is carrying into execution one of the Federal Government's enumerated powers, the law must be both necessary and proper to that objective. The "Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power." *Gonzales* v. *Raich*, 545 U. S. 1, 60 (2005) (THOMAS, J., dissenting). Instead, "there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve." *Comstock*, 560 U. S., at 160 (THOMAS, J., dissenting). The "means" chosen by Congress "will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted' to the exercise of an enumerated power, and 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" *Id.*, at 160–161 (alteration in original).

The argument that § 214(d), as applied to passports, could be an exercise of Congress' power to carry into execution its foreign commerce or naturalization powers falters because this aspect of § 214(d) is directed at neither of the ends served by these powers. Although at a high level of generality, a passport could be related to foreign commerce and naturalization, that attenuated relationship is insufficient. The law in question must be "directly link[ed]" to the enumerated power. *Id.*, at 169, n. 8. As applied to passports, § 214(d) fails that test because it does not "'carr[y] into Execution'" Congress' foreign commerce or naturalization powers. *Id.*, at 160. At most, it bears a tertiary relationship to an activity Congress is permitted to regulate: It directs the President's formulation of a document, which, in turn, may be used to facilitate travel, which, in turn, may facilitate foreign commerce. And the distinctive history of the passport as a travel rather than citizenship document makes its connection to naturalization even more tenuous.

Nor can this aspect of § 214(d) be justified as an exercise of Congress' power to enact laws to carry into execution the President's residual foreign affairs powers. Simply put, § 214(d)'s passport directive is not a "proper" means of carrying this power into execution.

To be "proper," a law must fall within the peculiar competence of Congress under the Constitution. Though "proper" was susceptible of several definitions at the time of the founding, only two are plausible candidates for use in the Necessary and Proper Clause—(1) "[f]it; accommodated; adapted; suitable; qualified" and (2) "[p]eculiar; not belonging to more; not common." See 2 Johnson, *supra*, at 1537. Because the former would render the word "necessary" superfluous, *McCulloch*, *supra*, at 413, and we ordinarily attempt to give effect "to each word of the Constitution," *Knowlton* v. *Moore*, 178 U. S. 41, 87 (1900), the latter is the more plausible. That is particularly true because the Constitution elsewhere uses the term "proper" by itself, Art. I, § 9, Art. II, §§ 2, 3; the term "necessary" by itself, Art. I, § 7; Art. V; and the term "necessary" as part of the phrase "necessary and expedient," Art. II, § 3. Thus, the best interpretation of "proper" is that a law must fall within the peculiar jurisdiction of Congress.

Our constitutional structure imposes three key limitations on that jurisdiction: It must conform to (1) the allocation of authority within the Federal Government, (2) the allocation of power between the Federal Government and the States, and (3) the protections for retained individual rights under the Constitution. See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 291, 297 (1993). In other words, to be "proper," a law "must be consistent with principles of separation of powers, principles of federalism, and individual rights." *Id.*, at 297.

Commentators during the ratification debates treated "proper" as having this meaning. Writing as Publius, Ham-

ilton posed the question who would "judge . . . the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union" and responded that "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded." The Federalist No. 33, pp. 203–204. For example, a law that "exceeded [Congress'] jurisdiction" and invaded the authority of the States would not meet that standard. *Id.*, at 204. Similarly, an "impartial citizen" wrote in a Virginia newspaper that, even if the governmental powers could not "be executed without the aid of a law, granting commercial monopolies, inflicting unusual punishments, creating new crimes, or commanding any unconstitutional act," thus making the law necessary to the execution of a power, "such a law would be manifestly not proper," and not "warranted by this clause, without absolutely departing from the usual acceptation of words." An Impartial Citizen V, Petersburg, Va., Gazette, Feb. 28, 1788, in 8 Documentary History of the Ratification of the Constitution 428, 431 (J. Kaminski & G. Saladino eds. 1988) (emphasis deleted).

Early interpretations of the Clause following ratification largely confirm that view. Lawson & Granger, *supra*, at 298–308. During debate on the Bank of the United States in the First Congress, for example, Representative Ames declared that the correct construction of the Necessary and Proper Clause "promotes the good of the society, and the ends for which the Government was adopted, without impairing the rights of any man, or the powers of any State." 2 Annals of Cong. 1906 (1791). During the Second Congress, Representative Niles railed against a bill that would have authorized federal mail carriers to transport passengers for hire in order to reduce the cost of the mails. He said that such a law would not be "proper" to the power to establish post offices and post roads because some States had "an exclusive right of carrying passengers for hire" and an interpretation of the word "proper" that would allow the bill

would render "as nugatory, all [the States'] deliberations on the Constitution" and effectively vest Congress with "general authority to legislate on every subject." 3 *id.*, at 308–310 (1792) (emphasis deleted). Each of these comments presumed that the word "proper" imposed a jurisdictional limit on congressional activity.

This evidence makes sense in light of the Framers' efforts to ensure a separation of powers, reinforced by checks and balances, as "practical and real protectio[n] for individual liberty in the new Constitution." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 118 (2015) (THOMAS, J., concurring in judgment). If Congress could rely on the Necessary and Proper Clause to exercise power expressly allocated to the other branches or to prevent the exercise of such power by other branches, it could undermine the constitutional allocation of powers.

That the evidence thus points to a definition of "proper" that protects the separation of powers does not fully explain the way that the "proper" requirement operates when Congress seeks to facilitate the exercise of a power allocated to another branch. I can see two potential mechanisms, either or both of which may accurately reflect the original understanding of the Clause. First, a law could be "improper" if it purports to direct another branch's exercise of its power. See Calabresi & Prakash, The President's Power To Execute the Laws, 104 Yale L. J. 541, 591 (1994) ("[T]he Clause . . . does [not] allow Congress to tell constitutionally empowered actors how they can implement their exclusive powers"). Second, a law could be "improper" if it takes one of those actions *and* the branch to which the power is allocated objects to the action. See Prakash & Ramsey 255–256 ("Congress has the general power to legislate in support of the President's foreign policy goals. But . . . [s]ince it is derivative of the President's power, it must be exercised in coordination with, and not in opposition to, the President").

I need not resolve that question today, as the application of § 214(d) to passports would be improper under either approach. The President has made a determination that the "place of birth" on a passport should list the country of present sovereignty. 7 FAM § 1300, App. D, § 1330 (2014). And the President has determined that no country is presently exercising sovereignty over the area of Jerusalem. Thus, the President has provided that passports for persons born in Jerusalem should list "Jerusalem" as the place of birth in the passport. *Id.*, § 1360(f). Section 214(d) directs the President to exercise his power to issue and regulate the content of passports in a particular way, and the President has objected to that direction. Under either potential mechanism for evaluating the propriety of a law under the separation-of-powers limitation, this law would be improper.[5]

c

In support of his argument that the President must enforce § 214(d), Zivotofsky relies heavily on a similar statute addressing the place of birth designation for persons born in Taiwan. See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 132, 108 Stat. 395. That statute provided, "For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." *Ibid.* The President has adopted that practice.

The President's decision to adopt that practice, however, says nothing about the constitutionality of the Taiwan provision in the first place. The constitutional allocation of powers "does not depend on the views of individual Presidents, nor on whether the encroached upon branch approves the encroachment." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 497 (2010) (citation

[5] Because § 214(d) is not proper, I need not resolve whether such a law could be understood to "carry into execution" the President's power.

and internal quotation marks omitted).[6] And the argument from Presidential acquiescence here is particularly weak, given that the Taiwan statute is consistent with the President's longstanding policy on Taiwan. At the time Congress enacted the statute, the Foreign Affairs Manual permitted consular officials to list "the city or area of birth" on a passport "[w]here the birthplace of the applicant is located in territory disputed by another country," 7 FAM § 1383.5–2 (1987), and to list "the city or town, rather than the country," of an applicant's birth "when there are objections to the listing shown on the birthplace guide," *id.*, § 1383.6. Because the President otherwise treats Taiwan as a geographical area within the People's Republic of China, listing Taiwan as the place of birth did not directly conflict with the President's prevailing practices. Section 214(d) *does* so conflict, as it requires the President to list citizens born in Jerusalem as born in "Israel," even though the Foreign Affairs Manual has long prohibited that action.

d

JUSTICE SCALIA would locate Congress' power to enact the passport directive of § 214(d) in Congress' power under the Necessary and Proper Clause to bring into effect its enumerated power over naturalization. *Post*, at 69–70 (dissenting opinion). As an initial matter, he asserts that "[t]he naturalization power . . . enables Congress to furnish the people it makes citizens with papers verifying their citizenship," *post*, at 69, yet offers no support for this interpretation of a clause that, by its terms, grants Congress only the "Power . . . To

[6] This principle is not necessarily inconsistent with the second mechanism for evaluating congressional action under the Necessary and Proper Clause discussed above. Although that mechanism would tie the propriety of congressional action to the objection (or nonobjection) of another branch, the point of that tying feature is to determine whether, in fact, Congress has encroached upon another branch, not whether such encroachment is acceptable.

establish an uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4. He then concludes that, if Congress can grant such documents, "it may also require these [documents] to record his birthplace as 'Israel' " pursuant to its power under the Necessary and Proper Clause, *post*, at 69. But this theory does not account for the President's power to act in this area, nor does it confront difficult questions about the application of the Necessary and Proper Clause in the case of conflict among the branches.

JUSTICE SCALIA disapproves of my "assertion of broad, unenumerated 'residual powers' in the President," *post*, at 84, but offers no response to my interpretation of the words "executive Power" in the Constitution. Instead, he claims that I have argued for "Presidential primacy over passports" and then rejects that position based on two postratification English statutes, the early practice of nonfederal actors issuing passports in this country, and the same congressional statutes that I have already discussed, most of which were enacted after the Civil War. *Post*, at 81–83; *supra*, at 44, and n. 4. But I do not argue that the President possesses primary power over passports. I need not argue that. I argue only that Congress did not act according to any of the powers granted to it in the Constitution and, in such circumstances, the question of primacy does not arise.

In any event, the historical evidence cited in JUSTICE SCALIA's dissent does not conflict with my analysis of the President's power in this area. The two postratification English statutes implicitly acknowledged that passports are issued by executive officers in the exercise of executive power, see 38 Geo. III, ch. 50, § 8, in 41 Eng. Stat. at Large 684; 33 Geo. III, ch. 4, § 8, in 39 Eng. Stat. at Large 12, and the practice of executive officials in the States of this country confirms that relationship. In addition, neither piece of historical evidence speaks to the scope of *Congress*' power to regulate passports under our federal system. JUSTICE

SCALIA's final piece of historical support—the increased congressional regulation of passports following the Civil War—is perhaps more on point from an institutional perspective, but still does not resolve the issue. Those regulations were, as I have already described, narrow in scope and continued to leave primary regulation of the content of passports to the President. To draw an inference from these "late-arising historical practices that are ambiguous at best"—and that might conflict with the original meaning of the "executive Power" and the "proper" requirement in the Necessary and Proper Clause—is a dubious way to undertake constitutional analysis. See *Noel Canning*, 573 U. S., at 570 (SCALIA, J., concurring in judgment).

Even more dubious, however, is the cursory treatment of the Necessary and Proper Clause in JUSTICE SCALIA's dissent. He asserts that, in acting pursuant to that Clause, "Congress . . . may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution." *Post*, at 70. But he offers no explanation for what those implied limits might be or how they would operate. Does he, for example, agree that the word "proper" requires Congress to act in a manner "'consistent with principles of separation of powers, principles of federalism, and individual rights'"? *Supra*, at 48 (quoting Lawson & Grainger, 43 Duke L. J., at 297). If so, then why does he find that requirement satisfied in this case? Is it because he views the President as having no constitutional authority to act in this area? Or is it because he views Congress' directive to the President as consistent with the separation of powers, irrespective of the President's authority? If the latter, is that because he perceives no separation-of-powers limitations on Congress when it acts to carry into execution one of *its* enumerated powers, as opposed to the enumerated powers of *another* branch? And if that is the case, what textual, structural, or historical evidence exists for that interpretation? JUSTICE SCALIA's dissent raises more questions than it answers.

JUSTICE SCALIA's dissent *does* at least answer how, in his view, the Constitution would resolve a conflict between the political branches, each acting pursuant to the powers granted them under the Constitution. He believes that congressional power should trump in any such conflict. *Post*, at 83–84. I see nothing in the Constitution that clearly mandates that solution to a difficult separation-of-powers question, and I need not opine on it. I find no power under which Congress could lawfully have enacted the passport directive of § 214(d), apart from its power under the Necessary and Proper Clause to carry into effect the President's powers. And I have offered textual and historical support for my conclusion that the Clause does not include the power to direct the President's exercise of his passport power.

Finally, JUSTICE SCALIA faults me for failing to consider a number of potential sources of congressional power for § 214(d) not argued by any of the parties, ranging from the Fourteenth Amendment; to the Migration or Importation Clause, Art. I, § 9, cl. 1; to the Territories Clause, Art. IV, § 3, cl. 2. *Post*, at 80–81. But no one—not even JUSTICE SCALIA—has seriously contended that those provisions would afford a basis for the passport provision of § 214(d).

In the end, JUSTICE SCALIA characterizes my interpretation of the executive power, the naturalization power, and the Necessary and Proper Clause as producing "a presidency more reminiscent of George III than George Washington." *Post*, at 84. But he offers no competing interpretation of either the Article II Vesting Clause or the Necessary and Proper Clause. And his decision about the Constitution's resolution of conflict among the branches could itself be criticized as creating a supreme legislative body more reminiscent of the Parliament in England than the Congress in America.

* * *

Because the President has residual foreign affairs authority to regulate passports and because there appears to be

no congressional power that justifies § 214(d)'s application to passports, Zivotofsky's challenge to the Executive's designation of his place of birth on his passport must fail.

B

Although the consular report of birth abroad shares some features with a passport, it is historically associated with naturalization, not foreign affairs. In order to establish a "uniform Rule of Naturalization," Congress must be able to identify the categories of persons who are eligible for naturalization, along with the rules for that process. Congress thus has always regulated the "acquisition of citizenship by being born abroad of American parents . . . in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 688 (1898); see also *Miller* v. *Albright*, 523 U. S. 420, 456 (1998) (SCALIA, J., concurring in judgment) (recognizing that "Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States"). It has determined that children born abroad to U. S. parents, subject to some exceptions, are natural-born citizens who do not need to go through the naturalization process. 8 U. S. C. §§ 1401(c), (d), (g).

The consular report of birth abroad is well suited to carrying into execution the power conferred on Congress in the Naturalization Clause. The report developed in response to Congress' requirement that children born abroad to U. S. citizens register with the consulate or lose their citizenship. And it continues to certify the acquisition of U. S. citizenship at birth by a person born abroad to a U. S. citizen. See 22 U. S. C. § 2705(2).

Although such persons have possessed a statutory right to citizenship at birth for much of this country's history,[7] the

[7] The First Congress passed a law recognizing citizenship at birth for children born abroad to U. S. citizens. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 104. An 1802 amendment to the provision rendered the availability

process by which that citizenship is evidenced has varied over time. Under the 1870 consular regulations, for instance, children born abroad to U. S. citizens were issued no certificates. If they applied for a U. S. passport, then they were issued one "qualified by the obligations and duties" that attached to those citizens by virtue of their residence in a foreign nation. Regulations Prescribed for the Use of the Consular Service of the United States, App. No. IV, p. 288 (1870); see also *id.*, § 109, at 38–39. Congress acted in 1907 to require children residing abroad to register with their local consulate at the age of 18. Act of Mar. 2, 1907, § 6, 34 Stat. 1229. Because of the importance of this registration requirement, consular officials began to issue reports to citizens confirming their registration. See generally National Archives, General Records of the Dept. of State, Record Group 59, Passport Office, Decimal File, 1910–1949.

In 1919, the Department of State acted to standardize the consular registration of children born abroad. Report of Birth of Children to American Citizens Residing Abroad, General Instruction No. 652. It urged consulates to impress upon U. S. citizens abroad the need to record the birth of their children within two years. *Id.*, at 2. To encourage that effort, the Department permitted consular officials to issue reports attesting that the parents of U. S. citizens born abroad had presented sufficient evidence of citizenship for their children. *Ibid.*

The 1960's brought additional regulations of consular reports of birth abroad, 31 Fed. Reg. 13538 (1966), which continue in a substantially similar form to this day. See 22 CFR §§ 50.5, 50.7 (2014). As currently issued, the consular report of birth abroad includes the applicant's name, sex,

---

of this citizenship uncertain. Binney, The Alienigenae of the United States, 2 Am. L. Reg. 193 (1854). But Congress acted to clarify the availability of such citizenship in 1855, Act of Feb. 10, 1855, ch. 71, 10 Stat. 604, and it continues to exist to this day, see Immigration and Nationality Act, § 301(a), 66 Stat. 235.

place of birth, date of birth, and parents. It has had the "same force and effect as proof of United States citizenship as [a] certificat[e] of naturalization" since 1982. § 117, 96 Stat. 279.

Thus, although registration is no longer required to maintain birthright citizenship, the consular report of birth abroad remains the primary means by which children born abroad may obtain official acknowledgment of their citizenship. See 22 CFR § 51.43. Once acknowledged as U. S. citizens, they need not pursue the naturalization process to obtain the rights and privileges of citizenship in this country. Regulation of the report is thus "appropriate" and "plainly adapted" to the exercise of the naturalization power. See *Comstock*, 560 U. S., at 161 (THOMAS, J., dissenting).

By contrast, regulation of the report bears no relationship to the President's residual foreign affairs power. It has no historical pedigree uniquely associated with the President, contains no communication directed at a foreign power, and is primarily used for domestic purposes. To the extent that a citizen born abroad seeks a document to use as evidence of his citizenship abroad, he must obtain a passport. See generally 7 FAM § 1311.

Because regulation of the consular report of birth abroad is justified as an exercise of Congress' powers under the Naturalization and Necessary and Proper Clauses and does not fall within the President's foreign affairs powers, § 214(d)'s treatment of that document is constitutional.[8]

III

The majority does not perform this analysis, but instead relies on a variation of the recognition power. That power is among the foreign affairs powers vested in the President by Article II's Vesting Clause, as is confirmed by Article II's ex-

[8] As the issue is not presented, I need not decide how a direct conflict between action pursuant to an enumerated power of Congress and action pursuant to the residual foreign affairs power of the President should be resolved.

press assignment to the President of the duty of receiving foreign Ambassadors, Art. II, § 3. But I cannot join the majority's analysis because no act of recognition is implicated here.[9]

Under international law, "recognition of a state signifies acceptance of its position within the international community and the possession by it of the full range of rights and obligations which are the normal attributes of statehood." 1 Oppenheim's International Law § 47, p. 158 (R. Jennings & A. Watts eds., 9th ed. 1992) (footnote omitted) (Oppenheim).[10] It can be accomplished expressly or implicitly, but the key is to discern a clear intention on the part of one state to recognize another. *Id.*, § 50, at 169. Important consequences are understood to flow from one state's recognition of another: The new state, for instance, acquires the capacity to engage in diplomatic relations, including the negotiation of treaties, with the recognizing state. *Id.*, § 47, at 158. The new state is also entitled to sue in, invoke sovereign immunity from, and demand acceptance of official acts in the courts of the recognizing state. *Ibid.*; see also I. Brownlie, Principles of Public International Law 95–96 (7th ed. 2008).

---

[9] I assume, as the majority does, that the recognition power conferred on the President by the Constitution is the power to accomplish the act of recognition as that act is defined under international law. It is possible, of course, that the Framers had a fixed understanding of the act of recognition that is at odds with the definition of that act under international law. But the majority does not make that argument, nor does the majority even specifically address how consular reports of birth abroad are related to recognition. Lacking any evidence that the modern practice of recognition deviates in any relevant way from the historical practice, or that the original understanding of the recognition power was something other than the power to take part in that practice, I proceed on the same assumption as the majority.

[10] Scholars have long debated the extent to which official recognition by the sovereign states that make up the international community is necessary to bring a new "state" into the international community and thereby subject it to international law. Oppenheim § 39, at 128–129. Resolving this debate is not necessary to resolve the issue at hand, so I describe the modern view of recognition without endorsing it.

Changes in territory generally do not affect the status of a state as an international person. Oppenheim § 57, at 204–205. France, for example, "has over the centuries retained its identity although it acquired, lost and regained parts of its territory, changed its dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now once more a republic." *Ibid.* "Even such loss of territory as occasions the reduction of a major power to a lesser status does not affect the state as an international person." *Id.*, § 57, at 205. Changes that *would* affect the status as an international person include the union of two separate international persons or a partial loss of independence. *Id.*, § 58, at 206.

Assuming for the sake of argument that listing a nonrecognized foreign sovereign as a citizen's place of birth on a U. S. passport could have the effect of recognizing that sovereign under international law, no such recognition would occur under the circumstances presented here. The United States has recognized Israel as a foreign sovereign since May 14, 1948. Statement by the President Announcing the Recognition of the State of Israel, Public Papers of the Presidents, Harry S. Truman, p. 258 (1964). That the United States has subsequently declined to acknowledge Israel's sovereignty over Jerusalem has not changed its recognition of Israel as a sovereign state. And even if the United States were to acknowledge Israel's sovereignty over Jerusalem, that action would not change its recognition of Israel as a sovereign state. That is because the United States has already afforded Israel the rights and responsibilities attendant to its status as a sovereign state. Taking a different position on the Jerusalem question will have no effect on that recognition.[11]

---

[11] The analysis might look different if § 214(d) required the President to list as a "place of birth" a country that the United States has never officially recognized. That is not the case here.

Perhaps recognizing that a formal recognition is not implicated here, the majority reasons that, if the Executive's exclusive recognition power "is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements." *Ante*, at 29. By "alter[ing] the President's statements on matters of recognition or forc[ing] him to contradict them," the majority reasons, "Congress in effect would exercise the recognition power." *Ibid.* This argument stretches the recognition power beyond all recognition. Listing a Jerusalem-born citizen's place of birth as "Israel" cannot amount to recognition because the United States already recognizes Israel as an international person. Rather than adopt a novel definition of the recognition power, the majority should have looked to other foreign affairs powers in the Constitution to resolve this dispute.

* * *

Adhering to the Constitution's allocation of powers leads me to reach a different conclusion in this case from my colleagues: Section 214(d) can be constitutionally applied to consular reports of birth abroad, but not passports. I therefore respectfully concur in the judgment in part and dissent in part.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring).

JUSTICE SCALIA's principal dissent, which I join in full, refutes the majority's unprecedented holding in detail. I write separately to underscore the stark nature of the Court's error on a basic question of separation of powers.

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to "take Care that the Laws be faithfully executed." Art. II, § 3. The Executive may disregard "the expressed or implied will of Congress" only if the Constitution grants him a power "at once so conclusive and preclusive" as to "disabl[e] the Congress from acting upon the subject." *Youngstown*, 343 U. S., at 637–638 (Jackson, J., concurring).

Assertions of exclusive and preclusive power leave the Executive "in the least favorable of possible constitutional postures," and such claims have been "scrutinized with caution" throughout this Court's history. *Id.*, at 640, 638; see *Dames & Moore* v. *Regan*, 453 U. S. 654, 668–669 (1981). For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs. See *Medellín* v. *Texas*, 552 U. S. 491, 524–532 (2008); *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 590–595, 613–625 (2006); *Youngstown*, 343 U. S., at 587–589 (majority opinion); *Little* v. *Barreme*, 2 Cranch 170, 177–179 (1804).

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive's contention. *Ante*, at 10–28. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." Art. II, § 3. But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by Article II, Section 3, not the *powers* granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton's assur-

ance that executive reception of ambassadors "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961). In short, at the time of the founding, "there was no reason to view the reception clause as a source of discretionary authority for the president." Adler, The President's Recognition Power: Ministerial or Discretionary? 25 Presidential Studies Q. 267, 269 (1995).

The majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, § 2. But those authorities are *shared* with Congress, *ibid.*, so they hardly support an inference that the recognition power is *exclusive*.

Precedent and history lend no more weight to the Court's position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 643 (1818) ("the courts of the union must view [a] newly constituted government as it is viewed by *the legislative and executive departments* of the government of the United States" (emphasis added)). When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that "Congress has accepted" the President's exclusive recognition power. *Ante*, at 28. In any event, we have held that congressional acquiescence is only "pertinent"

when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here. *Medellín*, 552 U. S., at 528; see *Dames & Moore*, 453 U. S., at 678–679.

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the "conclusive and preclusive" power required to justify defiance of an express legislative mandate. *Youngstown*, 343 U. S., at 638 (Jackson, J., concurring). As the leading scholar on this issue has concluded, the "text, original understanding, post-ratification history, and structure of the Constitution do not support the . . . expansive claim that this executive power is plenary." Reinstein, Is the President's Recognition Power Exclusive? 86 Temp. L. Rev. 1, 60 (2013).

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition*. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 210 (2012) (ALITO, J., concurring in judgment); *post*, at 71–76 (SCALIA, J., dissenting). The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State Department itself has explained that "identification"—not recognition—"is the principal reason that U. S. passports require 'place of birth.'" App. 42. Congress has not disputed the Executive's assurances that § 214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that § 214(d) does "not itself constitute a formal act of recognition." *Ante*, at 30. Taken together, these statements come close to a confession of error. The

majority attempts to reconcile its position by reconceiving § 214(d) as a "mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." *Ante*, at 30. But as just noted, neither Congress nor the Executive Branch regards § 214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a *perceived* contradiction based on a *mistaken* understanding of the effect of § 214(d), insisting that some "observers interpreted § 214 as altering United States policy regarding Jerusalem." *Ante*, at 31. To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler's veto.

Moreover, expanding the President's purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does § 214(d). If, for example, the President recognized a particular country in opposition to Congress's wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly, created a perceived contradiction with the President's recognition decision. And yet each of them would undoubtedly be constitutional. See *ante*, at 30. So too would statements by nonlegislative actors that might be seen to contradict the President's recognition positions, such as the declaration in a political party platform that "Jerusalem is and will remain the capital of Israel." Landler, Pushed by Obama, Democrats Alter Platform Over Jerusalem, N. Y. Times, Sept. 6, 2012, p. A14.

Ultimately, the only power that could support the President's position is the one the majority purports to reject: the "exclusive authority to conduct diplomatic relations." Brief

for Respondent 18. The Government offers a single citation for this allegedly exclusive power: *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320 (1936). But as the majority rightly acknowledges, *Curtiss-Wright* did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation. *Ante*, at 20.

The expansive language in *Curtiss-Wright* casting the President as the "sole organ" of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. Brief for Respondent 9, 10, 18, 19, 23, 24, 53, 54. But our precedents have never accepted such a sweeping understanding of executive power. See *Hamdan*, 548 U. S., at 591–592; *Dames & Moore*, 453 U. S., at 661–662; *Youngstown*, 343 U. S., at 587 (majority opinion); *id.*, at 635, n. 2 (Jackson, J., concurring); cf. *Little*, 2 Cranch, at 179 (Marshall, C. J.) ("I confess the first bias of my mind was very strong in favour of . . . the executive . . . [b]ut I have been convinced that I was mistaken.").

Just a few Terms ago, this Court rejected the President's argument that a broad foreign relations power allowed him to override a state court decision that contradicted U. S. international law obligations. *Medellín*, 552 U. S., at 523–532. If the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action, it surely does not authorize him to disregard an express statutory directive enacted by Congress, which—unlike the States—has extensive foreign relations powers of its own. Unfortunately, despite its protest to the contrary, the majority today allows the Executive to do just that.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by § 214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress

and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs.

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, dissenting.

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs. The royal prerogative included the "sole power of sending ambassadors to foreign states, and receiving them at home," the sole authority to "make treaties, leagues, and alliances with foreign states and princes," "the sole prerogative of making war and peace," and the "sole power of raising and regulating fleets and armies." 1 W. Blackstone, Commentaries *253, *257, *262. The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

The People therefore adopted a Constitution that divides responsibility for the Nation's foreign concerns between the legislative and executive departments. The Constitution gave the President the "executive Power," authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, §8. "Fully eleven of the powers that Ar-

ticle I, § 8 grants Congress deal in some way with foreign affairs." 1 L. Tribe, American Constitutional Law § 5–18, p. 965 (3d ed. 2000).

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

I

The political branches of our Government agree on the real-world fact that Israel controls the city of Jerusalem. See Jerusalem Embassy Act of 1995, 109 Stat. 398; Brief for Respondent 3. They disagree, however, about how official documents should record the birthplace of an American citizen born in Jerusalem. The Executive does not accept any state's claim to sovereignty over Jerusalem, and it maintains that the birthplace designation "Israel" would clash with this stance of neutrality. But the National Legislature has enacted a statute that provides: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, § 214(d), 116 Stat. 1366. Menachem Zivotofsky's parents seek enforcement of this statutory right in the issuance of their son's passport and consular report of birth abroad. They regard their son's birthplace as a part of Israel and insist as "a matter of conscience" that his Israeli nativity "not be erased" from his identity documents. App. 26.

Before turning to Presidential power under Article II, I think it well to establish the statute's basis in congressional power under Article I. Congress's power to "establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, enables it to grant American citizenship to someone born abroad. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 702–703 (1898). The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power "carries with it all those incidental powers which are necessary to its complete and effectual execution." *Cohens* v. *Virginia*, 6 Wheat. 264, 429 (1821). Even on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." The birthplace specification promotes the document's citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the Government's citizenship records. See App. 70. To be sure, recording Zivotofsky's birthplace as "Jerusalem" rather than "Israel" would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the "discretion" to choose the one it deems "most beneficial to the people." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). It thus has the right to decide that recording birthplaces as "Israel" makes for better foreign policy. Or that regardless of international politics,

a passport or birth report should respect its bearer's conscientious belief that Jerusalem belongs to Israel.

No doubt congressional discretion in executing legislative powers has its limits; Congress's chosen approach must be not only "necessary" to carrying its powers into execution, but also "proper." Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, § 214(d) does not transgress any such restriction.

II

The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on. 2 M. Whiteman, Digest of International Law § 1 (1963) (hereinafter Whiteman). President Truman recognized Israel as a state in 1948, but Presidents have consistently declined to recognize Jerusalem as a part of Israel's (or any other state's) sovereign territory.

The Court holds that the Constitution makes the President alone responsible for recognition and that § 214(d) invades this exclusive power. I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that "the weight of historical evidence" supports exclusive executive authority over "the formal determination of recognition." *Ante*, at 23. But even with its attention confined to formal recognition, the Court is forced to admit that "history is not all on one side." *Ibid.* To take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. 48 Stat. 456. In the course of doing so, Congress directed the President to "rec-

ognize the independence of the Philippine Islands as a separate and self-governing nation" and to "acknowledge the authority and control over the same of the government instituted by the people thereof." § 10, *id.*, at 463. Constitutional? And if Congress may control recognition when exercising its power "to dispose of . . . the Territory or other Property belonging to the United States," Art. IV, § 3, cl. 2, why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because § 214(d) plainly does not concern recognition.

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. It signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights. See, *e. g.*, Convention on the Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3100, T. S. No. 881. "Its legal effect is to create an estoppel. By granting recognition, [states] debar themselves from challenging in future whatever they have previously acknowledged." 1 G. Schwarzenberger, International Law 127 (3d ed. 1957). In order to extend recognition, a state must perform an act that unequivocally manifests that intention. Whiteman § 3. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition—chiefly, entering into a bilateral treaty, and sending or receiving an ambassador. *Ibid.*

To know all this is to realize at once that § 214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it

does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list "Israel." But in fact it requires only those passports to list "Israel" for which the citizen (or his guardian) *requests* "Israel"; all the rest, under the Secretary's policy, list "Jerusalem." It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. Cf. *Bowen* v. *Roy*, 476 U. S. 693 (1986). The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. Although normal protocol requires specifying the bearer's country of birth in his passport, Dept. of State, 7 Foreign Affairs Manual (FAM) § 1300, App. D, § 1330(a) (2014), the State Department will, if the bearer protests, specify the city of birth instead—so that an Irish nationalist may have his birthplace recorded as "Belfast" rather than "United Kingdom," *id.*, § 1380(a). And although normal protocol requires specifying the country with *present* sovereignty over the bearer's place of birth, *id.*, § 1330(b), a special exception allows a bearer born before 1948 in what was then Palestine to have his birthplace listed as "Palestine," *id.*, § 1360(g). Section 214(d) requires the State Department to make a further accommodation. Even though the Department normally refuses to specify a country that lacks recog-

nized sovereignty over the bearer's birthplace, it must suspend that policy upon the request of an American citizen born in Jerusalem. Granting a request to specify "Israel" rather than "Jerusalem" does not recognize Israel's sovereignty over Jerusalem, just as granting a request to specify "Belfast" rather than "United Kingdom" does not derecognize the United Kingdom's sovereignty over Northern Ireland.

The best indication that § 214(d) does not concern recognition comes from the State Department's policies concerning Taiwan. According to the Solicitor General, the United States "acknowledges the Chinese position" that Taiwan is a part of China, but "does not take a position" of its own on that issue. Brief for Respondent 51–52. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as "China." It indeed *insisted* on doing so until Congress passed a law (on which § 214(d) was modeled) giving citizens the option to have their birthplaces recorded as "Taiwan." See § 132, 108 Stat. 395, as amended by § 1(r), 108 Stat. 4302. The Solicitor General explains that the designation "China" "involves a geographic description, not an assertion that Taiwan is . . . part of sovereign China." Brief for Respondent 51–52. Quite so. Section 214(d) likewise calls for nothing beyond a "geographic description"; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress's control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs the Secretary to "record the place of birth as Israel" "*[f]or purposes of* the registration of birth, certification of nationality, or issuance of a passport." (Emphasis added.) And the law bears the caption, "Record of Place of Birth as Israel *for Passport Purposes*." (Emphasis added.)

Finding recognition in this provision is rather like finding admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program, 23 U. S. C. § 401.

III

The Court complains that § 214(d) requires the Secretary of State to issue official documents implying that Jerusalem is a part of Israel; that it appears in a section of the statute bearing the title "United States Policy with Respect to Jerusalem as the Capital of Israel"; and that foreign "observers interpreted [it] as altering United States policy regarding Jerusalem." *Ante*, at 31. But these features do not show that § 214(d) recognizes Israel's sovereignty over Jerusalem. They show only that the law displays symbolic support for Israel's territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to "regulate Commerce with foreign Nations," § 8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to "regulate the Value . . . of foreign Coin," § 8, cl. 5, includes power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers. These are not airy hypotheticals. A trade statute from 1800, for example, provided that "the whole of the island of Hispaniola"—whose status was then in controversy—"shall for purposes of [the] act be considered as a dependency of the French Republic." § 7, 2 Stat. 10. In 1938, Congress allowed admission of the Vatican City's public records in federal courts, decades before the United States extended formal recognition. Ch. 682, 52 Stat. 1163; Whiteman § 68.

The Taiwan Relations Act of 1979 grants Taiwan capacity to sue and be sued, even though the United States does not recognize it as a state. 22 U. S. C. § 3303(b)(7). Section 214(d) continues in the same tradition.

The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory "are legitimate in the eyes of the United States," *ante,* at 14. Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides. To take just one example, in 1991, Congress responded to Iraq's invasion of Kuwait by enacting a resolution authorizing use of military force. 105 Stat. 3. No doubt the resolution reflected Congress's views about the legitimacy of Iraq's territorial claim. The preamble referred to Iraq's "illegal occupation" and stated that "the international community has demanded . . . that Kuwait's independence and legitimate government be restored." *Ibid.* These statements are far more categorical than the caption "United States Policy with Respect to Jerusalem as the Capital of Israel." Does it follow that the authorization of the use of military force invaded the President's exclusive powers? Or that it would have done so had the President recognized Iraqi sovereignty over Kuwait?

History does not even support an exclusive Presidential power to make what the Court calls "formal statements" about "the legitimacy of a state or government and its territorial bounds," *ante,* at 32. For a long time, the Houses of Congress have made formal statements announcing their own positions on these issues, again without provoking constitutional objections. A recent resolution expressed the House of Representatives' "strong support for the legitimate, democratically-elected Government of Lebanon" and condemned an "illegitimate" and "unjustifiable" insurrection by "the terrorist group Hizballah." H. Res. 1194, 110th Cong, 2d Sess., 1, 4 (2008). An earlier enactment declared "the sense of the Congress that . . . Tibet . . . is an occupied

country under the established principles of international law" and that "Tibet's true representatives are the Dalai Lama and the Tibetan Government in exile." § 355, 105 Stat. 713 (1991). After Texas won independence from Mexico, the Senate resolved that "the State of Texas having established and maintained an independent Government, . . . it is expedient and proper . . . that the independent political existence of the said State be acknowledged by the Government of the United States." Cong. Globe, 24th Cong., 2d Sess., 83 (1837); see *id.*, at 270.

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else § 214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel's sovereignty over Jerusalem.

IV

The Court does not try to argue that § 214(d) extends recognition; nor does it try to argue that the President holds the exclusive power to make all nonrecognition decisions relating to the status of Jerusalem. As just shown, these arguments would be impossible to make with a straight face.

The Court instead announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the "formal recognition determination," the President holds an ancillary exclusive power "to control . . . formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds." *Ante*, at 32. It follows, the Court explains, that Congress may not "requir[e] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch." *Ibid.* So requiring imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense.

Recognition is a type of legal act, not a type of statement. It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders. The Court may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles.

No consistent or coherent theory supports the Court's decision. At times, the Court seems concerned with the possibility of congressional interference with the President's ability to extend or withhold legal recognition. The Court concedes, as it must, that the notation required by § 214(d) "would not itself constitute a formal act of recognition." *Ante*, at 30. It still frets, however, that Congress *could* try to regulate the President's "statements" in a way that "override[s] the President's recognition determination." *Ante*, at 29. But "[t]he circumstance, that . . . [a] power may be abused, is no answer. All powers may be abused." 2 J. Story, Commentaries on the Constitution of the United States § 921, p. 386 (1833). What matters is whether *this* law interferes with the President's ability to withhold recognition. It would be comical to claim that it does. The Court identifies no reason to believe that the United States—or indeed any other country—uses the place-of-birth field in passports and birth reports as a forum for performing the act of recognition. That is why nobody thinks the United States withdraws recognition from Canada when it accommodates a Quebec nationalist's request to have his birthplace recorded as "Montreal."

To the extent doubts linger about whether the United States recognizes Israel's sovereignty over Jerusalem, § 214(d) leaves the President free to dispel them by issuing a disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition. Restatement (Second) of Foreign Relations Law of the United States § 104(1) (1962). Recall that an earlier law grants citizens born in Taiwan the right to have their birthplaces recorded

as "Taiwan." The State Department has complied with the law, but states in its Foreign Affairs Manual: "The United States does not officially recognize Taiwan as a 'state' or 'country,' although passport issuing officers may enter 'Taiwan' as a place of birth." 7 FAM § 1300, App. D, § 1340(d)(6). Nothing stops a similar disclaimer here.

At other times, the Court seems concerned with Congress's failure to give effect to a recognition decision that the President has already made. The Court protests, for instance, that § 214(d) "directly contradicts" the President's refusal to recognize Israel's sovereignty over Jerusalem. *Ante*, at 30. But even if the Constitution empowers the President alone to extend recognition, it nowhere obliges Congress to align its laws with the President's recognition decisions. Because the President and Congress are "perfectly co-ordinate by the terms of their common commission," The Federalist No. 49, p. 314 (C. Rossiter ed. 1961) (Madison), the President's use of the recognition power does not constrain Congress's use of its legislative powers.

Congress has legislated without regard to recognition for a long time and in a range of settings. For example, responding in 1817 and 1818 to revolutions in Latin America, Congress amended federal neutrality laws—which originally prohibited private military action for or against *recognized* states—to prohibit private hostilities against *unrecognized* states too. Ch. 58, 3 Stat. 370; ch. 88, 3 Stat. 447; see *The Three Friends*, 166 U. S. 1, 52–59 (1897). Legislation from 90 years ago provided for the revision of national immigration quotas upon one country's surrender of territory to another, even if "the transfer . . . has not been recognized by the United States." § 12(c), 43 Stat. 161 (1924). Federal law today prohibits murdering a foreign government's officials, 18 U. S. C. § 1116, counterfeiting a foreign government's bonds, § 478, and using American vessels to smuggle goods in violation of a foreign government's laws, § 546—all "irrespective of recognition by the United States," §§ 11, 1116.

Just as Congress may legislate independently of recognition in all of those areas, so too may it legislate independently of recognition when regulating the recording of birthplaces.

The Court elsewhere objects that §214(d) interferes with the autonomy and unity of the Executive Branch, setting the branch against itself. The Court suggests, for instance, that the law prevents the President from maintaining his neutrality about Jerusalem in "his and his agent's statements." *Ante*, at 29. That is of no constitutional significance. As just shown, Congress has power to legislate without regard to recognition, and where Congress has the power to legislate, the President has a duty to "take Care" that its legislation "be faithfully executed," Art. II, §3. It is likewise "the duty of the secretary of state to conform to the law"; where Congress imposes a responsibility on him, "he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." *Marbury* v. *Madison*, 1 Cranch 137, 158, 166 (1803). The Executive's involvement in carrying out this law does not affect its constitutionality; the Executive carries out every law.

The Court's error could be made more apparent by applying its reasoning to the President's power "to make Treaties," Art. II, §2, cl. 2. There is no question that Congress may, if it wishes, pass laws that openly flout treaties made by the President. *Head Money Cases*, 112 U. S. 580, 597 (1884). Would anyone have dreamt that the President may refuse to carry out such laws—or, to bring the point closer to home, refuse to execute federal courts' judgments under such laws—so that the Executive may "speak with one voice" about the country's international obligations? To ask is to answer. Today's holding puts the implied power to recognize territorial claims (which the Court infers from the power to recognize states, which it infers from the responsibility to receive ambassadors) on a higher footing than the express power to make treaties. And this, even though the

Federalist describes the making of treaties as a "delicate and important prerogative," but the reception of ambassadors as "more a matter of dignity than of authority," "a circumstance which will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (Hamilton).

In the end, the Court's decision does not rest on text or history or precedent. It instead comes down to "functional considerations"—principally the Court's perception that the Nation "must speak with one voice" about the status of Jerusalem. *Ante*, at 14 (ellipsis and internal quotation marks omitted). The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

V

JUSTICE THOMAS's concurrence deems § 214(d) constitutional to the extent it regulates birth reports, but unconstitutional to the extent it regulates passports. *Ante*, at 41 (opinion concurring in judgment in part and dissenting in part). The concurrence finds no congressional power that would extend to the issuance or contents of passports. Including the power to regulate foreign commerce—even though passports facilitate the transportation of passengers, "a part of our commerce with foreign nations," *Henderson* v. *Mayor of New York*, 92 U. S. 259, 270 (1876). Including the power over naturalization—even though passports issued to citizens, like birth reports, "have the same force and effect as proof of United States citizenship as certificates of naturalization," 22 U. S. C. § 2705. Including the power to enforce the Fourteenth Amendment's guarantee that "[a]ll per-

sons born or naturalized in the United States . . . are citizens of the United States"—even though a passport provides evidence of citizenship and so helps enforce this guarantee abroad. Including the power to exclude persons from the territory of the United States, see Art. I, § 9, cl. 1—even though passports are the principal means of identifying citizens entitled to entry. Including the powers under which Congress has restricted the ability of various people to leave the country (fugitives from justice, for example, see 18 U. S. C. § 1073)—even though passports are the principal means of controlling exit. Including the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," Art. IV, § 3, cl. 2—even though "[a] passport remains at all times the property of the United States," 7 FAM § 1317 (2013). The concurrence's stingy interpretation of the enumerated powers forgets that the Constitution does not "partake of the prolixity of a legal code," that "only its great outlines [are] marked, its important objects designated, and the minor ingredients which compose those objects [left to] be deduced from the nature of the objects themselves." *McCulloch*, 4 Wheat., at 407. It forgets, in other words, "that it is a *constitution* we are expounding." *Ibid.*

Defending Presidential primacy over passports, the concurrence says that the royal prerogative in England included the power to issue and control travel documents akin to the modern passport. *Ante*, at 42. Perhaps so, but that power was assuredly not exclusive. The Aliens Act 1793, for example, enacted almost contemporaneously with our Constitution, required an alien traveling within England to obtain "a passport from [a] mayor or . . . [a] justice of [the] peace," "in which passport shall be expressed the name and rank, occupation or description, of such alien." 33 Geo. III, ch. 4, § 8, in 39 Eng. Stat. at Large 12. The Aliens Act 1798 prohibited aliens from leaving the country without "a passport . . . first obtained from one of his Majesty's principal

secretaries of state," and instructed customs officers to mark, sign, and date passports before allowing their bearers to depart. 38 Geo. III, ch. 50, § 8, in 41 Eng. Stat. at Large 684. These and similar laws discredit any claim that, in the "Anglo-American legal tradition," travel documents have "consistently been issued *and controlled* by the body exercising executive power," *ante*, at 41 (emphasis added).

Returning to this side of the Atlantic, the concurrence says that passports have a "historical pedigree uniquely associated with the President." *Ante*, at 58. This statement overlooks the reality that, until Congress restricted the issuance of passports to the State Department in 1856, "passports were also issued by governors, mayors, and even . . . notaries public." Assn. of the Bar of the City of New York, Special Committee to Study Passport Procedures, Freedom to Travel 6 (1958). To be sure, early Presidents granted passports without express congressional authorization. *Ante*, at 43. But this point establishes Presidential authority over passports in the face of congressional *silence*, not Presidential authority in the face of congressional *opposition*. Early in the Republic's history, Congress made it a crime for a consul to "grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States." § 8, 2 Stat. 205 (1803). Closer to the Civil War, Congress expressly authorized the granting of passports, regulated passport fees, and prohibited the issuance of passports to foreign citizens. § 23, 11 Stat. 60–61 (1856). Since then, Congress has made laws about eligibility to receive passports, the duration for which passports remain valid, and even the type of paper used to manufacture passports. 22 U. S. C. §§ 212, 217a; § 617(b), 102 Stat. 1755. (The concurrence makes no attempt to explain how these laws were supported by congressional powers other than those it rejects in the present case.) This Court has held that the President may not curtail a citizen's travel by withholding a passport, *except on grounds approved by Congress*.

Kent v. *Dulles*, 357 U. S. 116, 129 (1958). History and precedent thus refute any suggestion that the Constitution disables Congress from regulating the President's issuance and formulation of passports.

The concurrence adds that a passport "contains [a] communication directed at a foreign power." *Ante*, at 58. The "communication" in question is a message that traditionally appears in each passport (though no statute, to my knowledge, expressly requires its inclusion): "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." App. 22. I leave it to the reader to judge whether a request to "all whom it may concern" qualifies as a "communication directed at a foreign power." Even if it does, its presence does not affect § 214(d)'s constitutionality. Requesting protection is only a "subordinate" function of a passport. *Kent*, *supra*, at 129. This subordinate function has never been thought to invalidate other laws regulating the contents of passports; why then would it invalidate this one?

That brings me, in analytic crescendo, to the concurrence's suggestion that *even if* Congress's enumerated powers otherwise encompass § 214(d), and *even if* the President's power to regulate the contents of passports is not exclusive, the law might *still* violate the Constitution, because it "conflict[s]" with the President's passport policy. *Ante*, at 55. It turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around. Congress *may* make laws necessary and proper for carrying into execution the President's powers, Art. I, § 8, cl. 18, but the President *must* "take Care" that Congress's legislation "be faithfully executed," Art. II, § 3. And Acts of Congress made in pursuance of the Constitution are the "supreme Law of the Land";

acts of the President (apart from treaties) are not. Art. VI, cl. 2. That is why Chief Justice Marshall was right to think that a law prohibiting the seizure of foreign ships trumped a military order requiring it. *Little* v. *Barreme*, 2 Cranch 170, 178–179 (1804). It is why Justice Jackson was right to think that a President who "takes measures incompatible with the expressed or implied will of Congress" may "rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (concurring opinion) (emphasis added). And it is why JUSTICE THOMAS is wrong to think that even if § 214(d) operates in a field of shared authority the President might still prevail.

Whereas the Court's analysis threatens congressional power over foreign affairs with gradual erosion, the concurrence's approach shatters it in one stroke. The combination of (a) the concurrence's assertion of broad, unenumerated "residual powers" in the President, see *ante*, at 33–40; (b) its parsimonious interpretation of Congress's enumerated powers, see *ante*, at 44–48; and (c) its even more parsimonious interpretation of Congress's authority to enact laws "necessary and proper for carrying into Execution" the President's executive powers, see *ante*, at 48–51; produces (d) a presidency more reminiscent of George III than George Washington.

* * *

International disputes about statehood and territory are neither rare nor obscure. Leading foreign debates during the 19th century concerned how the United States should respond to revolutions in Latin America, Texas, Mexico, Hawaii, Cuba. During the 20th century, attitudes toward Communist governments in Russia and China became conspicuous subjects of agitation. Disagreements about Taiwan, Kashmir, and Crimea remain prominent today. A President empowered to decide all questions relating to these matters, immune from laws embodying congressional

disagreement with his position, would have uncontrolled mastery of a vast share of the Nation's foreign affairs.

That is not the chief magistrate under which the American People agreed to live when they adopted the national charter. They believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (Madison). For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies. Under the Constitution they approved, Congress may require Zivotofsky's passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President's preference for neutrality about the status of Jerusalem.

I dissent.

Syllabus

KERRY, SECRETARY OF STATE, ET AL. *v.* DIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–1402. Argued February 23, 2015—Decided June 15, 2015

Respondent Fauzia Din petitioned to have her husband, Kanishka Berashk, a resident citizen of Afghanistan and former civil servant in the Taliban regime, classified as an "immediate relative" entitled to priority immigration status. Din's petition was approved, but Berashk's visa application was ultimately denied. A consular officer informed Berashk that he was inadmissible under 8 U. S. C. § 1182(a)(3)(B), which excludes aliens who have engaged in "[t]errorist activities," but the officer provided no further information. Unable to obtain a more detailed explanation for Berashk's visa denial, Din filed suit in Federal District Court, which dismissed her complaint. The Ninth Circuit reversed, holding that Din had a protected liberty interest in her marriage that entitled her to review of the denial of Berashk's visa. It further held that the Government deprived her of that liberty interest without due process when it denied Berashk's visa application without providing a more detailed explanation of its reasons.

Held: The judgment is vacated, and the case is remanded.

718 F. 3d 856, vacated and remanded.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded that the Government did not deprive Din of any constitutional right entitling her to due process of law. Pp. 90–101.

(a) Under a historical understanding of the Due Process Clause, Din cannot possibly claim that the denial of Berashk's visa application deprived her of life, liberty, or property. Pp. 91–92.

(b) Even accepting the textually unsupportable doctrine of implied fundamental rights, nothing in that line of cases establishes a free-floating and categorical liberty interest sufficient to trigger constitutional protection whenever a regulation touches upon any aspect of the marital relationship. Even if those cases could be so broadly construed, the relevant question is not whether the asserted interest "is consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice," *Washington* v. *Glucksberg*, 521 U. S. 702, 723–724. Here, the Government's long practice of regulating immigration, which has included erecting serious impediments to a person's ability to bring a spouse into the United States, precludes Din's claim. And this Court has consistently recognized its

lack of "judicial authority to substitute [its] political judgment for that of Congress" with regard to the various distinctions in immigration policy. *Fiallo* v. *Bell*, 430 U. S. 787, 798. Pp. 92–97.

JUSTICE KENNEDY, joined by JUSTICE ALITO, concluded that there is no need to decide whether Din has a protected liberty interest, because, even assuming she does, the notice she received satisfied due process. Pp. 101–106.

(a) This conclusion is dictated by the reasoning of *Kleindienst* v. *Mandel*, 408 U. S. 753. There the Court declined to balance the asserted First Amendment interest of college professors seeking a nonimmigrant visa for a revolutionary Marxist speaker against "Congress' 'plenary power to make rules for the admission of aliens,'" *id.*, at 766, and limited its inquiry to whether the Government had provided a "facially legitimate and bona fide" reason for its action, *id.*, at 770. *Mandel*'s reasoning has particular force here, where national security is involved. Pp. 102–104.

(b) Assuming that Din's rights were burdened directly by the visa denial, the consular officer's citation of § 1182(a)(3)(B) satisfies *Mandel*'s "facially legitimate and bona fide" standard. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543, the Government's decision to exclude Berashk because he did not satisfy a statutory condition for admissibility is facially legitimate. Supporting this conclusion is the fact that, by Din's own admission, Berashk worked for the Taliban government. These considerations lend to the conclusion that there was a bona fide factual basis for exclusion, absent an affirmative showing of bad faith on the consular officer's part, which Din has not plausibly alleged. Pp. 104–106.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and THOMAS, J., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which ALITO, J., joined, *post*, p. 101. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 107.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Attorney General Verrilli*, *Acting Assistant Attorney General Branda*, *Elaine J. Goldenberg*, and *Stacey I. Young.*

Mark E. Haddad argued the cause for respondent. With him on the brief were *Geoffrey D. DeBoskey*, *David R. Car-*

penter, *Heidi Larson Howell*, *Kathleen M. Mueller*, *Anoop Prasad*, *Jenny Zhao*, *Nasrina Bargzie*, and *Winfred Kao*.*

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE THOMAS join.

Fauzia Din is a citizen and resident of the United States. Her husband, Kanishka Berashk, is an Afghan citizen and former civil servant in the Taliban regime who resides in that country. When the Government declined to issue an immigrant visa to Berashk, Din sued.

The state action of which Din complains is the denial of *Berashk's* visa application. Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission. See *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). So, Din attempts to bring suit on his behalf, alleging that the Government's denial of her *husband's* visa application violated *her* constitutional rights. See App. 36–37, Complaint ¶56. In particular, she claims that the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse. There is no such constitutional right. What JUSTICE BREYER's dissent strangely describes as a "deprivation of her freedom to live together with her spouse in America," *post*, at 110, is, in any world other than the artificial world of ever-expanding

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Steven R. Shapiro*, *Jameel Jaffer*, and *Hina Shamsi*; for the California Women's Law Center by *Theane Evangelis*; for Former Consular Officers by *Ira J. Kurban* and *Trina Realmuto*; for Law School Professors by *Robert Pauw*; for the National Immigrant Justice Center et al. by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Michael B. Kimberly*, *Paul W. Hughes*, and *Charles Roth*; and for National Justice for Our Neighbors by *Brian J. Murray* and *John M. Gore*.

constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America.

For the reasons given in this opinion and in the opinion concurring in the judgment, we vacate and remand.

I

A

Under the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, an alien may not enter and permanently reside in the United States without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by "immediate relatives" in the United States. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. See §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer. See §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA. § 1361.

One ground for inadmissibility, § 1182(a)(3)(B), covers "[t]errorist activities." In addition to the violent and destructive acts the term immediately brings to mind, the INA defines "terrorist activity" to include providing material support to a terrorist organization and serving as a terrorist organization's representative. § 1182(a)(3)(B)(i), (iii)–(vi).

B

Fauzia Din came to the United States as a refugee in 2000, and became a naturalized citizen in 2007. She filed a petition to have Kanishka Berashk, whom she married in 2006, classified as her immediate relative. The petition was granted, and Berashk filed a visa application. The U. S. Embassy in Islamabad, Pakistan, interviewed Berashk and de-

nied his application. A consular officer informed Berashk that he was inadmissible under § 1182(a)(3)(B) but provided no further explanation.

Din then brought suit in Federal District Court seeking a writ of mandamus directing the United States to properly adjudicate Berashk's visa application; a declaratory judgment that 8 U. S. C. § 1182(b)(2)–(3), which exempts the Government from providing notice to an alien found inadmissible under the terrorism bar, is unconstitutional as applied; and a declaratory judgment that the denial violated the Administrative Procedure Act. App. 36–39, Complaint ¶¶55–68. The District Court granted the Government's motion to dismiss, but the Ninth Circuit reversed. The Ninth Circuit concluded that Din "has a protected liberty interest in marriage that entitles [her] to review of the denial of [her] spouse's visa," 718 F. 3d 856, 860 (2013), and that the Government's citation of § 1182(a)(3)(B) did not provide Din with the "limited judicial review" to which she was entitled under the Due Process Clause, *id.*, at 868. This Court granted certiorari. 573 U. S. 990 (2014).

II

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Although the amount and quality of process that our precedents have recognized as "due" under the Clause has changed considerably since the founding, see *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28–36 (1991) (SCALIA, J., concurring in judgment), it remains the case that *no* process is due if one is not deprived of "life, liberty, or property," *Swarthout* v. *Cooke*, 562 U. S. 216, 219 (2011) (*per curiam*). The first question that we must ask, then, is whether the denial of Berashk's visa application deprived Din of any of these interests. Only if we answer in the affirmative must we proceed to consider whether the Government's explanation afforded sufficient process.

A

The Due Process Clause has its origin in Magna Carta. As originally drafted, the Great Charter provided that "[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or *by the law of the land*." Magna Carta, ch. 29, in 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797) (emphasis added). The Court has recognized that at the time of the Fifth Amendment's ratification, the words "due process of law" were understood "to convey the same meaning as the words 'by the law of the land'" in Magna Carta. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856). Although the terminology associated with the guarantee of due process changed dramatically between 1215 and 1791, the general scope of the underlying rights protected stayed roughly constant.

Edward Coke, whose Institutes "were read in the American Colonies by virtually every student of the law," *Klopfer* v. *North Carolina*, 386 U. S. 213, 225 (1967), thoroughly described the scope of the interests that could be deprived only pursuant to "the law of the land." Magna Carta, he wrote, ensured that, without due process, "no man [may] be taken or imprisoned"; "disseised of his lands, or tenements, or dispossessed of his goods, or chattels"; "put from his livelihood without answer"; "barred to have the benefit of the law"; denied "the franchises, and priviledges, which the subjects have of the gift of the king"; "exiled"; or "fore-judged of life, or limbe, disherited, or put to torture, or death." 1 Coke, *supra*, at 46–48. Blackstone's description of the rights protected by Magna Carta is similar, although he discusses them in terms much closer to the "life, liberty, or property" terminology used in the Fifth Amendment. He described first an interest in "personal security," "consist[ing] in a person's legal and uninterrupted enjoyment of his life, his limbs, his

body, his health, and his reputation." 1 W. Blackstone, Commentaries on the Laws of England 125 (1765). Second, the "personal liberty of individuals" "consist[ed] in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint." *Id.*, at 130. And finally, a person's right to property included "the free use, enjoyment, and disposal of all his acquisitions." *Id.*, at 134.

Din, of course, could not conceivably claim that the denial of Berashk's visa application deprived her—or for that matter even Berashk—of life or property; and under the above described historical understanding, a claim that it deprived her of liberty is equally absurd. The Government has not "taken or imprisoned" Din, nor has it "confine[d]" her, either by "keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street." *Id.*, at 132. Indeed, not even Berashk has suffered a deprivation of liberty so understood.

B

Despite this historical evidence, this Court has seen fit on several occasions to expand the meaning of "liberty" under the Due Process Clause to include certain implied "fundamental rights." (The reasoning presumably goes like this: If you have a right to do something, you are free to do it, and deprivation of freedom is a deprivation of "liberty"—never mind the original meaning of that word in the Due Process Clause.) These implied rights have been given *more* protection than "life, liberty, or property" properly understood. While one may be dispossessed of property, thrown in jail, or even executed so long as proper procedures are followed, the enjoyment of implied constitutional rights cannot be limited at all, except by provisions that are "narrowly tailored to serve a compelling state interest." *Reno* v. *Flores*, 507 U. S. 292, 301–302 (1993). Din does not explicitly argue that the Government has violated this absolute

prohibition of the *substantive* component of the Due Process Clause, likely because it is obvious that a law barring aliens engaged in terrorist activities from entering this country *is* narrowly tailored to serve a compelling state interest. She nevertheless insists that, because enforcement of the law affects her enjoyment of an implied fundamental liberty, the Government must first provide her a full battery of procedural-due-process protections.

I think it worth explaining why, *even if* one accepts the textually unsupportable doctrine of implied fundamental rights, Din's arguments would fail. Because "extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action," *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997), and because the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992), "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field," *ibid.* Accordingly, before conferring constitutional status upon a previously unrecognized "liberty," we have required "a careful description of the asserted fundamental liberty interest," as well as a demonstration that the interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." *Glucksberg*, *supra*, at 720–721 (citations and internal quotation marks omitted).

Din describes the denial of Berashk's visa application as implicating, alternately, a "liberty interest in her marriage," Brief for Respondent 28, a "right of association with one's spouse," *id.*, at 18, "a liberty interest in being reunited with certain blood relatives," *id.*, at 22, and "the liberty interest of a U. S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse," *ibid.* To be sure, this Court has at times indulged

a propensity for grandiloquence when reviewing the sweep of implied rights, describing them so broadly that they would include not only the interests Din asserts but many others as well. For example: "Without doubt, [the liberty guaranteed by the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). But this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases. And the actual holdings of the cases Din relies upon hardly establish the capacious right she now asserts.

Unlike the States in *Loving* v. *Virginia*, 388 U. S. 1 (1967), *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), and *Turner* v. *Safley*, 482 U. S. 78 (1987), the Federal Government here has not attempted to forbid a marriage. Although Din and the dissent borrow language from those cases invoking a fundamental right to marriage, they both implicitly concede that no such right has been infringed in this case. Din relies on the "associational interests in marriage that necessarily are protected by the right to marry," and that are "presuppose[d]" by later cases establishing a right to marital privacy. Brief for Respondent 16, 18. The dissent supplements the fundamental right to marriage with a fundamental right to live in the United States in order to find an affected liberty interest. *Post*, at 108 (BREYER, J., dissenting).

Attempting to abstract from these cases some liberty interest that might be implicated by Berashk's visa denial, Din draws on even more inapposite cases. *Meyer*, for example, invalidated a state statute proscribing the teaching of foreign language to children who had not yet passed the eighth grade, reasoning that it violated the teacher's "right thus to teach and the right of parents to engage him so to instruct their children." 262 U. S., at 400. *Pierce* v. *Society of Sis-*

ters, 268 U. S. 510, 534–535 (1925), extended *Meyer*, finding that a law requiring children to attend public schools "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Moore* v. *East Cleveland*, 431 U. S. 494, 505–506 (1977), extended this interest in raising children to caretakers in a child's extended family, striking down an ordinance that limited occupancy of a single-family house to members of a nuclear family on the ground that "[d]ecisions concerning child rearing . . . long have been shared with grandparents or other relatives." And *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965), concluded that a law criminalizing the use of contraceptives by married couples violated "penumbral rights of 'privacy and repose' " protecting "the sacred precincts of the marital bedroom"—rights which do not plausibly extend into the offices of our consulates abroad.

Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship. Even if our cases could be construed so broadly, the relevant question is not whether the asserted interest "is consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice." *Glucksberg*, 521 U. S., at 723–724 (emphasis deleted). Even if we might "imply" a liberty interest in marriage generally speaking, that must give way when there is a tradition denying the specific application of that general interest. Thus, *Glucksberg* rejected a claimed liberty interest in "self-sovereignty" and "personal autonomy" that extended to assisted suicide when there was a longstanding tradition of outlawing the practice of suicide. *Id.*, at 724, 727–728 (internal quotation marks omitted).

Here, a long practice of regulating spousal immigration precludes Din's claim that the denial of Berashk's visa application has deprived her of a fundamental liberty interest.

Although immigration was effectively unregulated prior to 1875, as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States. See Abrams, What Makes the Family Special? 80 U. Chi. L. Rev. 7, 10–16 (2013).

Most strikingly, perhaps, the Expatriation Act of 1907 provided that "any American woman who marries a foreigner shall take the nationality of her husband." Ch. 2534, 34 Stat. 1228. Thus, a woman in Din's position not only lacked a liberty interest that might be affected by the Government's disposition of her husband's visa application, she lost her *own* rights as a citizen upon marriage. When Congress began to impose quotas on immigration by country of origin less than 15 years later, with the Immigration Act of 1921, it omitted fiances and husbands from the family relations eligible for preferred status in the allocation of quota spots. § 2(d), 42 Stat. 6. Such relations were similarly excluded from the relations eligible for nonquota status, when that status was expanded three years later. Immigration Act of 1924, § 4(a), 43 Stat. 155.

To be sure, these early regulations were premised on the derivative citizenship of women, a legacy of the law of coverture that was already in decline at the time. C. Bredbenner, A Nationality of Her Own 5 (1998). Modern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order. Nevertheless, this all-too-recent practice repudiates any contention that Din's asserted liberty interest is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Glucksberg*, *supra*, at 721 (citations and internal quotations marks omitted).

Indeed, the law showed little more solicitude for the marital relationship when it was a male resident or citizen seek-

ing admission for his fiancee or wife. The Immigration Act of 1921 granted nonquota status only to unmarried, minor children of citizens, § 2(a), while granting fiancees and wives preferred status *within* the allocation of quota spots, § 2(d). In other words, a citizen could move his spouse forward in the line, but once all the quota spots were filled for the year, the spouse was barred without exception. This was not just a theoretical possibility: As one commentator has observed, "[f]or many immigrants, the family categories did little to help, because the quotas were so small that the number of family members seeking slots far outstripped the number available." Abrams, *supra*, at 13.

Although Congress has tended to show "a continuing and kindly concern . . . for the unity and the happiness of the immigrant family," E. Hutchinson, Legislative History of American Immigration Policy 1798–1965, p. 518 (1981), this has been a matter of legislative grace rather than fundamental right. Even where Congress has provided special privileges to promote family immigration, it has also "written in careful checks and qualifications." *Ibid.* This Court has consistently recognized that these various distinctions are "policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." *Fiallo* v. *Bell*, 430 U. S. 787, 798 (1977). Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of Berashk's visa application implicates any of Din's fundamental liberty interests.

C

JUSTICE BREYER suggests that procedural due process rights attach to liberty interests that either are (1) created by nonconstitutional law, such as a statute, or (2) "sufficiently important" so as to "flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause." *Post*, at 108.

The first point is unobjectionable, at least given this Court's case law. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 262, and n. 8 (1970); *Collins* 503 U. S., at 129. But it is unhelpful to Din, who does not argue that a statute confers on her a liberty interest protected by the Due Process Clause. JUSTICE BREYER attempts to make this argument for Din, latching onto language in *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005), saying that a liberty interest "may arise from an expectation or interest created by state laws or policies." Such an "expectation" has been created here, he asserts, because "the law . . . surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure," *post*, at 108–109. But what *Wilkinson* meant by an "expectation or interest" was not that sort of judicially unenforceable substantial hope, but a present and legally recognized substantive entitlement.* As sole support for its conclusion that nonconstitutional law can create constitutionally protected liberty interests, *Wilkinson* cited *Wolff* v. *McDonnell*, 418 U. S. 539, 556–558 (1974), which held that a prisoner could not be deprived of statutory good-time credit without procedural due process. That was not because a prisoner might have "a strong expectation" that the government would not deprive him of good-time credit "without strong reasons" or "fair procedure," but because "the State itself has not only provided a statutory *right* to good time [credit] but also specifies that it is to be forfeited *only* for serious misbehavior," *id.*, at 557 (emphasis added). The legal benefits afforded to marriages and the preferential treatment accorded to visa applicants with

*JUSTICE BREYER characterizes this as a reintroduction of "the rights/privilege distinction that this Court rejected almost five decades ago." *Post*, at 109. Not so. All I insist upon (and all that our cases over the past five decades require) is that the privilege be one to which the claimant has been given an entitlement.

citizen-relatives are insufficient to confer on Din a right that can be deprived only pursuant to procedural due process.

JUSTICE BREYER's second point—that procedural due process rights attach even to some nonfundamental liberty interests that have *not* been created by statute—is much more troubling. He relies on the implied-fundamental-rights cases discussed above to divine a "right of spouses to live together and to raise a family," along with "a citizen's right to live within this country." *Post*, at 108. But perhaps recognizing that our established methodology for identifying fundamental rights cuts against his conclusion, see Part II–B, *supra*, he argues that the term "liberty" in the Due Process Clause includes implied rights that, although not so fundamental as to deserve substantive-due-process protection, are important enough to deserve procedural-due-process protection. *Post*, at 108. In other words, there are two categories of implied rights protected by the Due Process Clause: really fundamental rights, which cannot be taken away at all absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as procedural due process is observed.

The dissent fails to cite a single case supporting its novel theory of implied nonfundamental rights. It is certainly true that *Vitek* v. *Jones*, 445 U. S. 480 (1980), and *Washington* v. *Harper*, 494 U. S. 210 (1990), do not entail implied *fundamental* rights, but this is because they do not entail *implied* rights at all. *Vitek* concerned the involuntary commitment of a prisoner, deprivation of the expressly protected right of liberty under the original understanding of the term, see Part II–A, *supra*. "'Among the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" *Vitek*, *supra*, at 492. The same is true of *Harper*, which concerned forced administration of psychotropic drugs to an inmate. 494 U. S., at 214. Arguably, *Paul* v. *Davis*, 424 U. S. 693 (1976), also addressed an

interest expressly contemplated within the meaning of "liberty." See 1 W. Blackstone, Commentaries on the Laws of England 125 ("The right of personal security consists in a person's . . . reputation"). But that case is of no help to the dissent anyway, since it found no liberty interest entitled to the Due Process Clause's protection. *Paul*, *supra*, at 713–714. Finally, the dissent points to *Goss* v. *Lopez*, 419 U. S. 565, 574 (1975), a case that "recognize[d] . . . as a property interest" a student's right to a public education conferred by Ohio's express statutory creation of a public school system; and further concluded that the student's 10-day suspension implicated the constitutionally grounded liberty interest in "'a person's good name, reputation, honor, or integrity.'"

Ultimately, the dissent identifies no case holding that there is an implied nonfundamental right protected by procedural due process, and only one case even *suggesting* that there is. That suggestion, in *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816 (1977), is contained in dictum in a footnote, *id.*, at 842, n. 48. The holding of the case was that "the procedures provided by New York State . . . and by New York Cit[y] . . . are adequate to protect *whatever* liberty interests appellees *may* have." *Id.*, at 856 (emphasis added).

The footnoted dictum that JUSTICE BREYER proposes to elevate to constitutional law is a dangerous doctrine. It vastly expands the scope of our implied-rights jurisprudence by setting it free from the requirement that the liberty interest be "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty," *Glucksberg*, 521 U. S., at 720–721 (citations and internal quotation marks omitted). Even shallow-rooted liberties would, thanks to this new procedural-rights-only notion of quasi-fundamental rights, qualify for judicially imposed procedural requirements. Moreover, JUSTICE BREYER gives no basis for distinguishing the fundamental rights recognized in the cases he depends on from the *nonfundamental* right he believes they give rise to in the present case.

Neither Din's right to live with her spouse nor her right to live within this country is implicated here. There is a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally." *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 788 (1980). The Government has not refused to recognize Din's marriage to Berashk, and Din remains free to live with her husband anywhere in the world that both individuals are permitted to reside. And the Government has not expelled Din from the country. It has simply determined that Kanishka Berashk engaged in terrorist activities within the meaning of the Immigration and Nationality Act, and has therefore denied him admission into the country. This might, indeed, deprive Din of something "important," *post*, at 108, but if that is the criterion for JUSTICE BREYER's new pairing of substantive and procedural due process, we are in for quite a ride.

* * *

Because Fauzia Din was not deprived of "life, liberty, or property" when the Government denied Kanishka Berashk admission to the United States, there is no process due to her under the Constitution. To the extent that she received any explanation for the Government's decision, this was more than the Due Process Clause required. The judgment of the Ninth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, concurring in the judgment.

The respondent, Fauzia Din, is a citizen and resident of the United States. She asserts that petitioner Government officials (collectively, Government) violated her own constitutional right to live in this country with her husband, an alien now residing in Afghanistan. She contends this violation

occurred when the Government, through State Department consular officials, denied her spouse's immigrant visa application with no explanation other than that the denial was based on 8 U. S. C. §1182 (a)(3)(B), the statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities.

The plurality is correct that the case must be vacated and remanded. But rather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband's visa denial satisfied due process.

Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse. The Court need not decide that issue, for this Court's precedents instruct that, even assuming she has such an interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar, § 1182(a)(3)(B). See *ante*, at 89–90.

I

The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court's decision in *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972). There, college professors—all of them citizens—had invited Dr. Ernest Mandel, a self-described "'revolutionary Marxist,'" to speak at a conference at Stanford University. *Id.*, at 756. Yet when Mandel applied for a temporary nonimmigrant visa to enter the country, he was denied. At the time, the immigration laws deemed aliens "who advocate[d] the economic, international, and governmental doctrines of World communism" ineligible for visas. § 1182(a)(28)(D) (1964 ed.). Aliens ineligible under this provision did have one opportunity for recourse: The Attorney General was given discretion to waive the prohibition and grant individual exceptions, allowing the alien to obtain a temporary visa.

§ 1182(d)(3). For Mandel, however, the Attorney General, acting through the Immigration and Naturalization Service (INS), declined to grant a waiver. In a letter regarding this decision, the INS explained Mandel had exceeded the scope and terms of temporary visas on past trips to the United States, which the agency deemed a "'flagrant abuse of the opportunities afforded him to express his views in this country.'" 408 U. S., at 759.

The professors who had invited Mandel to speak challenged the INS' decision, asserting a First Amendment right to "'hear his views and engage him in a free and open academic exchange.'" *Id.*, at 760. They claimed the Attorney General infringed this right when he refused to grant Mandel relief. See *ibid.*

The Court declined to balance the First Amendment interest of the professors against "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Id.*, at 766, 768. To do so would require "courts in each case . . . to weigh the strength of the audience's interest against that of the Government in refusing a [visa] to the particular applicant," a nuanced and difficult decision Congress had "properly . . . placed in the hands of the Executive." *Id.*, at 769.

Instead, the Court limited its inquiry to the question whether the Government had provided a "facially legitimate and bona fide" reason for its action. *Id.*, at 770. Finding the Government had proffered such a reason—Mandel's abuse of past visas—the Court ended its inquiry and found the Attorney General's action to be lawful. See *ibid.* The Court emphasized it did not address "[w]hat First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced." *Ibid.*

The reasoning and the holding in *Mandel* control here. That decision was based upon due consideration of the con-

gressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field. *Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made "on the basis of a facially legitimate and bona fide reason." *Ibid.* Once this standard is met, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" the constitutional interests of citizens the visa denial might implicate. *Ibid.* This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.

II

Like the professors who sought an audience with Dr. Mandel, Din claims her constitutional rights were burdened by the denial of a visa to a noncitizen, namely, her husband. And as in *Mandel*, the Government provided a reason for the visa denial: It concluded Din's husband was inadmissible under § 1182(a)(3)(B)'s terrorism bar. Even assuming Din's rights were burdened directly by the visa denial, the remaining question is whether the reasons given by the Government satisfy *Mandel*'s "facially legitimate and bona fide" standard. I conclude that they do.

Here, the consular officer's determination that Din's husband was ineligible for a visa was controlled by specific statutory factors. The provisions of § 1182(a)(3)(B) establish specific criteria for determining terrorism-related inadmissibility. The consular officer's citation of that provision suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States*

ex rel. Knauff v. *Shaughnessy*, 338 U. S. 537, 543 (1950), it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*.

The Government's citation of § 1182(a)(3)(B) also indicates it relied upon a bona fide factual basis for denying a visa to Berashk. Cf. *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926). Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis. It is true the Attorney General there disclosed the facts motivating his decision to deny Dr. Mandel a waiver, and that the Court cited those facts as demonstrating "the Attorney General validly exercised the plenary power that Congress delegated to the Executive." 408 U. S., at 769. But unlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa. Din, moreover, admits in her complaint that Berashk worked for the Taliban government, App. 27–28, which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity. Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed. See 408 U. S., at 770.

The Government, furthermore, was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B). To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on

which the consular officer relied. Congress understood this problem, however. The statute generally requires the Government to provide an alien denied a visa with the "specific provision or provisions of law under which the alien is inadmissible," § 1182(b)(1); but this notice requirement does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns, § 1182(b)(3). Notably, the Government is not prohibited from offering more details when it sees fit, but the statute expressly refrains from requiring it to do so.

Congress evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. See *Fiallo* v. *Bell*, 430 U. S. 787, 795–796 (1977); see also *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 425 (1999). And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this. Under *Mandel*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). By requiring the Government to provide more, the Court of Appeals erred in adjudicating Din's constitutional claims.

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

Fauzia Din, an American citizen, wants to know why the State Department denied a visa to her husband, a noncitizen. She points out that, without a visa, she and her husband will have to spend their married lives separately or abroad. And she argues that the Department, in refusing to provide an adequate reason for the denial, has violated the constitutional requirement that "[n]o person . . . be deprived of life, liberty, or property, without due process of law." U. S. Const., Amdt. 5.

In my view, Ms. Din should prevail on this constitutional claim. She possesses the kind of "liberty" interest to which the Due Process Clause grants procedural protection. And the Government has failed to provide her with the procedure that is constitutionally "due." See *Swarthout* v. *Cooke*, 562 U. S. 216, 219 (2011) (*per curiam*) (setting forth the Court's two-step inquiry for procedural due process claims). Accordingly, I would affirm the judgment of the Ninth Circuit.

I

The plurality opinion (which is not controlling) concludes that Ms. Din lacks the kind of liberty interest to which the Due Process Clause provides procedural protections. *Ante*, at 90–101. JUSTICE KENNEDY's opinion "*assum[es]*" that Ms. Din possesses that kind of liberty interest. *Ante*, at 102 (opinion concurring in judgment) (emphasis added). I agree with JUSTICE KENNEDY's assumption. More than that, I believe that Ms. Din possesses that kind of constitutional interest.

The liberty interest that Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks *procedural*, not *substantive*, protection for this freedom. Compare *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005) (Due Process Clause requires compli-

ance with fair *procedures* when the government deprives an individual of certain "liberty" or "property" interests), with *Reno* v. *Flores*, 507 U. S. 292, 302 (1993) (Due Process Clause limits the extent to which government can *substantively* regulate certain "fundamental" rights, "no matter what process is provided"). Cf. *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 842, n. 48 (1977) (liberty interests arising under the Constitution for procedural due process purposes are not the same as fundamental rights requiring substantive due process protection).

Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow "implicit[ly]" from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates "an expectation" that a person will not be deprived of that kind of liberty without fair procedures. *Wilkinson*, *supra*, at 221.

The liberty for which Ms. Din seeks protection easily satisfies both standards. As this Court has long recognized, the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals' "orderly pursuit of happiness." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). See also, *e. g.*, *Griswold* v. *Connecticut*, 381 U. S. 479, 485–486 (1965); *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978); *Moore* v. *East Cleveland*, 431 U. S. 494, 500–503 (1977) (plurality opinion); *Smith*, *supra*, at 843. Similarly, the Court has long recognized that a citizen's right to live within this country, being fundamental, enjoys basic procedural due process protection. See *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–285 (1922); *Baumgartner* v. *United States*, 322 U. S. 665, 670 (1944).

At the same time, the law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not de-

prive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure. Cf. *Turner* v. *Safley*, 482 U. S. 78, 95–96 (1987) (noting various legal benefits of marriage); 8 U. S. C. § 1151(b)(2)(A)(i) (special visa preference for spouse of an American citizen). JUSTICE SCALIA's response—that nonconstitutional law creates an "expectation" that merits procedural protection under the Due Process Clause only if there is an unequivocal statutory right, *ante*, at 98–99—is sorely mistaken. His argument rests on the rights/privilege distinction that this Court rejected almost five decades ago, in the seminal case of *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970). See generally *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights"); *id.*, at 572 ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed").

JUSTICE SCALIA's more general response—claiming that I have created a new category of constitutional rights, *ante*, at 99–101—misses the mark. I break no new ground here. Rather, this Court has *already* recognized that the Due Process Clause guarantees that the government will not, without fair procedure, deprive individuals of a host of rights, freedoms, and liberties that are no more important, and for which the state has created no greater expectation of continued benefit, than the liberty interest at issue here. See, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 556–557 (1974) (prisoner's right to maintain "good time" credits shortening term of imprisonment; procedurally protected liberty interest based on nonconstitutional law); *Paul* v. *Davis*, 424 U. S. 693, 701 (1976) (right to certain aspects of reputation; procedurally protected liberty interest arising under the Constitution); *Goss* v. *Lopez*, 419 U. S. 565, 574–575 (1975) (student's right not to be suspended from school class; procedurally

protected liberty interest arising under the Constitution); *Vitek* v. *Jones*, 445 U. S. 480, 491–495 (1980) (prisoner's right against involuntary commitment; procedurally protected liberty interest arising under the Constitution); *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990) (mentally ill prisoner's right not to take psychotropic drugs; procedurally protected liberty interest arising under the Constitution); see generally *Goldberg*, *supra*, at 262–263 (right to welfare benefits; procedurally protected property interest based on nonconstitutional law). But cf. *ante,* at 99–100 (plurality opinion) (making what I believe are unsuccessful efforts to distinguish these cases). How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America? As compared to reputational harm, for example, how is Ms. Din's liberty interest any less worthy of due process protections?

II

A

The more difficult question is the nature of the procedural protection required by the Constitution. After all, sometimes, as with the military draft, the law separates spouses with little individualized procedure. And sometimes, as with criminal convictions, the law provides procedure to one spouse but not to the other. Unlike criminal convictions, however, neither spouse here has received any procedural protection. Cf. *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (availability of alternative procedures can satisfy due process). Compare *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 213 (1953) (no due process protections for aliens outside United States), with *Zadvydas* v. *Davis*, 533 U. S. 678, 693 (2001) (such protections are available for aliens inside United States). And, unlike the draft (justified by a classic military threat), the deprivation does not apply simi-

larly to hundreds of thousands of American families. Cf. *Bi-Metallic Investment Co.* v. *State Bd. of Equalization of Colo.*, 239 U. S. 441, 445 (1915).

Rather, here, the Government makes individualized visa determinations through the application of a legal rule to particular facts. Individualized adjudication normally calls for the ordinary application of Due Process Clause procedures. *Londoner* v. *City and County of Denver*, 210 U. S. 373, 385–386 (1908). And those procedures normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decisionmaker, and reasoned decisionmaking. See *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 533 (2004) (plurality opinion); see also Friendly, Some Kind of a Hearing, 123 U. Pa. L. Rev. 1267, 1278–1281 (1975). These procedural protections help to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law. It is that rule of law, stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause seeks to protect. *Hurtado* v. *California*, 110 U. S. 516, 527 (1884).

Here, we need not consider all possible procedural due process elements. Rather we consider only the minimum procedure that Ms. Din has requested—namely, a statement of reasons, some kind of explanation, as to why the State Department denied her husband a visa.

We have often held that this kind of statement, permitting an individual to understand *why* the government acted as it did, is a fundamental element of due process. See, *e. g.*, *Goldberg*, 397 U. S., at 267–268; *Perry* v. *Sindermann*, 408 U. S. 593, 603 (1972); *Morrissey* v. *Brewer*, 408 U. S. 471, 485, 489 (1972); *Wolff*, *supra*, at 563–564; *Goss*, *supra*, at 581; *Mathews* v. *Eldridge*, 424 U. S. 319, 345–346 (1976); *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 546 (1985); *Wilkinson*, 545 U. S., at 224; *Hamdi*, *supra*, at 533 (plurality opinion).

That is so in part because a statement of reasons, even one provided after a visa denial, serves much the same function as a "notice" of a proposed action. It allows Ms. Din, who suffered a "serious loss," a fair "opportunity to meet" "the case" that has produced separation from her husband. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 171–172 (1951) (Frankfurter, J., concurring); see also *Hamdi*, *supra*, at 533 (plurality opinion); *Wolff*, *supra*, at 563; Friendly, *supra*, at 1280 ("notice" must provide "the grounds for" the relevant action). Properly apprised of the grounds for the Government's action, Ms. Din can then take appropriate action—whether this amounts to an appeal, internal agency review, or (as is likely here) an opportunity to submit additional evidence and obtain reconsideration, 22 CFR § 42.81(e) (2014).

I recognize that our due process cases often determine the constitutional insistence upon a particular procedure by balancing, with respect to that procedure, the "private interest" at stake, "the risk of an erroneous deprivation" absent the sought-after protection, and the Government's interest in not providing additional procedure. *Eldridge*, *supra*, at 335; but cf. *Hamdi*, *supra*, at 533 (plurality opinion) (suggesting minimal due process requirements cannot be balanced away). Here "balancing" would not change the result. The "private interest" is important, the risk of an "erroneous deprivation" is significant, and the Government's interest in not providing a reason is normally small, at least administratively speaking. Indeed, Congress requires the State Department to provide a reason for a visa denial in most contexts. 8 U. S. C. § 1182(b)(1). Accordingly, in the absence of some highly unusual circumstance (not shown to be present here, see *infra*, at 115), the Constitution requires the Government to provide an adequate reason why it refused to grant Ms. Din's husband a visa. That reason, in my view, could be either the factual basis for the Government's decision or a

sufficiently specific statutory subsection that conveys effectively the same information.

B

1

JUSTICE KENNEDY, without denying that Ms. Din was entitled to a reason, believes that she received an adequate reason here. According to the complaint, however, the State Department's denial letter stated only that the visa "had been denied under . . . 8 U. S. C. § 1182(a)." App. 30. In response to requests for further explanation, the State Department sent an e-mail stating that the visa "had been denied under . . . 8 U. S. C. § 1182(a)(3)(B)—the terrorism and national security bars to admissibility." *Id.*, at 31. I do not see how either statement could count as adequate.

For one thing, the statutory provision to which it refers, § 1182(a)(3)(B), sets forth, not one reason, but dozens. It is a complex provision with 10 different subsections, many of which cross-reference other provisions of law. See Appendix, *infra*. Some parts cover criminal conduct that is particularly serious, such as hijacking aircraft and assassination. §§ 1182(a)(3)(B)(iii)(I), (IV). Other parts cover activity that, depending on the factual circumstances, cannot easily be labeled "terrorist." One set of cross-referenced subsections, for example, brings within the section's visa prohibition any individual who has "transfer[red] . . . [any] material financial benefit" to "a group of two or more individuals, whether organized or not, which . . . has a subgroup which engages" in "afford[ing] material support . . . for . . . any individual who . . . plans" "[t]he use of any . . . weapon . . . with intent . . . to cause substantial damage to property." §§ 1182(a)(3)(B)(iv)(VI), (vi)(III), (iv)(VI)(bb), (iii)(V). At the same time, some subsections provide the visa applicant with a defense; others do not. See, *e. g.*, § 1182(a)(3)(B)(iv)(VI)(dd) (permitting applicant to show "by clear and convincing evidence that

the actor did not know, and should not reasonably have known, that the organization was a terrorist organization"). Taken together the subsections, directly or through cross-reference, cover a vast waterfront of human activity potentially benefiting, sometimes in major ways, sometimes hardly at all, sometimes directly, sometimes indirectly, sometimes a few people, sometimes many, sometimes those with strong links, sometimes those with hardly a link, to a loosely or strongly connected group of individuals, which, through many different kinds of actions, might fall within the broad statutorily defined term "terrorist." See, *e. g.*, *Daneshvar* v. *Ashcroft*, 355 F. 3d 615, 628 (CA6 2004) (alleging material support for selling newspapers); *Singh* v. *Wiles*, 747 F. Supp. 2d 1223, 1227 (WD Wash. 2010) (alleging material support for letting individuals sleep on a temple floor).

For another thing, the State Department's reason did not set forth any factual basis for the Government's decision. Cf., *e. g.*, *Wilkinson*, *supra*, at 225–226 (prison administrators must inform prisoners of "factual basis" for extreme solitary confinement). Perhaps the Department denied the visa because Ms. Din's husband at one point was a payroll clerk for the Afghan Government when that government was controlled by the Taliban. See *ante*, at 105 (opinion of KENNEDY, J.). But there is no way to know if that is so.

The generality of the statutory provision cited and the lack of factual support mean that here, the reason given is analogous to telling a criminal defendant only that he is accused of "breaking the law"; telling a property owner only that he cannot build because environmental rules forbid it; or telling a driver only that police pulled him over because he violated traffic laws. As such, the reason given cannot serve its procedural purpose. It does not permit Ms. Din to assess the correctness of the State Department's conclusion; it does not permit her to determine what kinds of facts she might provide in response; and it does not permit her to learn whether, or what kind of, defenses might be available. In short,

any "reason" that Ms. Din received is not constitutionally adequate.

2

Seemingly aware that he cannot deny these basic legal principles, JUSTICE KENNEDY rests his conclusions upon two considerations that, in his view, provide sufficient grounds for an exception. *Ante*, at 106. Most importantly, he says that ordinary rules of due process must give way here to national security concerns. But just what are those concerns? And how do they apply here? Ms. Din's counsel stated at oral argument that there were no such concerns in this case. Tr. of Oral Arg. 35. And the Solicitor General did not deny that statement.

In other cases, such concerns may exist. But, when faced with the need to provide public information without compromising security interests, the Government has found ways to do so, for example, by excising sensitive portions of documents requested by the press, members of the public, or other public officials. See, *e. g.*, 5 U. S. C. § 552(b)(1). Moreover, agencies and courts have found ways to conduct proceedings in private, through internal review or *in camera* proceedings, and thereby protect sensitive information. See *Webster* v. *Doe*, 486 U. S. 592, 604 (1988); Brief for Respondent 48–52, and n. 20; Brief for American Civil Liberties Union as *Amicus Curiae* 23–28. Would these (or other) methods prove adequate in other cases where a citizen's freedom to live in America with her spouse is at issue? Are they even necessary here? The Government has not explained.

I do not deny the importance of national security, the need to keep certain related information private, or the need to respect the determinations of the other branches of Government in such matters. But protecting ordinary citizens from arbitrary government action is fundamental. Thus, the presence of security considerations does not suspend the Constitution. *Hamdi*, 542 U. S., at 527–537 (plurality opinion). Rather, it requires us to take security needs into ac-

count when determining, for example, what "process" is "due." *Ibid.*

Yet how can we take proper account of security considerations without knowing what they are, without knowing how and why they require modification of traditional due process requirements, and without knowing whether other, less restrictive alternatives are available? How exactly would it harm important security interests to give Ms. Din a better explanation? Is there no way to give Ms. Din such an explanation while also maintaining appropriate secrecy? I believe we need answers to these questions before we can accept as constitutional a major departure from the procedural requirements that the Due Process Clause ordinarily demands.

JUSTICE KENNEDY also looks for support to the fact that Congress specifically exempted the section here at issue, § 1182(a)(3)(B), from the statutory provision requiring the State Department to provide a reason for visa denials. § 1182(b)(3). An exception from a statutory demand for a reason, however, is not a command to do the opposite; rather, at most, it leaves open the question whether other law requires a reason. Here that other law is the Constitution, not a statute. In my view, the Due Process Clause requires the Department to provide an adequate reason. And, I believe it has failed to do so.

* * *

For these reasons, with respect, I dissent.

APPENDIX

Title 8 U. S. C. § 1182(a)(3) provides:

"**(B) Terrorist activities**
"**(i) In general**
"Any alien who—

"(I) has engaged in a terrorist activity;

"(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

"(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

"(IV) is a representative (as defined in clause (v)) of—

"(aa) a terrorist organization (as defined in clause (vi)); or

"(bb) a political, social, or other group that endorses or espouses terrorist activity;

"(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

"(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

"(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

"(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

"(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

"is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

"**(ii) Exception**

"Subclause (IX) of clause (i) does not apply to a spouse or child—

"(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

"(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

"**(iii) 'Terrorist activity' defined**

"As used in this chapter, the term 'terrorist activity' means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

"(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

"(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

"(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

"(IV) An assassination.

"(V) The use of any—

"(a) biological agent, chemical agent, or nuclear weapon or device, or

"(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

"with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

"(VI) A threat, attempt, or conspiracy to do any of the foregoing.

"**(iv) 'Engage in terrorist activity' defined**

"As used in this chapter, the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization—

"(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

"(II) to prepare or plan a terrorist activity;

"(III) to gather information on potential targets for terrorist activity;

"(IV) to solicit funds or other things of value for—

"(aa) a terrorist activity;

"(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

"(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

"(V) to solicit any individual—

"(aa) to engage in conduct otherwise described in this subsection;

"(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

"(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

"(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

"(aa) for the commission of a terrorist activity;

"(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

"(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

"(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

"**(v) 'Representative' defined**

"As used in this paragraph, the term 'representative' includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

"**(vi) 'Terrorist organization' defined**

"As used in this section, the term 'terrorist organization' means an organization—

"(I) designated under section 1189 of this title;

"(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

"(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)."

Syllabus

BAKER BOTTS L. L. P. ET AL. *v.* ASARCO LLC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14–103. Argued February 25, 2015—Decided June 15, 2015

Respondent ASARCO LLC hired petitioner law firms pursuant to § 327(a) of the Bankruptcy Code to assist it in carrying out its duties as a Chapter 11 debtor in possession. See 11 U. S. C. § 327(a). When ASARCO emerged from bankruptcy, the law firms filed fee applications requesting fees under § 330(a)(1), which permits bankruptcy courts to "award . . . reasonable compensation for actual, necessary services rendered by" § 327(a) professionals. ASARCO challenged the applications, but the Bankruptcy Court rejected ASARCO's objections and awarded the law firms fees for time spent defending the applications. ASARCO appealed to the District Court, which held that the law firms could be awarded fees for defending their fee applications. The Fifth Circuit reversed, holding that § 330(a)(1) did not authorize fee awards for defending fee applications.

Held: Section 330(a)(1) does not permit bankruptcy courts to award fees to § 327(a) professionals for defending fee applications. Pp. 126–135.

(a) The American Rule provides the "'basic point of reference'" for awards of attorney's fees: "'Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.'" *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 252–253. Because the rule is deeply rooted in the common law, see, *e. g.*, *Arcambel* v. *Wiseman*, 3 Dall. 306, this Court will not deviate from it "'absent explicit statutory authority,'" *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 602. Departures from the American Rule have been recognized only in "specific and explicit provisions," *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 260, usually containing language that authorizes the award of "a reasonable attorney's fee," "fees," or "litigation costs," and referring to a "prevailing party" in the context of an adversarial "action," see generally *Hardt*, *supra*, at 253, and nn. 3–7. Pp. 126–127.

(b) Congress did not depart from the American Rule in § 330(a)(1) for fee-defense litigation. Section 327(a) professionals are hired to serve an estate's administrator for the benefit of the estate, and § 330(a)(1) authorizes "reasonable compensation for actual, necessary services rendered." The word "services" ordinarily refers to "labor performed for another," Webster's New International Dictionary 2288. Thus, the

phrase " 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client, *Woods* v. *City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262, 268. Time spent litigating a fee application against the bankruptcy estate's administrator cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator. Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1), it could have done so, as it has done in other Bankruptcy Code provisions, *e. g.*, § 110(i)(1)(C). Pp. 127–129.

(c) Neither the law firms nor the United States, as *amicus curiae*, offers a persuasive theory for why § 330(a)(1) should override the American Rule in this context. Pp. 129–135.

(1) The law firms' view—that fee-defense litigation is part of the "services rendered" to the estate administrator—not only suffers from an unnatural interpretation of the term "services rendered," but would require a particularly unusual deviation from the American Rule, as it would permit attorneys to be awarded fees for unsuccessfully defending fee applications when most fee-shifting provisions permit awards only to "a 'prevailing party,' " *Hardt*, *supra*, at 253. P. 130.

(2) The Government's argument is also unpersuasive. Its theory—that fees for fee-defense litigation must be understood as a component of the "reasonable compensation for [the underlying] services rendered" so that compensation for the "actual . . . services rendered" will not be diluted by unpaid time spent litigating fees—cannot be reconciled with the relevant text. Section 330(a)(1) does not authorize courts to award "reasonable compensation," but "reasonable compensation for *actual, necessary services rendered*," and the Government properly concedes that litigation in defense of a fee application is not a "service." And § 330(a)(6), which presupposes compensation "for the preparation of a fee application," does not suggest that time spent defending a fee application must also be compensable. *Commissioner* v. *Jean*, 496 U. S. 154, distinguished.

The Government's theory ultimately rests on the flawed policy argument that a "judicial exception" is needed to compensate fee-defense litigation and safeguard Congress' aim of ensuring that talented attorneys take on bankruptcy work. But since no attorneys are entitled to such fees absent express statutory authorization, requiring bankruptcy attorneys to bear the costs of their fee-defense litigation under § 330(a)(1) creates no disincentive to bankruptcy practice. And even if this Court believed that uncompensated fee-defense litigation would fall particularly hard on the bankruptcy bar, it has no "roving authority . . . to allow counsel fees . . . whenever [it] might deem them warranted," *Alyeska Pipeline*, *supra*, at 260. Pp. 131–135.

Syllabus

751 F. 3d 291, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined, and in which SOTOMAYOR, J., joined as to all but Part III–B–2. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 135. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 135.

Aaron M. Streett argued the cause for petitioners. With him on the briefs were *G. Irvin Terrell*, *Shane Pennington*, *Wm. Bradford Reynolds*, *Evan A. Young*, *Omar J. Alaniz*, and *Shelby A. Jordan*.

Brian H. Fletcher argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, *Sydney Foster*, *Ramona D. Elliott*, *P. Matthew Sutko*, and *Robert J. Schneider, Jr.*

Jeffrey L. Oldham argued the cause for respondent. With him on the brief were *Bryan S. Dumesnil*, *Bradley J. Benoit*, *Heath A. Novosad*, *Paul D. Clement*, and *Jeffrey M. Harris.**

---

*Briefs of *amici curiae* urging reversal were filed for Bankruptcy Law Scholars by *Susan M. Freeman*; for the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York et al. by *Christopher Landau* and *James H. M. Sprayregen*; for Former Bankruptcy Judge Leif M. Clark et al. by *James P. Sullivan* and *Ashley C. Parrish*; for the National Association of Bankruptcy Trustees by *Catherine Steege*, *Barry Levenstam*, and *Melissa M. Hinds*; for the National Association of Chapter Thirteen Trustees by *Henry E. Hildebrand III*; for the National Association of Consumer Bankruptcy Attorneys by *Jeffrey T. Green*, *David R. Kuney*, *Tara Twomey*, and *Sarah O'Rourke Schrup*; for Neutral Fee Examiners by *Brady C. Williamson* and *Patricia L. Wheeler*; and for the State Bar of Texas Bankruptcy Law Section by *John P. Elwood*, *William L. Wallander*, and *Katherine Drell Grissel*.

Richard Lieb filed a brief for Richard Aaron et al. as *amici curiae* urging affirmance.

JUSTICE THOMAS delivered the opinion of the Court.

Section 327(a) of the Bankruptcy Code allows bankruptcy trustees to hire attorneys, accountants, and other professionals to assist them in carrying out their statutory duties. 11 U. S. C. § 327(a). Another provision, § 330(a)(1), states that a bankruptcy court "may award . . . reasonable compensation for actual, necessary services rendered by" those professionals. The question before us is whether § 330(a)(1) permits a bankruptcy court to award attorney's fees for work performed in defending a fee application in court. We hold that it does not and therefore affirm the judgment of the Court of Appeals.

I

In 2005, respondent ASARCO LLC, a copper mining, smelting, and refining company, found itself in financial trouble. Faced with falling copper prices, debt, cashflow deficiencies, environmental liabilities, and a striking work force, ASARCO filed for Chapter 11 bankruptcy. As in many Chapter 11 bankruptcies, no trustee was appointed and ASARCO—the "'debtor in possession'"—administered the bankruptcy estate as a fiduciary for the estate's creditors. §§ 1101(1), 1107(a).

Relying on § 327(a) of the Bankruptcy Code, which permits trustees to employ attorneys and other professionals to assist them in their duties, ASARCO obtained the Bankruptcy Court's permission to hire two law firms, petitioners Baker Botts L. L. P. and Jordan, Hyden, Womble, Culbreth & Holzer, P. C., to provide legal representation during the bankruptcy.[1] Among other services, the firms prosecuted fraudulent-transfer claims against ASARCO's parent company and ultimately obtained a judgment against it worth between $7 and $10 billion. This judgment contributed to a

[1] Although § 327(a) directly applies only to trustees, § 1107(a) gives Chapter 11 debtors in possession the same authority as trustees to retain § 327(a) professionals. For the sake of simplicity, we refer to § 327(a) alone throughout this opinion.

successful reorganization in which all of ASARCO's creditors were paid in full. After over four years in bankruptcy, ASARCO emerged in 2009 with $1.4 billion in cash, little debt, and resolution of its environmental liabilities.

The law firms sought compensation under § 330(a)(1), which provides that a bankruptcy court "may award . . . reasonable compensation for actual, necessary services rendered by" professionals hired under § 327(a). As required by the bankruptcy rules, the two firms filed fee applications. Fed. Rule Bkrtcy. Proc. 2016(a). ASARCO, controlled once again by its parent company, challenged the compensation requested in the applications. After extensive discovery and a 6-day trial on fees, the Bankruptcy Court rejected ASARCO's objections and awarded the firms approximately $120 million for their work in the bankruptcy proceeding plus a $4.1 million enhancement for exceptional performance. The court also awarded the firms over $5 million for time spent litigating in defense of their fee applications.

ASARCO appealed various aspects of the award to the District Court. As relevant here, the court held that the firms could recover fees for defending their fee application.

The Court of Appeals for the Fifth Circuit reversed. It reasoned that the American Rule—the rule that each side must pay its own attorney's fees—"applies absent explicit statutory . . . authority" to the contrary and that "the Code contains no statutory provision for the recovery of attorney fees for *defending* a fee application." *In re ASARCO, L. L. C.*, 751 F. 3d 291, 301 (2014) (internal quotation marks omitted). It observed that § 330(a)(1) provides "that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration." *Id.*, at 299. Because "[t]he primary beneficiary of a professional fee application, of course, is the professional," compensation for litigation defending that application does not fall within § 330(a)(1). *Ibid.*

We granted certiorari, 573 U. S. 991 (2014), and now affirm.

II

A

"Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 252–253 (2010) (internal quotation marks omitted). The American Rule has roots in our common law reaching back to at least the 18th century, see *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796), and "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar [legal] principles," *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 534 (1994) (internal quotation marks and ellipsis omitted). We consequently will not deviate from the American Rule "'absent explicit statutory authority.'" *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 602 (2001) (quoting *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814 (1994)).

We have recognized departures from the American Rule only in "specific and explicit provisions for the allowance of attorneys' fees under selected statutes." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 260 (1975). Although these "[s]tatutory changes to [the American Rule] take various forms," *Hardt*, *supra*, at 253, they tend to authorize the award of "a reasonable attorney's fee," "fees," or "litigation costs," and usually refer to a "prevailing party" in the context of an adversarial "action," see, *e. g.*, 28 U. S. C. §2412(d)(1)(A); 42 U. S. C. §§1988(b), 2000e–5(k); see generally *Hardt*, *supra*, at 253, and nn. 3–7 (collecting examples).

The attorney's fees provision of the Equal Access to Justice Act offers a good example of the clarity we have required to deviate from the American Rule. See 28 U. S. C. §2412(d)(1)(A). That section provides that "a court shall

award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States" under certain conditions. *Ibid.* As our decision in *Commissioner* v. *Jean*, 496 U. S. 154 (1990), reveals, there could be little dispute that this provision—which mentions "fees," a "prevailing party," and a "civil action"—is a "fee-shifting statut[e]" that trumps the American Rule, *id.*, at 161.

B

Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings. Section 327(a) authorizes the employment of such professionals, providing that a "trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist [him] in carrying out [his] duties." In other words, § 327(a) professionals are hired to serve the administrator of the estate for the benefit of the estate.

Section 330(a)(1) in turn authorizes compensation for these professionals as follows:

> "After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—
>
> "(A) *reasonable compensation for actual, necessary services rendered by* the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

"(B) reimbursement for actual, necessary expenses." (Emphasis added.)

This text cannot displace the American Rule with respect to fee-defense litigation. To be sure, the phrase "reasonable compensation for actual, necessary services rendered" permits courts to award fees to attorneys for work done to assist the administrator of the estate, as the Bankruptcy Court did here when it ordered ASARCO to pay roughly $120 million for the firms' work in the bankruptcy proceeding. No one disputes that § 330(a)(1) authorizes an award of attorney's fees for that kind of work. See *Alyeska Pipeline*, *supra*, at 260, and n. 33 (listing § 330(a)(1)'s predecessor as an example of a provision authorizing attorney's fees). But the phrase "reasonable compensation for actual, necessary services rendered" neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate—as most statutes that displace the American Rule do.

Instead, § 330(a)(1) provides compensation for all § 327(a) professionals—whether accountant, attorney, or auctioneer—for all manner of work done *in service of* the estate administrator. More specifically, § 330(a)(1) allows "reasonable compensation" only for "*actual, necessary services rendered*." (Emphasis added.) That qualification is significant. The word "services" ordinarily refers to "labor performed for another." Webster's New International Dictionary 2288 (def. 4) (2d ed. 1934); see also Black's Law Dictionary 1607 (3d ed. 1933) ("duty or labor to be rendered by one person to another"); Oxford English Dictionary 517 (def. 19) (1933) ("action of serving, helping or benefiting; conduct tending to the welfare or advantage of another").[2] Thus, in

[2] Congress added the phrase "reasonable compensation for the services rendered" to federal bankruptcy law in 1934. Act of June 7, 1934, § 77B(c)(9), 48 Stat. 917. We look to the ordinary meaning of those words at that time.

a case addressing § 330(a)'s predecessor, this Court concluded that the phrase " 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client. *Woods* v. *City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262, 268 (1941); accord, *American United Mut. Life Ins. Co.* v. *Avon Park*, 311 U. S. 138, 147 (1940). Time spent litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator.

This legislative decision to limit "compensation" to "services rendered" is particularly telling given that other provisions of the Bankruptcy Code expressly transfer the costs of litigation from one adversarial party to the other. Section 110(i), for instance, provides that "[i]f a bankruptcy petition preparer . . . commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any)," the bankruptcy court must "order the bankruptcy petition preparer to pay the debtor . . . reasonable attorneys' fees and costs in moving for damages under this subsection." § 110(i)(1)(C). Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1) in a similar manner, it easily could have done so. We accordingly refuse "to invade the legislature's province by redistributing litigation costs" here. *Alyeska Pipeline*, 421 U. S., at 271.

III

The law firms, the United States as *amicus curiae*, and the dissent resist this straightforward interpretation of the statute. The law firms and the Government each offer a theory for why § 330(a)(1) expressly overrides the American Rule in the context of litigation in defense of a fee application, and the dissent embraces the latter. Neither theory is persuasive.

A

We begin with the law firms' approach. According to the firms, fee-defense litigation is part of the "services rendered" to the estate administrator under § 330(a)(1). See Brief for Petitioners 23–30. As explained above, that reading is untenable. The term "services" in this provision cannot be read to encompass adversarial fee-defense litigation. See Part II–B, *supra*. Even the dissent agrees on this point. See *post*, at 136 (opinion of BREYER, J.).

Indeed, reading "services" in this manner could end up compensating attorneys for the *unsuccessful* defense of a fee application. The firms insist that "estates *do* benefit from fee defenses"—and thus receive a "service" under § 330(a)(1)—because "the estate has an interest in obtaining a just determination of the amount it should pay its professionals." Brief for Petitioners 25–26 (internal quotation marks omitted). But that alleged interest—and hence the supposed provision of a "service"—exists whether or not a § 327(a) professional prevails in his fee dispute. We decline to adopt a reading of § 330(a)(1) that would allow courts to pay professionals for arguing for fees they were found never to have been entitled to in the first place. Such a result would not only require an unnatural interpretation of the term "services rendered," but a particularly unusual deviation from the American Rule as well, as "[m]ost fee-shifting provisions permit a court to award attorney's fees only to a 'prevailing party,' " a " 'substantially prevailing' party," or "a 'successful' litigant," *Hardt*, 560 U. S., at 253 (footnote omitted). There is no indication that Congress departed from the American Rule in § 330(a)(1) with respect to fee-defense litigation, let alone that it did so in such an unusual manner.

B

The Government's theory, embraced by the dissent, fares no better. Although the United States agrees that "the defense of a fee application does not *itself* qualify as an inde-

pendently compensable service," it nonetheless contends that "compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy proceeding." Brief for United States as *Amicus Curiae* 25. According to the Government, if an attorney is not repaid for his time spent successfully litigating fees, his compensation for his actual "services rendered" to the estate administrator in the underlying proceeding will be diluted. *Id.*, at 18. The United States thus urges us to treat fees for fee-defense work "as a component of 'reasonable compensation.'" *Id.*, at 33; accord, *post*, at 136 (BREYER, J., dissenting). We refuse to do so for several reasons.

1

First and foremost, the Government's theory cannot be reconciled with the relevant text. Section 330(a)(1) does not authorize courts to award "reasonable compensation" *simpliciter*, but "reasonable compensation *for actual, necessary services rendered by*" the § 327(a) professional. § 330(a)(1)(A) (emphasis added). Here, the contested award was tied to the firms' work on the fee-defense litigation and is correctly understood only as compensation for that work. The Government and the dissent properly concede that litigation in defense of a fee application is not a "service" within the meaning of § 330(a)(1); it follows that the contested award was not "compensation" for a "service." Thus, the only way to reach their reading of the statute would be to excise the phrase "for actual, necessary services rendered" from the statute.[3]

Contrary to the Government's assertion, § 330(a)(6) does not presuppose that courts are free to award compensation based on work that does not qualify as a service to the estate

[3] The dissent's focus on reasonable compensation is therefore a red herring. See *post*, at 140. The question is not whether an award for fee-defense work would be "reasonable," but whether such work is compensable in the first place.

administrator. That provision specifies that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." The Government argues that because time spent *preparing* a fee application is compensable, time spent *defending* it must be too. But the provision cuts the other way. A § 327(a) professional's preparation of a fee application is best understood as a "servic[e] rendered" to the estate administrator under § 330(a)(1), whereas a professional's defense of that application is not. By way of analogy, it would be natural to describe a car mechanic's preparation of an itemized bill as part of his "services" to the customer because it allows a customer to understand—and, if necessary, dispute—his expenses. But it would be less natural to describe a subsequent court battle over the bill as part of the "services rendered" to the customer.

The Government used to understand that time spent preparing a fee application was different from time spent defending one for the purposes of § 330(a)(1). Just a few years ago, the U. S. Trustee explained that "[r]easonable charges for preparing . . . fee applications . . . are compensable . . . because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid." 78 Fed. Reg. 36250 (2013) (emphasis deleted). By contrast, "time spent . . . defending . . . fee applications" is ordinarily "not compensable," the Trustee observed, as such time can be "properly characterized as work that is for the benefit of the professional and not the estate." *Ibid.*

To support its broader interpretation of § 330(a)(6), the Government, echoed by the dissent, relies on our remark in *Jean* that "[w]e find no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." 496 U. S., at 162; see *post,* at 142. But that use of *Jean* begs the question. *Jean* addressed a statutory provision that

everyone agreed authorized court-awarded fees for fee-defense litigation. 496 U. S., at 162. The "only dispute" in that context was over what "finding [was] necessary to support such an award." *Ibid.* In resolving that issue, the Court declined to treat fee-application and fee-litigation work differently given that the relevant statutory text—"a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action"—could not support such a distinction. *Id.*, at 158. Here, by contrast, the operative language—"reasonable compensation for actual, necessary services rendered"—reaches only the fee-application work. The fact that the provision at issue in *Jean* "did not mention fee-defense work," *post*, at 140, is thus irrelevant.

In any event, the Government's textual foothold for its argument is too insubstantial to support a deviation from the American Rule. The open-ended phrase "reasonable compensation," standing alone, is not the sort of "specific and explicit provisio[n]" that Congress must provide in order to alter this default rule. *Alyeska Pipeline*, 421 U. S., at 260.

2

Ultimately, the Government's theory rests on a flawed and irrelevant policy argument. The United States contends that awarding fees for fee-defense litigation is a "judicial exception" necessary to the proper functioning of the Bankruptcy Code. Brief for United States as *Amicus Curiae* 15, n. 7 (internal quotation marks omitted). Absent this exception, it warns, fee-defense litigation will dilute attorney's fees and result in bankruptcy lawyers receiving less compensation than nonbankruptcy lawyers, thereby undermining the congressional aim of ensuring that talented attorneys will take on bankruptcy work. Accord, *post*, at 137–138.

As an initial matter, we find this policy argument unconvincing. In our legal system, *no* attorneys, regardless of whether they practice in bankruptcy, are entitled to receive

fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers.[4]

The United States nonetheless contends that uncompensated fee litigation in bankruptcy will be particularly costly because multiple parties in interest may object to fee applications, whereas nonbankruptcy fee litigation typically involves just a lawyer and his client. But this argument rests on unsupported predictions of how the statutory scheme will operate in practice, and the Government's conduct in this case reveals the perils associated with relying on such prognostications to interpret statutes: The United States took the opposite view below, asserting that "requiring a professional to bear the normal litigation costs of litigating a contested request for payment . . . dilutes a bankruptcy fee award no more than any litigation over professional fees." Reply Brief for Appellant United States Trustee in No. 11–290 (SD Tex.), p. 15. The speed with which the Government has changed its tune offers a good argument against substituting policy-oriented predictions for statutory text.

More importantly, we would lack the authority to rewrite the statute even if we believed that uncompensated fee litigation would fall particularly hard on the bankruptcy bar. "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding," and that is no less true in bankruptcy than it is elsewhere. *Lamie* v. *United States Trustee*, 540 U. S. 526, 538 (2004). Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us

---

[4] To the extent the United States harbors any concern about the possibility of frivolous objections to fee applications, we note that "Federal Rule of Bankruptcy Procedure 9011—bankruptcy's analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct, which may include 'an order directing payment . . . of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.'" *Law* v. *Siegel*, 571 U. S. 415, 427 (2014).

"roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted." *Alyeska Pipeline*, *supra*, at 260. Our job is to follow the text even if doing so will supposedly "undercut a basic objective of the statute," *post*, at 137. Section 330(a)(1) itself does not authorize the award of fees for defending a fee application, and that is the end of the matter.

* * *

As we long ago observed, "The general practice of the United States is in opposition" to forcing one side to pay the other's attorney's fees, and "even if that practice [is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Arcambel*, 3 Dall., at 306 (emphasis deleted). We follow that approach today. Because § 330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE SOTOMAYOR, concurring in part and concurring in the judgment.

As the Court's opinion explains, there is no textual, contextual, or other support for reading 11 U. S. C. § 330(a)(1) in the way advocated by petitioners and the United States. Given the clarity of the statutory language, it would be improper to allow policy considerations to undermine the American Rule in this case. On that understanding, I join all but Part III–B–2 of the Court's opinion.

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

The Bankruptcy Code authorizes a court to award "*reasonable compensation* for actual, necessary services rendered by" various "professional person[s]," including "attorneys," whom a bankruptcy "trustee [has] employ[ed] . . . to

represent or assist the trustee in carrying out the trustee's duties." 11 U. S. C. §§ 327(a), 330(a) (emphasis added). I agree with the Court that a professional's defense of a fee application is not a "service" within the meaning of the Code. See *ante*, at 129. But I agree with the Government that compensation for fee-defense work "is properly viewed as part of the compensation *for the underlying services* in [a] bankruptcy proceeding." Brief for United States as *Amicus Curiae* 25. In my view, when a bankruptcy court determines "reasonable compensation," it may take into account the expenses that a professional has incurred in defending his or her application for fees.

I

The Bankruptcy Code affords courts broad discretion to decide what constitutes "reasonable compensation." The Code provides that a "court shall consider the nature, the extent, and the value of . . . services [rendered], taking into account *all relevant factors*." § 330(a)(3) (emphasis added). Cf. *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983) ("re-emphasiz[ing a trial court's] discretion in determining the amount of a fee award," which "is appropriate in view of the [trial] court's superior understanding of the litigation"). I would hold that it is within a bankruptcy court's discretion to consider as "relevant factors" the cost and effort that a professional has reasonably expended in order to recover his or her fees.

Where a statute provides for reasonable fees, a court may take into account factors other than hours and hourly rates. *Perdue* v. *Kenny A.*, 559 U. S. 542, 551–557 (2010). For instance, "an enhancement" to attorney's fees "may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Id.*, at 555. And "there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees" that justify addi-

tional compensation. *Id.*, at 556. These examples demonstrate that increased compensation is sometimes warranted to reflect exceptional effort or resources expended in order to attain one's fees.

In that vein, work performed in defending a fee application may, in some cases, be a relevant factor in calculating "reasonable compensation." Consider a bankruptcy attorney who earns $50,000—a fee that reflects her hours, rates, and expertise—but is forced to spend $20,000 defending her fee application against meritless objections. It is within a bankruptcy court's discretion to decide that, taking into account the extensive fee litigation, $50,000 is an insufficient award. The attorney has effectively been paid $30,000, and the bankruptcy court might understandably conclude that such a fee is not "reasonable."

Indeed, this Court has previously acknowledged that work performed in defending a fee application is relevant to a determination of attorney's fees. In *Commissioner* v. *Jean*, 496 U. S. 154, 160–166 (1990), the Court held that fee-defense work is compensable under the Equal Access to Justice Act, 28 U. S. C. § 2412(d)(1)(A). The Court quoted with approval the Second Circuit's statement that "[d]enying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." 496 U. S., at 162 (quoting *Gagne* v. *Maher*, 594 F. 2d 336, 344 (1979); internal quotation marks omitted).

A contrary interpretation of "reasonable compensation" would undercut a basic objective of the statute. Congress intended to ensure that high-quality attorneys and other professionals would be available to assist trustees in representing and administering bankruptcy estates. To that end, Congress directed bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under" the Bankruptcy Code.

§ 330(a)(3)(F). Congress recognized that comparable compensation was necessary to ensure that professionals would "remain in the bankruptcy field." H. R. Rep. No. 95–595, p. 330 (1977). Cf. *Perdue*, *supra*, at 552 ("[A] 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case").

In some cases, the extensive process through which a bankruptcy professional defends his or her fees may be so burdensome that additional fees are necessary in order to maintain comparability of compensation. In order to be paid, a professional assisting a trustee must file with the court a detailed application seeking compensation. Fed. Rule Bkrtcy. Proc. 2016(a). The application will not be granted until after the court has conducted a hearing on the matter. § 330(a)(1). And "[t]he court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested." § 330(a)(2).

By contrast, an attorney representing a private party, or a professional working outside of the bankruptcy context, generally faces fee objections made only by his or her client—and those objections typically are made outside of court, at least initially. This process is comparatively simple, involves fewer parties in interest, and does not necessarily impose litigation costs. Consequently, in order to maintain comparable compensation, a court may find it necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code. Accounting for this process ensures that a professional is paid "reasonable compensation."

II

The majority rests its conclusion upon an interpretation of the statutory language that I find neither legally necessary nor convincing. The majority says that Congress, in writing

the reasonable-compensation statute, did not "displace the American Rule with respect to fee-defense litigation." *Ante*, at 128. The American Rule normally requires "[e]ach litigant" to "pa[y] his own attorney's fees, win or lose." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 253 (2010).

But the American Rule is a default rule that applies only where "a statute or contract" does not "provid[e] otherwise." *Ibid.* And here, the statute "provides otherwise." *Ibid.* Section 330(a)(1)(A) permits a "court [to] award . . . reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person." This Court has recognized that through § 330(a), Congress "ma[d]e specific and explicit [its] provisio[n] for the allowance of attorneys' fees," and thus displaced the American Rule. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 260, and n. 33 (1975) (listing § 330(a)'s predecessor among examples of provisions authorizing attorney's fees).

The majority suggests that the American Rule is not displaced with respect to fee-defense work in bankruptcy because § 330(a) does not specifically authorize fees for that particular type of work. See *ante*, at 127 ("Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings"). To the extent that the majority intends to impose a requirement that a statute must explicitly mention fee defense in order to provide compensation for that work, this requirement is difficult to reconcile with the Court's decision in *Jean*. There, the Court held that the Equal Access to Justice Act authorizes compensation for fee-defense work. See 496 U. S., at 160–166. The fee provision of the Equal Access to Justice Act, as enacted at the time, permitted an "award to a prevailing party . . . [of] fees and other expenses . . . incurred by that

party in any civil action . . . brought by or against the United States." *Id.*, at 158 (quoting 28 U. S. C. § 2412(d)(1)(A) (1988 ed.)). The provision did not mention fee-defense work—but the Court nonetheless held that such work was compensable. See *Jean*, *supra*, at 160–166. I would do the same here.

The majority focuses on particular words that appear in the Equal Access to Justice Act: "fees," "prevailing party," and "civil action." See *ante*, at 127. But neither the term "fees" nor the phrase "prevailing party" relates specifically to fee-defense work. And even assuming that the phrase "civil action" is more easily read to cover fee litigation than the phrase "actual, necessary services," that difference here is beside the point. I find the necessary authority in the words "reasonable compensation," not the words "actual, necessary services." In order to ensure that each professional is paid *reasonably* for compensable services, a court must have the discretion to authorize pay reflecting fee-defense work.

The majority asserts that by interpreting the phrase "reasonable compensation," I have effectively "excise[d] the phrase 'for actual, necessary services rendered' from the statute." *Ante*, at 131. But the majority misunderstands my views. The statute permits compensation for fee-defense work as a part of compensation *for the underlying services*. Thus, where fee-defense work is not necessary to ensure reasonable compensation for some underlying service, then under my reading of the statute, a court should not consider that work when calculating compensation.

Indeed, to the extent that the majority bases its decision on the specific words of § 330(a), its argument seems weak. The majority disregards direct statutory evidence that Congress intended to give courts the authority to account for reasonable fee-litigation costs. Section 330(a)(6) states that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." This provision does not

authorize compensation, but rather *assumes* (through the words "[a]ny compensation awarded") pre-existing authorization under § 330(a). And the majority cannot convincingly explain why, under its reading of the statute, fee application is a compensable "actual, necessary servic[e] rendered" to the estate.

The majority asserts that a fee application, unlike fee defense, can be construed as a "service" to the bankruptcy estate. See *ante*, at 131–132. The majority draws an analogy between a fee application and an itemized bill prepared by a car mechanic. See *ante*, at 132. It argues that, like an itemized bill, a fee application is a "service" to the customer. But customers do not generally pay their mechanics for time spent preparing the bill. A mechanic's bill is not a separate "service," but rather is a medium through which the mechanic conveys what he or she wants to be paid. Similarly, a legal bill is not a "service" rendered to a client. In fact, ASARCO concedes that attorneys do not charge their clients for time spent preparing legal bills. See Tr. of Oral Arg. 33. A bill prepared by an attorney, or another bankruptcy professional, is not a "service" to the bankruptcy estate.

The majority suggests that a fee application *must* be a service "'because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid.'" *Ante*, at 132 (quoting 78 Fed. Reg. 36250 (2013)). But if the existence of a legal requirement specific to bankruptcy were sufficient to make an activity a compensable service, then the time that a professional spends at a hearing defending his or her fees would also be compensable. After all, the statute permits a court to award compensation only after "a hearing" with respect to the issue. § 330(a)(1). And there is no such requirement for most attorneys, who simply bill their clients and are paid their fees. But the majority does not believe that preparing for or appearing at such a hearing—an integral part of fee-defense work—is compensable. The majority simply cannot

reconcile its narrow interpretation of "reasonable compensation" with § 330(a)(6)'s provision for fee-application preparation fees.

In my view, the majority is wrong to distinguish between the costs of fee preparation and the costs of fee litigation. Cf. *Jean*, 496 U. S., at 162 ("We find no textual or logical argument for treating . . . differently a party's preparation of a fee application and its ensuing efforts to support that same application"). And the majority should not distinguish between the compensability of fee litigation under the Equal Access to Justice Act and fee litigation under the Bankruptcy Code. Its decision to do so creates anomalies and undermines the basic purpose of the Bankruptcy Code's fee award provision.

For these reasons, I respectfully dissent.

Syllabus

REYES MATA *v.* LYNCH, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14–185. Argued April 29, 2015—Decided June 15, 2015

After petitioner Noel Reyes Mata, an unlawful resident alien, was convicted of assault in a Texas court, an Immigration Judge ordered him removed to Mexico. Mata's attorney filed a notice of appeal with the Board of Immigration Appeals (BIA or Board), but never filed a brief, and the appeal was dismissed. Acting through different counsel, Mata filed a motion to reopen his removal proceedings, as authorized by statute. See 8 U. S. C. § 1229a(c)(7)(A). Acknowledging that he had missed the 90-day deadline for such motions, see § 1229a(c)(7)(C)(i), Mata argued that his previous counsel's ineffective assistance was an exceptional circumstance entitling him to equitable tolling of the time limit. But the BIA disagreed and dismissed the motion as untimely. The BIA also declined to reopen Mata's removal proceedings *sua sponte* based on its separate regulatory authority. See 8 CFR § 1003.2(a). On appeal, the Fifth Circuit construed Mata's equitable tolling claim as an invitation for the Board to exercise its regulatory authority to reopen the proceedings *sua sponte*, and—because circuit precedent forbids the court to review BIA decisions not to exercise that authority—dismissed Mata's appeal for lack of jurisdiction.

Held: The Fifth Circuit erred in declining to take jurisdiction over Mata's appeal. A court of appeals has jurisdiction to review the BIA's rejection of an alien's motion to reopen. *Kucana* v. *Holder*, 558 U. S. 233, 253. Nothing about that jurisdiction changes where the Board rejects a motion as untimely, or when it rejects a motion requesting equitable tolling of the time limit. That jurisdiction likewise remains unchanged if the BIA's denial also contains a separate decision not to exercise its *sua sponte* authority. So even assuming the Fifth Circuit is correct that courts of appeals lack jurisdiction to review BIA decisions not to reopen cases *sua sponte*, that lack of jurisdiction does not affect jurisdiction over the decision on the alien's motion to reopen. It thus follows that the Fifth Circuit had jurisdiction over this case.

The Fifth Circuit's contrary decision rested on its construing Mata's motion as an invitation for the Board to exercise its *sua sponte* discretion. Court-appointed *amicus* asserts that the Fifth Circuit's recharacterization was based on the premise that equitable tolling in Mata's situation is categorically forbidden. In *amicus*'s view, the court's construal was therefore an example of the ordinary practice of recharacterizing a

doomed request as one for relief that may be available. But even if equitable tolling is prohibited, the Fifth Circuit's action was not justified. If Mata is not entitled to relief on the merits, then the correct disposition is to take jurisdiction and affirm the BIA's denial of his motion. For a court retains jurisdiction even if a litigant's request for relief lacks merit, see *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89, and a federal court has a "virtually unflagging obligation," *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817, to assert jurisdiction where it has that authority. Nor can the established practice of recharacterizing pleadings so as to offer the possibility of relief justify an approach that, as here, renders relief impossible and sidesteps the judicial obligation to assert jurisdiction. Pp. 147–151.

558 Fed. Appx. 366, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 151.

Mark C. Fleming argued the cause for petitioner. With him on the briefs were *Raed Gonzalez*, *Naimeh Salem*, *Bruce Godzina*, *Sydenham B. Alexander III*, *Jason D. Hirsch*, *Brian K. Bates*, and *Alexander I. Afanassiev.*

Anthony A. Yang argued the cause for respondent. With him on the briefs were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, and *Patrick J. Glen.*

William R. Peterson, by invitation of the Court, 574 U. S. 1118, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief was *Charles R. Flores.**

JUSTICE KAGAN delivered the opinion of the Court.

An alien ordered to leave the country has a statutory right to file a motion to reopen his removal proceedings. See 8 U. S. C. § 1229a(c)(7)(A). If immigration officials deny that

---

**Ira J. Kurzban*, *Beth Werlin*, and *Trina Realmuto* filed a brief for the American Immigration Council et al. as *amici curiae* urging reversal.

Chris Roth filed a brief for the National Immigrant Justice Center as *amicus curiae.*

motion, a federal court of appeals has jurisdiction to consider a petition to review their decision. See *Kucana* v. *Holder*, 558 U. S. 233, 242, 253 (2010). Notwithstanding that rule, the court below declined to take jurisdiction over such an appeal because the motion to reopen had been denied as untimely. We hold that was error.

I

The Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, and its implementing regulations set out the process for removing aliens from the country. An immigration judge (IJ) conducts the initial proceedings; if he orders removal, the alien has the opportunity to appeal that decision to the Board of Immigration Appeals (BIA or Board). §§ 1229a(a)(1), (c)(5). "[E]very alien ordered removed" also "has a right to file one motion" with the IJ or Board to "reopen his or her removal proceedings." *Dada* v. *Mukasey*, 554 U. S. 1, 4–5 (2008); see § 1229a(c)(7)(A). Subject to exceptions not relevant here, that motion to reopen "shall be filed within 90 days" of the final removal order. § 1229a(c)(7)(C)(i). Finally, the BIA's regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings "on its own motion"—or, in Latin, *sua sponte*—at any time. 8 CFR § 1003.2(a) (2015).

Petitioner Noel Reyes Mata is a Mexican citizen who entered the United States unlawfully almost 15 years ago. In 2010, he was convicted of assault under the Texas Penal Code. The federal Department of Homeland Security (DHS) immediately initiated removal proceedings against him, and in August 2011 an IJ ordered him removed. See App. 6–13. Mata's lawyer then filed a notice of appeal with the BIA, indicating that he would soon submit a written brief stating grounds for reversing the IJ's decision. But the attorney never filed the brief, and the BIA dismissed the appeal in September 2012. See *id.*, at 4–5.

More than a hundred days later, Mata (by then represented by new counsel) filed a motion with the Board to reopen his case. DHS opposed the motion, arguing in part that Mata had failed to file it, as the INA requires, within 90 days of the Board's decision. Mata responded that the motion was "not time barred" because his first lawyer's "ineffective assistance" counted as an "exceptional circumstance[ ]" excusing his lateness. Certified Administrative Record in No. 13–60253 (CA5, Aug. 2, 2013), p. 69. In addressing those arguments, the Board reaffirmed prior decisions holding that it had authority to equitably toll the 90-day period in certain cases involving ineffective representation. See App. to Pet. for Cert. 7; see also, *e. g.*, *In re Santa Celenia Diaz*, 2009 WL 2981747 (BIA, Aug. 21, 2009). But the Board went on to determine that Mata was not entitled to equitable tolling because he could not show prejudice from his attorney's deficient performance; accordingly, the Board found Mata's motion untimely. See App. to Pet. for Cert. 7–8. And in closing, the Board decided as well that Mata's case was not one "that would warrant reopening as an exercise of" its *sua sponte* authority. *Id.*, at 9 (stating that "the power to reopen on our own motion is not meant to be used as a general cure for filing defects" (internal quotation marks omitted)).

Mata petitioned the Court of Appeals for the Fifth Circuit to review the BIA's denial of his motion to reopen, arguing that he was entitled to equitable tolling. The Fifth Circuit, however, declined to "address the merits of Mata's equitable-tolling . . . claim[ ]." *Reyes Mata* v. *Holder*, 558 Fed. Appx. 366, 367 (2014) (*per curiam*). It stated instead that "[i]n this circuit, an alien's request [to the BIA] for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*." *Ibid.* And circuit precedent held that courts have no jurisdiction to review the BIA's refusal to exercise its *sua sponte* power to

reopen cases. See *ibid.* The Court of Appeals thus dismissed Mata's appeal for lack of jurisdiction.

Every other Circuit that reviews removal orders has affirmed its jurisdiction to decide an appeal, like Mata's, that seeks equitable tolling of the statutory time limit to file a motion to reopen a removal proceeding.[1] We granted certiorari to resolve this conflict. 574 U. S. 1118 (2015). And because the Federal Government agrees with Mata that the Fifth Circuit had jurisdiction over his appeal, we appointed an *amicus curiae* to defend the judgment below.[2] We now reverse.

II

As we held in *Kucana* v. *Holder*, circuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding. See 558 U. S., at 242, 253. The INA, in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review "final order[s] of removal." 8 U. S. C. § 1252(a)(1); 28 U. S. C. § 2342. That jurisdiction, as the INA expressly contemplates, encompasses review of decisions refusing to reopen or reconsider such orders. See 8 U. S. C. § 1252(b)(6) ("[A]ny review sought of a motion to reopen or reconsider [a

---

[1] See, *e. g., Da Silva Neves* v. *Holder*, 613 F. 3d 30, 33 (CA1 2010) (*per curiam*) (exercising jurisdiction over such a petition); *Iavorski* v. *INS*, 232 F. 3d 124, 129–134 (CA2 2000) (same); *Borges* v. *Gonzales*, 402 F. 3d 398, 406 (CA3 2005) (same); *Kuusk* v. *Holder*, 732 F. 3d 302, 305–306 (CA4 2013) (same); *Barry* v. *Mukasey*, 524 F. 3d 721, 724–725 (CA6 2008) (same); *Pervaiz* v. *Gonzales*, 405 F. 3d 488, 490 (CA7 2005) (same); *Hernandez-Moran* v. *Gonzales*, 408 F. 3d 496, 499–500 (CA8 2005) (same); *Valeriano* v. *Gonzales*, 474 F. 3d 669, 673 (CA9 2007) (same); *Riley* v. *INS*, 310 F. 3d 1253, 1257–1258 (CA10 2002) (same); *Avila-Santoyo* v. *United States Atty. Gen.*, 713 F. 3d 1357, 1359, 1362–1364 (CA11 2013) (*per curiam*) (same). Except for *Da Silva Neves*, which did not resolve the issue, all those decisions also held, on the merits, that the INA allows equitable tolling in certain circumstances. See *infra*, at 151.

[2] We appointed William R. Peterson to brief and argue the case, 574 U. S. 1118 (2015), and he has ably discharged his responsibilities.

removal] order shall be consolidated with the review of the [underlying] order"). Indeed, as we explained in *Kucana*, courts have reviewed those decisions for nearly a hundred years; and even as Congress curtailed other aspects of courts' jurisdiction over BIA rulings, it left that authority in place. See 558 U. S., at 242–251.

Nothing changes when the Board denies a motion to reopen because it is untimely—nor when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision.

Similarly, that jurisdiction remains unchanged if the Board, in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate *sua sponte* authority to reopen the case. See *supra*, at 145. In *Kucana*, we declined to decide whether courts have jurisdiction to review the BIA's use of that discretionary power. See 558 U. S., at 251, n. 18. Courts of Appeals, including the Fifth Circuit, have held that they generally lack such authority. See, *e. g.*, *Enriquez-Alvarado* v. *Ashcroft*, 371 F. 3d 246, 249–250 (CA5 2004); *Tamenut* v. *Mukasey*, 521 F. 3d 1000, 1003–1004 (CA8 2008) (en banc) (*per curiam*) (citing other decisions). Assuming *arguendo* that is right, it means only that judicial review ends after the court has evaluated the Board's ruling on the alien's motion. That courts lack jurisdiction over one matter (the *sua sponte* decision) does not affect their jurisdiction over another (the decision on the alien's request).

It follows, as the night the day, that the Court of Appeals had jurisdiction over this case. Recall: As authorized by the INA, Mata filed a motion with the Board to reopen his removal proceeding. The Board declined to grant Mata his proposed relief, thus conferring jurisdiction on an appellate

court under *Kucana*. The Board did so for timeliness reasons, holding that Mata had filed his motion after 90 days had elapsed and that he was not entitled to equitable tolling. But as just explained, the reason the Board gave makes no difference: Whenever the Board denies an alien's statutory motion to reopen a removal case, courts have jurisdiction to review its decision. In addition, the Board determined not to exercise its *sua sponte* authority to reopen. But once again, that extra ruling does not matter. The Court of Appeals did not lose jurisdiction over the Board's denial of Mata's motion just because the Board also declined to reopen his case *sua sponte*.

Nonetheless, the Fifth Circuit dismissed Mata's appeal for lack of jurisdiction. That decision, as described earlier, hinged on "constru[ing]" Mata's motion as something it was not: "an invitation for the BIA to exercise" its *sua sponte* authority. 558 Fed. Appx., at 367; *supra*, at 146. *Amicus*'s defense of that approach centrally relies on a merits-based premise: that the INA forbids equitable tolling of the 90-day filing period in any case, no matter how exceptional the circumstances. See Brief for *Amicus Curiae* by Invitation of the Court 14–35. Given that is so, *amicus* continues, the court acted permissibly in "recharacteriz[ing]" Mata's pleadings. *Id.*, at 36. After all, courts often treat a request for "categorically unavailable" relief as instead "seeking relief [that] may be available." *Id.*, at 35, 38. And here (*amicus* concludes) that meant construing Mata's request for equitable tolling as a request for *sua sponte* reopening—even though that caused the Fifth Circuit to lose its jurisdiction.

But that conclusion is wrong even on the assumption—and it is only an assumption—that its core premise about equitable tolling is true.[3] If the INA precludes Mata from getting

[3] We express no opinion as to whether or when the INA allows the Board to equitably toll the 90-day period to file a motion to reopen. Moreover, we are not certain what the Fifth Circuit itself thinks about that question. Perhaps, as *amicus* asserts, the court believes the INA cate-

the relief he seeks, then the right course on appeal is to take jurisdiction over the case, explain why that is so, and affirm the BIA's decision not to reopen. The jurisdictional question (whether the court has power to decide if tolling is proper) is of course distinct from the merits question (whether tolling is proper). See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998) ("[T]he absence of a valid . . . cause of action does not implicate subject-matter jurisdiction"). The Fifth Circuit thus retains jurisdiction even if Mata's appeal lacks merit. And when a federal court has jurisdiction, it also has a "virtually unflagging obligation . . . to exercise" that authority. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976). Accordingly, the Court of Appeals should have asserted jurisdiction over Mata's appeal and addressed the equitable tolling question.

Contrary to *amicus*'s view, the practice of recharacterizing pleadings so as to offer the possibility of relief cannot justify the Court of Appeals' alternative approach. True enough (and a good thing too) that courts sometimes construe one kind of filing as another: If a litigant misbrands a motion, but could get relief under a different label, a court will often make the requisite change. See, *e. g.*, 12 J. Moore, Moore's Federal Practice § 59.11[4] (3d ed. 2015) (explaining how courts treat untimely Rule 59 motions as Rule 60 motions

---

gorically precludes equitable tolling: It is hard to come up with any other reason why the court construes every argument for tolling as one for *sua sponte* relief. See Brief for *Amicus Curiae* by Invitation of the Court 2, 10, 14, n. 2. But the Fifth Circuit has stated that position in only a single sentence in a single unpublished opinion, which (according to the Circuit) has no precedential force. See *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (2008) (*per curiam*); Rule 47.5.4 (2015). And another unpublished decision cuts in the opposite direction, "hold[ing] that the doctrine of equitable tolling applies" when exceptional circumstances excuse an alien's failure to meet the 90-day reopening deadline. *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (CA5 2006) (*per curiam*). So, in the end, it is hard to say.

because the latter have no time limit). But that established practice does not entail sidestepping the judicial obligation to exercise jurisdiction. And it results in identifying a route to relief, not in rendering relief impossible. That makes all the difference between a court's generously reading pleadings and a court's construing away adjudicative authority.

And if, as *amicus* argues, that construal rests on an underlying merits decision—that the INA precludes any equitable tolling—then the Court of Appeals has effectively insulated a circuit split from our review. Putting the Fifth Circuit to the side, all appellate courts to have addressed the matter have held that the Board may sometimes equitably toll the time limit for an alien's motion to reopen. See n. 1, *supra*. Assuming the Fifth Circuit thinks otherwise, that creates the kind of split of authority we typically think we need to resolve. See this Court's Rule 10(a). But the Fifth Circuit's practice of recharacterizing appeals like Mata's as challenges to the Board's *sua sponte* decisions and then declining to exercise jurisdiction over them prevents that split from coming to light. Of course, the Court of Appeals may reach whatever conclusion it thinks best as to the availability of equitable tolling; we express no opinion on that matter. See n. 3, *supra*. What the Fifth Circuit may not do is to wrap such a merits decision in jurisdictional garb so that we cannot address a possible division between that court and every other.

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Court's opinion in this case elides an important distinction between construing a court filing and recharacterizing it. See *Castro* v. *United States*, 540 U. S. 375, 386 (2003) (SCALIA, J., concurring in part and concurring in judgment)

(discussing this distinction). Courts routinely construe ambiguous filings to make sense out of them, as parties—both counseled and uncounseled—sometimes submit documents lacking even rudimentary clarity. See, *e. g.*, *Alabama Legislative Black Caucus* v. *Alabama*, 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013) ("The filings and arguments made by the plaintiffs on these claims were mystifying at best"). Recharacterization is something very different: It occurs when a court treats an unambiguous filing as something it is not. That practice is an unusual one, and should be used, if at all, with caution. See *Castro*, 540 U. S., at 385–386 (opinion of SCALIA, J.). Courts should not approach recharacterization with a freewheeling attitude, but with "regard to the exceptional nature of recharacterization within an adversarial system." *Ibid.* Recharacterization has, for example, been used "deliberately to override the *pro se* litigant's choice of procedural vehicle." *Id.*, at 386 (disapproving of the practice). But it is not the role of courts to "create a 'better correspondence' between the substance of a claim and its underlying procedural basis." *Ibid.*

In my view, then, it makes all the difference whether the Court of Appeals here properly construed an ambiguous motion or recharacterized an unambiguous motion contrary to Mata's stated choice of procedural vehicle. Although the majority's opinion does not address this point, Mata's motion to reopen does not expressly state whether he was invoking statutory relief under 8 U. S. C. § 1229a(c)(7)(A) or instead requesting *sua sponte* reopening under the Board of Immigration Appeals' (BIA) asserted inherent authority. Had the Court of Appeals engaged in the discretionary action of construing that ambiguous filing, it might not have abused its discretion by concluding that Mata really meant to ask for *sua sponte* reopening rather than equitable tolling of the statutory time bar.

The Court of Appeals, however, did not purport to construe an ambiguous motion. Instead, it applied what ap-

pears to be a categorical rule that all motions to reopen that would be untimely under § 1229a(c)(7)(A) must be construed as motions for *sua sponte* reopening of the proceedings. See *Reyes Mata* v. *Holder*, 558 Fed. Appx. 366, 367 (CA5 2014) (*per curiam*) ("In this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*"). That rule would appear to foreclose a litigant from ever filing an untimely statutory motion to reopen removal proceedings seeking equitable tolling, as well as to invite improper recharacterization in the event any such a motion is filed. The Court of Appeals should have assessed Mata's motion on its own terms. It erred in not doing so.

The reason it erred, though, has nothing to do with its fidelity to our precedents discussing "the judicial obligation to exercise jurisdiction," *ante*, at 151. That obligation does not allow evasion of constitutional and statutory jurisdictional prerequisites. It is true that "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation to . . . exercise' that authority." *Ante*, at 150 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976)). But that "unflagging obligation" arises only if a court actually has jurisdiction. Federal courts have no obligation to seek out jurisdiction, nor should they misconstrue filings to satisfy jurisdictional requirements. Rather, federal courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342, n. 3 (2006). And they should apply the ordinary rule that the party asserting federal jurisdiction bears the burden of proving that jurisdictional prerequisites are met. *Ibid.* The practice of construing filings does not alter the usual rules of establishing jurisdiction in federal court.

I would vacate and remand for the Court of Appeals to consider the BIA's judgment without the burden of what ap-

pears to be a categorical rule demanding that Mata's motion be construed (or recharacterized) as a request for *sua sponte* reopening. Because the majority does more than this by reversing the judgment below, I respectfully dissent.

Syllabus

REED ET AL. *v.* TOWN OF GILBERT, ARIZONA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–502. Argued January 12, 2015—Decided June 18, 2015

Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season. "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

Held: The Sign Code's provisions are content-based regulations of speech that do not survive strict scrutiny. Pp. 163–174.

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E. g., R. A. V.* v. *St. Paul*, 505 U. S. 377, 395. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E. g., Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–565.

And courts are required to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.*, at 564. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be "'justified without reference to the content of the regulated speech,'" or were adopted by the government "because of disagreement with the message" conveyed. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791. Pp. 163–164.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. Pp. 164–165.

(c) None of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 429. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829, but "[t]he First Amendment's hostility to content-based regulation [also] extends . . . to prohibition of public discussion of an entire topic," *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

Syllabus

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code's categories are not speaker based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658. This same analysis applies to event-based distinctions. Pp. 165–171.

(d) The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 734. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly underinclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network*, *supra*, at 425. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 171–172.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 817. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—*e. g.*, warning signs marking hazards on private property or signs directing traffic—might also survive strict scrutiny. Pp. 172–173.

707 F. 3d 1057, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined, *post*, p. 174. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 175. KAGAN, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, p. 179.

Counsel

David A. Cortman argued the cause for petitioners. With him on the briefs were *Rory T. Gray*, *Kevin H. Theriot*, and *Jeremy D. Tedesco*.

Eric Feigin argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Gershengorn*, *Michael S. Raab*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, and *Christopher S. Perry*.

Philip W. Savrin argued the cause for respondents. With him on the brief were *Dana K. Maine* and *William H. Buechner, Jr.**

---

*Briefs of *amici curiae* urging reversal were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, *Elbert Lin*, Solicitor General, *Misha Tseytlin*, Deputy Attorney General, and *Julie Marie Blake* and *J. Zak Ritchie*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Samuel S. Olens* of Georgia, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Greg Abbott* of Texas, and *Sean D. Reyes* of Utah; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Jordan A. Sekulow*, *Colby M. May*, *Walter M. Weber*, and *Geoffrey R. Surtees*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Mark L. Rienzi*, and *Diana M. Verm*; for the Christian Legal Society et al. by *Kimberlee Wood Colby* and *Thomas C. Berg*; for the Christian Life Commission of the Missouri Baptist Convention by *Jonathan R. Whitehead* and *Michael K. Whitehead*; for the Family Research Council by *John P. Tuskey* and *Travis Weber*; for the General Conference of Seventh-day Adventists by *Gene C. Schaerr* and *Todd R. McFarland*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Liberty Counsel et al. by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. McAlister*; and for the Pacific Legal Foundation by *Deborah J. La Fetra*.

William D. Brinton, *Susan L. Trevarthen*, *Lisa Soronen*, and *Randal R. Morrison* filed a brief for the National League of Cities et al. as *amici curiae* urging affirmance.

William H. Mellor, *Robert P. Frommer*, and *Erica J. Smith* filed a brief for Robert Wilson et al. as *amici curiae*.

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, § 4.402 (2005).[1] The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. § 4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square

[1] The Town's Sign Code is available online at http://www.gilbertaz.gov/departments/development-services/planning-development/land-development-code (as visited June 16, 2015, and available in Clerk of Court's case file).

feet in area and to be placed in all "zoning districts" without time limits. § 4.402(J).

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." Glossary 23.[2] The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." § 4.402(I).[3] These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. *Ibid.*

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" Glossary 25 (emphasis deleted). A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Ibid.* The Code treats temporary directional signs even less favorably than political signs.[4] Temporary directional signs may be

---

[2] A "Temporary Sign" is a "sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." Glossary 25.

[3] The Code defines "Right-of-Way" as a "strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities." *Id.*, at 18.

[4] The Sign Code has been amended twice during the pendency of this case. When litigation began in 2007, the Code defined the signs at issue as "Religious Assembly Temporary Direction Signs." App. 75. The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. *Id.*, at 75–76. In 2008, the Town redefined the category as "Temporary Directional Signs Related to a Qualifying Event," and it expanded the time limit to 12 hours before and 1 hour after the "qualifying event." *Ibid.* In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Id.*, at 89.

no larger than six square feet. § 4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. *Ibid.* And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward. *Ibid.*

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. 587 F. 3d 966, 979 (2009). It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the "'kind of cursory examination'" that would be necessary for an officer to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." *Id.*, at 978. It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." 707 F. 3d 1057, 1069 (CA9 2013). Relying on this Court's decision in *Hill* v. *Colorado*, 530 U. S. 703 (2000), the Court of Appeals concluded that the Sign Code is content neutral. 707 F. 3d, at 1071–1072. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Ibid.* Accordingly, the court believed that the Code was

"content-neutral as that term [has been] defined by the Supreme Court." *Id.*, at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.*, at 1073–1076.

We granted certiorari, 573 U. S. 957 (2014), and now reverse.

II

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U. S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 395 (1992); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115, 118 (1991).

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–565 (2011); *Carey* v. *Brown*, 447 U. S. 455, 462 (1980); *Mosley*, *supra*, at 95. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell*, *supra*, at 564. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinc-

tions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." Glossary 25. It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." *Id.*, at 23. And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. *Ibid.* It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to con-

sider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." 707 F. 3d, at 1071–1072. In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the regulated speech.'" Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward*, *supra*, at 791; emphasis deleted).

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster*, *supra*, at 117. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary."

Turner Broadcasting System, Inc. v. *FCC*, 512 U. S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See, *e. g.*, *Sorrell*, *supra*, at 563–565 (statute was content based "on its face," and there was also evidence of an impermissible legislative motive); *United States* v. *Eichman*, 496 U. S. 310, 315 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression" (internal quotation marks omitted)); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) ("The text of the ordinance is neutral," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (requiring that a facially content-neutral ban on camping must be "justified without reference to the content of the regulated speech"); *United States* v. *O'Brien*, 391 U. S. 367, 375, 377 (1968) (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved

a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. 491 U. S., at 787, and n. 2. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "'justified without reference to the content of the speech.'" *Id.*, at 791. But *Ward*'s framework "applies only if a statute is content neutral." *Hill*, 530 U. S., at 766 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.*, at 765.

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i. e.*, the "abridg[ment] of speech"—rather than merely the motives of those who enacted them. U. S. Const., Amdt. 1. "'The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Hill*, *supra*, at 743 (SCALIA, J., dissenting).

For instance, in *NAACP* v. *Button*, 371 U. S. 415 (1963), the Court encountered a State's attempt to use a statute prohibiting "'improper solicitation'" by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.*, at 438. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the "regulation of professional conduct" rendered the statute consistent with the First Amendment, observing that "it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." *Id.*, at 438–439. Likewise, one could easily imagine a Sign Code compliance man-

ager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Discovery Network*, *supra*, at 429. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." 587 F. 3d, at 977. It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." 707 F. 3d, at 1069.

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." Brief for Respondents 22. In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. *Ibid.* The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,'" *id.*, at 27, and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories, *id.*, at 37.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*,

515 U. S. 819, 829 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network*, 507 U. S., at 428. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'" 707 F. 3d, at 1069. That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far

larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner*, 512 U. S., at 658. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United*, *supra*, at 340–341. Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). Glossary 23. That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i. e.*, an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court

supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. *Supra*, at 163–164. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 60 (1994) (O'Connor, J., concurring).

III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,'" *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 734 (2011) (quoting *Citizens United*, *supra*, at 340). Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. See 558 U. S., at 340.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network*, 507 U. S., at 425, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,'" *Republican Party of Minn.* v. *White*, 536 U. S. 765, 780 (2002), the Sign Code fails strict scrutiny.

IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "'absolutist'" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," Brief for Respondents 34–35, but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. See *Clark*, 468 U. S., at 295.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. See, *e. g.*, § 4.402(R). And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent*, 466 U. S., at 817 (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. See, *e. g.*, *Solantic, LLC* v. *Neptune Beach*, 410 F. 3d 1250, 1264–1269 (CA11 2005) (sign categories similar to the town of Gilbert's were content based and subject to strict scrutiny); *Matthews* v. *Needham*, 764 F. 2d 58, 59–60 (CA1 1985) (law banning political signs but not commercial signs was content based and subject to strict scrutiny).

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue*, 512 U. S., at 48. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE BREYER, concurring in the judgment.

I join JUSTICE KAGAN's separate opinion. Like JUSTICE KAGAN I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as

---

*Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 798 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

"content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995); see also *Boos* v. *Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410 (1993). I also concede that, whenever government disfa-

vors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e. g.*, 15 U. S. C. § 78*l* (requirements for content that must be included in a registration statement); of energy conservation labeling practices, *e. g.*, 42 U. S. C. § 6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e. g.*, 21 U. S. C. § 353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e. g.*, 38 U. S. C. § 7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e. g.*, 26 U. S. C. § 6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds $10,000); of commercial airplane briefings, *e. g.*, 14 CFR § 136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos,

e. g., N. Y. Gen. Bus. Law Ann. § 399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit "'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area'"); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to "commercial speech." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980). But I have great concern that many justifiable instances of "content-based" regulation are noncommercial. And, worse than that, the Court has applied the heightened "strict scrutiny" standard even in cases where the less stringent "commercial speech" standard was appropriate. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 580 (2011) (BREYER, J., dissenting). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust* v. *Sullivan*, 500 U. S. 173, 193–194 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that "strict scrutiny" normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where "strict scrutiny" should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where

viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. See, *e. g.*, *United States* v. *Alvarez*, 567 U. S. 709, 730–732 (2012) (BREYER, J., concurring in judgment); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 400–403 (2000) (BREYER, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny." Nonetheless, for the reasons that JUSTICE KAGAN sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting

certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e. g.*, City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§ 11–13–2.3, 11–13–2.9(H)(4) (2014). In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. See, *e. g.*, Code of Athens-Clarke County, Ga., Pt. III, § 7–4–7(1) (1993). Elsewhere, historic site markers—for example, "George Washington Slept Here"—are also exempt from general regulations. See, *e. g.*, Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, § 4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee. See 23 U. S. C. §§ 131(b), (c)(1), (c)(5).

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. See *ante*, at 171 (acknowledging that "entirely reasonable" sign laws "will sometimes be struck down" under its approach (internal quotation marks omitted)). Says the majority: When laws "single[ ] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. *Ante*, at 169, 173. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, *ante*, at 173, the likelihood is that most will be struck down. After all, it is the "rare case[ ] in which a speech restriction withstands strict scrutiny." *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 444 (2015). To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers'*

Project, Inc. v. *Ragland*, 481 U. S. 221, 231 (1987). So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.*

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, *ante*, at 171, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen* v. *Coakley*, 573 U. S. 464, 476 (2014) (internal quotation marks omitted). The second is to ensure that the government has not regulated speech "based on hostility—or favoritism—towards the underlying message expressed." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 386 (1992). Yet the subject-

*Even in trying (commendably) to limit today's decision, JUSTICE ALITO's concurrence highlights its far-reaching effects. According to JUSTICE ALITO, the majority does not subject to strict scrutiny regulations of "signs advertising a one-time event." *Ante*, at 175 (ALITO, J., concurring). But of course it does. On the majority's view, a law with an exception for such signs "singles out specific subject matter for differential treatment" and "defin[es] regulated speech by particular subject matter." *Ante*, at 163, 169 (majority opinion). Indeed, the precise reason the majority applies strict scrutiny here is that "the Code singles out signs bearing a particular message: the time and location of a specific event." *Ante*, at 171.

matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 189 (2007) (quoting *R. A. V.*, 505 U. S., at 390). That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537, 539–540 (1980) (invalidating a limitation on speech about nuclear power). We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Id.*, at 537–538 (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972)). And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785 (1978); accord, *ante*, at 174 (ALITO, J., concurring) (limiting all speech on one topic "favors those who do not want to disturb the status quo"). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"—we insist that the law pass the most demand-

ing constitutional test. *R. A. V.*, 505 U. S., at 387 (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991)).

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. *Ante*, at 171. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas—so when "that risk is inconsequential, . . . strict scrutiny is unwarranted." *Davenport*, 551 U. S., at 188; see *R. A. V.*, 505 U. S., at 388 (approving certain content-based distinctions when there is "no significant danger of idea or viewpoint discrimination"). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. See *Davenport*, 551 U. S., at 188 (noting that "we have identified numerous situations in which [the] risk" attached to content-based laws is "attenuated"). In *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. *Id.*, at 792, n. 1 (listing exemptions); see *id.*, at 804–810 (upholding ordinance under intermediate scrutiny). After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship."

Id., at 804; see also *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was "designed to prevent crime, protect the city's retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views"). And another decision involving a similar law provides an alternative model. In *City of Ladue* v. *Gilleo*, 512 U. S. 43 (1994), the Court assumed *arguendo* that a sign ordinance's exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.*, at 46–47, and n. 6 (listing exemptions); *id.*, at 53 (noting this assumption). We did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See *ante*, at 171–172 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See Gilbert, Ariz., Land Development Code, ch. I, §§ 4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§ 4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs "need to be smaller because they need to guide travelers along a route." Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations.

Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." *Ante*, at 171. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

Syllabus

McFADDEN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14–378. Argued April 21, 2015—Decided June 18, 2015

Petitioner McFadden was arrested and charged with distributing controlled substance analogues in violation of the federal Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which identifies a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U. S. C. § 802(32)(A), and instructs courts to treat those analogues as schedule I controlled substances if they are intended for human consumption, § 813. Arguing that he did not know the "bath salts" he was distributing were regulated as controlled substance analogues, McFadden sought an instruction that would have prevented the jury from finding him guilty unless it found that he knew the substances he distributed had chemical structures and effects on the central nervous system substantially similar to those of controlled substances. Instead, the District Court instructed the jury that it need only find that McFadden knowingly and intentionally distributed a substance with substantially similar effects on the central nervous system as a controlled substance and that he intended that substance to be consumed by humans. McFadden was convicted. The Fourth Circuit affirmed, holding that the Analogue Act's intent element required only proof that McFadden intended the substance to be consumed by humans.

Held: When a controlled substance is an analogue, § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with a substance regulated under the Controlled Substances Act (CSA) or the Analogue Act. Pp. 191–198.

(a) In addressing the treatment of controlled substance analogues under federal law, one must look to the CSA, which, as relevant here, makes it "unlawful for any person knowingly" to "distribute . . . a controlled substance." § 841(a)(1). The ordinary meaning of that provision requires a defendant to know only that the substance he is distributing is some unspecified substance listed on the federal drug schedules. Thus, the Government must show either that the defendant knew he was distributing a substance listed on the schedules, even if he did not know which substance it was, or that the defendant knew the identity of the substance he was distributing, even if he did not know it was listed on the schedules.

Syllabus

Because the Analogue Act extends that framework to analogous substances, the CSA's mental-state requirement applies when the controlled substance is, in fact, an analogue. It follows that the Government must prove that a defendant knew that the substance he was distributing was "a controlled substance," even in prosecutions dealing with analogues. That knowledge requirement can be established in two ways: by evidence that a defendant knew that the substance he was distributing is controlled under the CSA or the Analogue Act, regardless of whether he knew the substance's identity; or by evidence that the defendant knew the specific analogue he was distributing, even if he did not know its legal status as a controlled substance analogue. A defendant with knowledge of the features defining a substance as a controlled substance analogue, § 802(32)(A), knows all of the facts that make his conduct illegal. Pp. 191–195.

(b) The Fourth Circuit did not adhere to § 813's command to treat a controlled substance analogue as a controlled substance listed in schedule I by applying § 841(a)(1)'s mental-state requirement. Instead, it concluded that the only mental-state requirement for analogue prosecutions is the one in § 813—that an analogue be "intended for human consumption." That conclusion is inconsistent with the text and structure of the statutes.

Neither the Government's nor McFadden's interpretation fares any better. The Government's contention that § 841(a)(1)'s knowledge requirement as applied to analogues is satisfied if the defendant knew he was dealing with a substance regulated under some law ignores § 841(a)(1)'s requirement that a defendant know he was dealing with "a controlled substance." That term includes only drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act; it is not broad enough to include all substances regulated by any law. McFadden contends that a defendant must also know the substance's features that cause it to fall within the scope of the Analogue Act. But the key fact that brings a substance within the scope of the Analogue Act is that the substance is "controlled," and that fact can be established in the two ways previously identified. *Staples* v. *United States*, 511 U. S. 600, distinguished. Contrary to McFadden's submission, the canon of constitutional avoidance "has no application" in the interpretation of an unambiguous statute such as this one. *Warger* v. *Shauers*, 574 U. S. 40, 50. But even if the statute were ambiguous, the scienter requirement adopted here "alleviate[s] vagueness concerns" under this Court's precedents. *Gonzales* v. *Carhart*, 550 U. S. 124, 149. Pp. 195–197.

(c) The Government argues that no rational jury could have concluded that McFadden was unaware that the substances he was distributing

were controlled under the CSA or the Analogue Act and that any error in the jury instruction was therefore harmless. The Fourth Circuit, which did not conduct a harmless-error analysis, is to consider that issue in the first instance. P. 197.

753 F. 3d 432, vacated and remanded.

THOMAS, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 198.

Kevin K. Russell argued the cause for petitioner. With him on the briefs was *J. Lloyd Snook III*.

Sarah E. Harrington argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Gershengorn*, and *Vijay Shanker*.*

JUSTICE THOMAS delivered the opinion of the Court.

The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act) identifies a category of substances substantially similar to those listed on the federal controlled substance schedules, 21 U. S. C. § 802(32)(A), and then instructs courts to treat those analogues, if intended for human consumption, as controlled substances listed on schedule I for purposes of federal law, § 813. The Controlled Substances Act (CSA) in turn makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances. § 841(a)(1). The question presented in this case concerns the knowledge necessary for conviction under § 841(a)(1) when the controlled substance at issue is in fact an analogue.

We hold that § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with "a con-

*Briefs of *amici curiae* urging reversal were filed for Forensic Scientists by *Gerald M. Finkel*; and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green*, *Jonathan Hacker*, and *Sarah O'Rouke Schrup*.

trolled substance." When the substance is an analogue, that knowledge requirement is met if the defendant knew that the substance was controlled under the CSA or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a "'controlled substance analogue.'" § 802(32)(A). Because the U. S. Court of Appeals for the Fourth Circuit approved a jury instruction that did not accurately convey this knowledge requirement, we vacate its judgment and remand for that court to determine whether the error was harmless.

I

In 2011, law enforcement officials in Charlottesville, Virginia, began investigating individuals at a Charlottesville video store for suspected distribution of "bath salts"—various recreational drugs used to produce effects similar to those of cocaine, methamphetamine, and other controlled substances. The owner of the store, Lois McDaniel, had been purchasing bath salts from petitioner Stephen McFadden for several months. McFadden had marketed the substances to her as "Alpha," "No Speed," "Speed," "Up," and "The New Up," and had compared them to cocaine and crystal meth. He had often sold those products with labels borrowing language from the Analogue Act, asserting that the contents were "not for human consumption" or stating that a particular product "does not contain any of the following compounds or analogues of the following compounds" and listing controlled substances. McDaniel purchased the bath salts for $15 per gram and resold them for $30 to $70 per gram.

After investigators had conducted two controlled buys from the store and confronted McDaniel, she agreed to cooperate in their investigation by making five controlled buys from McFadden. The Government intercepted the substances McFadden sent when they arrived at the local FedEx

store. Like the substances sold in the video store, these substances were white and off-white powders packaged in small plastic bags. Chemical analysis identified the powders as containing, among other substances, 3,4-Methylenedioxypyrovalerone, also known as MDPV; 3,4-Methylenedioxy-N-methylcathinone, also known as Methylone or MDMC; and 4-Methyl-N-ethylcathinone, also known as 4-MEC. When ingested, each of these substances is capable of producing effects on the central nervous system similar to those that controlled substances (such as cocaine, methamphetamine, and methcathinone) produce.

A federal grand jury indicted McFadden on eight counts of distribution of controlled substance analogues and one count of conspiracy. At trial, McFadden argued that he did not know the substances he was distributing were regulated as controlled substances under the Analogue Act. He and the Government also disagreed about what knowledge was required for a conviction. The Government sought an instruction requiring only "[t]hat the defendant knowingly and intentionally distributed a mixture or substance . . . [t]hat . . . was a controlled substance analogue . . . with the intent that it be consumed by humans." App. 26–27. McFadden sought a more demanding instruction requiring that he "knew that the substances that he was distributing possessed the characteristics of controlled substance analogues," including their chemical structures and effects on the central nervous system. *Id.*, at 29–30. The District Court compromised, instructing the jury that the statute required that "the defendant knowingly and intentionally distributed a mixture or substance that has" substantially similar effects on the nervous system as a controlled substance and "[t]hat the defendant intended for the mixture or substance to be consumed by humans." *Id.*, at 40.

The jury convicted McFadden on all nine counts. On appeal, McFadden insisted that the District Court "erred in refusing to instruct the jury that the government was re-

quired to prove that he knew, had a strong suspicion, or deliberately avoided knowledge that the [substances] possessed the characteristics of controlled substance analogues." 753 F. 3d 432, 443 (CA4 2014). Rejecting that argument, the Court of Appeals affirmed. *Id.*, at 444, 446. Stating that it was bound by Circuit precedent, the court concluded that the "intent element [in the Act] requires [only] that the government prove that the defendant meant for the substance at issue to be consumed by humans." *Id.*, at 441; see *id.*, at 444.

We granted a writ of certiorari, 574 U. S. 1118 (2015), and now vacate the judgment of the Court of Appeals and remand.

II

A

The Analogue Act requires a controlled substance analogue, if intended for human consumption, to be treated "as a controlled substance in schedule I" for purposes of federal law. § 1201, 100 Stat. 3207–13, 21 U. S. C. § 813. We therefore must turn first to the statute that addresses controlled substances, the CSA. The CSA makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." § 401(a)(1), 84 Stat. 1260, 21 U. S. C. § 841(a)(1). Under the most natural reading of this provision, the word "knowingly" applies not just to the statute's verbs but also to the object of those verbs—"*a* controlled substance." See *Flores-Figueroa* v. *United States*, 556 U. S. 646, 650 (2009); *id.*, at 657 (SCALIA, J., concurring in part and concurring in judgment); *id.*, at 660–661 (ALITO, J., concurring in part and concurring in judgment). When used as an indefinite article, "a" means "[s]ome undetermined or unspecified particular." Webster's New International Dictionary 1 (2d ed. 1954). And the CSA defines "controlled substance" as "a drug or other substance,

or immediate precursor, included in schedule I, II, III, IV, or V." § 802(6) (internal quotation marks omitted). The ordinary meaning of § 841(a)(1) thus requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules. The Courts of Appeals have recognized as much. See, *e. g.*, *United States* v. *Andino*, 627 F. 3d 41, 45–46 (CA2 2010); *United States* v. *Gamez-Gonzalez*, 319 F. 3d 695, 699 (CA5 2003); *United States* v. *Martinez*, 301 F. 3d 860, 865 (CA7 2002).

That knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was. Take, for example, a defendant whose role in a larger drug organization is to distribute a white powder to customers. The defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is. And if so, he would be guilty of knowingly distributing "a controlled substance."

The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules, 21 CFR § 1308.11 (2014). Because ignorance of the law is typically no defense to criminal prosecution, *Bryan* v. *United* States, 524 U. S. 184, 196 (1998), this defendant would also be guilty of knowingly distributing "a controlled substance."[1]

---

[1] The Courts of Appeals have held that, as with most *mens rea* requirements, the Government can prove the requisite mental state through either direct evidence or circumstantial evidence. Direct evidence could include, for example, past arrests that put a defendant on notice of the controlled status of a substance. *United States* v. *Abdulle*, 564 F. 3d 119, 127 (CA2 2009). Circumstantial evidence could include, for example, a defendant's concealment of his activities, evasive behavior with respect to law enforcement, knowledge that a particular substance produces a "high"

The Analogue Act extends the framework of the CSA to analogous substances. 21 U. S. C. § 813. The Act defines a "controlled substance analogue" as a substance:

> "(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> "(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> "(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II." § 802(32)(A).

It further provides, "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." § 813.

The question in this case is how the mental-state requirement under the CSA for knowingly manufacturing, distributing, or possessing with intent to distribute "a controlled substance" applies when the controlled substance is in fact an analogue. The answer begins with § 841(a)(1), which expressly requires the Government to prove that a defendant knew he was dealing with "a controlled substance." The

---

similar to that produced by controlled substances, and knowledge that a particular substance is subject to seizure at customs. *United States* v. *Ali*, 735 F. 3d 176, 188–189 (CA4 2013). The Government presented such circumstantial evidence in this case, and neither party disputes that this was proper.

Analogue Act does not alter that provision, but rather instructs courts to treat controlled substance analogues "as . . . controlled substance[s] in schedule I." § 813. Applying this statutory command, it follows that the Government must prove that a defendant knew that the substance with which he was dealing was "a controlled substance," even in prosecutions involving an analogue.[2]

That knowledge requirement can be established in two ways. First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. The Analogue Act defines a controlled substance analogue by its features, as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II"; "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance in schedule I or II; or which is represented or intended to have that effect with respect to a particular person. § 802(32)(A). A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct

[2] The Government has accepted for the purpose of this case that it must prove two elements to show that a substance is a controlled substance analogue under the definition in § 802(32)(A): First, that an alleged analogue is substantially similar in chemical structure to a controlled substance, § 802(32)(A)(i). Second, that an alleged analogue either has, or is represented or intended to have, a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to that of a controlled substance, §§ 802(32)(A)(ii), (iii). Brief for United States 3. Because we need not decide in this case whether that interpretation is correct, we assume for the sake of argument that it is.

illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal. A defendant need not know of the existence of the Analogue Act to know that he was dealing with "a controlled substance."

B

The Court of Appeals did not adhere to § 813's command to treat a controlled substance analogue "as a controlled substance in schedule I," and, accordingly, it did not apply the mental-state requirement in § 841(a)(1). Instead, it concluded that the only mental-state requirement for prosecutions involving controlled substance analogues is the one in § 813—that the analogues be "intended for human consumption." 753 F. 3d, at 436 (citing *United States* v. *Klecker*, 348 F. 3d 69, 71 (CA4 2003)). Because that interpretation is inconsistent with the text and structure of the statutes, we decline to adopt it.

Unsurprisingly, neither the Government nor McFadden defends the Court of Appeals' position. But their alternative interpretations fare no better. The Government agrees that the knowledge requirement in § 841(a)(1) applies to prosecutions involving controlled substance analogues, yet contends that it is met if the "defendant knew he was dealing with an illegal or regulated substance" under some law. Brief for United States 15. Section 841(a)(1), however, requires that a defendant knew he was dealing with "a controlled substance." That term includes only those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act. §§ 802(6), 813. It is not broad enough to include all substances regulated by any law.[3]

[3] Although the Government must prove that a defendant knew that the substance in question was "a controlled substance" under federal law, the Government need not introduce direct evidence of such knowledge. As with prosecutions involving substances actually listed on the drug schedules, the Government may offer circumstantial evidence of that knowledge. See n. 1, *supra*. In such cases, it will be left to the trier of fact to deter-

For his part, McFadden contends that, in the context of analogues, knowledge of "a controlled substance" can *only* be established by knowledge of the characteristics that make a substance an "analogue" under the Act. In support of that argument, he relies heavily on our conclusion in *Staples* v. *United States*, 511 U. S. 600 (1994), that a statute making it "'unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record,'" *id.*, at 605 (quoting 26 U. S. C. § 5861(d)), required proof that a defendant "knew of the features of his AR–15 that brought it within the scope of the Act," 511 U. S., at 619. McFadden reasons by analogy that a defendant convicted under § 841(a)(1) must also know the features of the substance that brought it within the scope of the Analogue Act. But that position ignores an important textual distinction between § 841(a)(1) and the statute at issue in *Staples*. The statute at issue in *Staples* defined "a firearm" by its physical features such as the length of its barrel and its capacity to shoot more than one shot with a single function of the trigger. Unlike those physical features that brought the firearm "within the scope of" that statute, the feature of a substance "that br[ings] it within the scope of" § 841(a)(1) is the fact that it is "'controlled.'" § 802(6). Knowledge of *that* fact can be established in the two ways previously discussed: either by knowledge that a substance is listed or treated as listed by operation of the Analogue Act, §§ 802(6), 813, or by knowledge of the physical characteristics that give rise to that treatment. *Supra*, at 194.

McFadden also invokes the canon of constitutional avoidance, arguing that we must adopt his interpretation of the statute lest it be rendered unconstitutionally vague. But

---

mine whether the circumstantial evidence proves that the defendant knew that the substance was a controlled substance under the CSA or the Analogue Act, as opposed to under any other federal or state laws.

that argument fails on two grounds. Under our precedents, this canon "is a tool for choosing between competing plausible interpretations of a provision." *Warger* v. *Shauers*, 574 U. S. 40, 50 (2014) (internal quotation marks omitted). It "has no application" in the interpretation of an unambiguous statute such as this one. See *ibid.* (internal quotation marks omitted). Even if this statute were ambiguous, McFadden's argument would falter. Under our precedents, a scienter requirement in a statute "alleviate[s] vagueness concerns," "narrow[s] the scope of [its] prohibition[,] and limit[s] prosecutorial discretion." *Gonzales* v. *Carhart*, 550 U. S. 124, 149, 150 (2007). The scienter requirement in this statute does not, as McFadden suggests, render the statute vague. Moreover, to the extent McFadden suggests that the substantial similarity test for defining analogues is itself indeterminate, his proposed alternative scienter requirement would do nothing to cure that infirmity.

III

The District Court's instructions to the jury did not fully convey the mental state required by the Analogue Act. The jury was instructed only that McFadden had to "knowingly and intentionally distribut[e] a mixture or substance that has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system" substantially similar to that of a controlled substance. App. 40.

The Government contends that any error in the jury instructions was harmless because no rational jury could have concluded that McFadden was unaware that the substances he was distributing were controlled. We have recognized that even the omission of an element from a jury charge is subject to harmless-error analysis. *Neder* v. *United States*, 527 U. S. 1, 15 (1999). Because the Court of Appeals did not address that issue, we remand for that court to consider it in the first instance.

* * *

For the foregoing reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice Roberts, concurring in part and concurring in the judgment.

I join the Court's opinion, except to the extent that it says the Government can satisfy the mental state requirement of Section 841(a)(1) "by showing that the defendant knew the identity of the substance he possessed." *Ante*, at 192. Section 841(a)(1) makes it "unlawful for any person knowingly . . . to manufacture, distribute, or dispense . . . a controlled substance." As the Court points out, the word "knowingly" applies "not just to the statute's verbs, but also to the object of those verbs—'a controlled substance.'" *Ante*, at 191 (emphasis deleted). That suggests that a defendant needs to know more than the identity of the substance; he needs to know that the substance is *controlled*. See, *e. g.*, *United States* v. *Howard*, 773 F. 3d 519, 526 (CA4 2014); *United States* v. *Washington*, 596 F. 3d 926, 944 (CA8 2010); *United States* v. *Rogers*, 387 F. 3d 925, 935 (CA7 2004).

In cases involving well-known drugs such as heroin, a defendant's knowledge of the identity of the substance can be compelling evidence that he knows the substance is controlled. See *United States* v. *Turcotte*, 405 F. 3d 515, 525 (CA7 2005). But that is not necessarily true for lesser known drugs. A pop quiz for any reader who doubts the point: Two drugs—dextromethorphan and hydrocodone—are both used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?*

The Court says that knowledge of the substance's identity suffices because "ignorance of the law is typically no defense

*The answer is hydrocodone.

to criminal prosecution." *Ante,* at 192. I agree that is "typically" true. But when "there is a legal element in the definition of the offense," a person's lack of knowledge regarding that legal element *can* be a defense. *Liparota* v. *United States*, 471 U. S. 419, 425, n. 9 (1985). And here, there is arguably a legal element in Section 841(a)(1)—that the substance be "controlled."

The analogy the Court drew in *Liparota* was to a charge of receipt of stolen property: It is no defense that the defendant did not know such receipt was illegal, but it is a defense that he did not know the property was stolen. Here, the argument goes, it is no defense that a defendant did not know it was illegal to possess a controlled substance, but it is a defense that he did not know the substance was controlled.

Ultimately, the Court's statements on this issue are not necessary to its conclusion that the District Court's jury instructions "did not fully convey the mental state required by the Analogue Act." *Ante*, at 197. Those statements should therefore not be regarded as controlling if the issue arises in a future case.

Syllabus

WALKER, CHAIRMAN, TEXAS DEPARTMENT OF MOTOR VEHICLES BOARD, ET AL. *v.* TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14–144. Argued March 23, 2015—Decided June 18, 2015

Texas offers automobile owners a choice between general-issue and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas. Here, the Texas Division of the Sons of Confederate Veterans and its officers (collectively SCV) filed suit against the chairman and members of the Board (collectively Board), arguing that the Board's rejection of SCV's proposal for a specialty plate design featuring a Confederate battle flag violated the Free Speech Clause. The District Court entered judgment for the Board, but the Fifth Circuit reversed, holding that Texas' specialty license plate designs are private speech and that the Board engaged in constitutionally forbidden viewpoint discrimination when it refused to approve SCV's design.

Held: Texas' specialty license plate designs constitute government speech, and thus Texas was entitled to refuse to issue plates featuring SCV's proposed design. Pp. 207–220.

(a) When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468. A government is generally entitled to promote a program, espouse a policy, or take a position. Were the Free Speech Clause interpreted otherwise, "it is not easy to imagine how government would function." *Id.*, at 468. That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech, and the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. Pp. 207–208.

Syllabus

(b) This Court's precedents regarding government speech provide the appropriate framework through which to approach the case. Pp. 208–219.

(1) The same analysis the Court used in *Summum*—to conclude that a city "accepting a privately donated monument and placing it on city property" was engaging in government speech, 555 U. S., at 464—leads to the conclusion that government speech is at issue here. First, history shows that States, including Texas, have long used license plates to convey government speech, *e. g.*, slogans urging action, promoting tourism, and touting local industries. Cf. *id.*, at 470. Second, Texas license plate designs "are often closely identified in the public mind with the [State]." *Id.*, at 472. Each plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters across the top of every plate. Texas also requires Texas vehicle owners to display license plates, issues every Texas plate, and owns all of the designs on its plates. The plates are, essentially, government IDs, and ID issuers "typically do not permit" their IDs to contain "message[s] with which they do not wish to be associated," *id.,* at 471. Third, Texas maintains direct control over the messages conveyed on its specialty plates, by giving the Board final approval over each design. Like the city government in *Summum*, Texas "has effectively controlled the messages [conveyed] by exercising final approval authority over their selection." *Id.*, at 473. These considerations, taken together, show that Texas' specialty plates are similar enough to the monuments in *Summum* to call for the same result. Pp. 209–214.

(2) Forum analysis, which applies to government restrictions on purely private speech occurring on government property, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800, is not appropriate when the State is speaking on its own behalf. The parties agree that Texas' specialty license plates are not a traditional public forum. Further, Texas' policies and the nature of its license plates indicate that the State did not intend its specialty plates to serve as either a designated public forum—where "government property . . . not traditionally . . . a public forum is intentionally opened up for that purpose," *Summum*, *supra*, at 469—or a limited public forum—where a government "reserv[es a forum] for certain groups or for the discussion of certain topics," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829. The State exercises final authority over the messages that may be conveyed by its specialty plates, it takes ownership of each specialty plate design, and it has traditionally used its plates for govern-

ment speech. These features of Texas specialty plates militate against a determination that Texas has created a public forum. Finally, the plates are not a nonpublic forum, where the "government is . . . a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678–679. The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider. See *Summum*, *supra*, at 470–471. Nor does Texas' requirement that vehicle owners pay annual fees for specialty plates mean that the plates are a forum for private speech. And this case does not resemble other nonpublic forum cases. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 48–49; *Lehman* v. *Shaker Heights*, 418 U. S. 298; and *Cornelius*, *supra*, at 804–806, distinguished. Pp. 214–219.

(c) The determination that Texas' specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. The Court has acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley* v. *Maynard*, 430 U. S. 705, 717, n. 15. The Court has also recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. Just as Texas cannot require SCV to convey "the State's ideological message," *id.*, at 715, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates. P. 219.

759 F. 3d 388, reversed.

BREYER, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 221.

Scott A. Keller, Solicitor General of Texas, argued the cause for petitioners. With him on the briefs were *Ken Paxton*, Attorney General, *Charles E. Roy*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, *Erika M. Kane*, Assistant Attorney General, *Bill Davis*, *Evan S. Greene*, and *Alex Potapov*, Assistant Solicitors General, *Greg Abbott*, former Attorney General, *Jonathan F. Mitchell*, former Solicitor General,

Daniel T. Hodge, former First Assistant Attorney General, and *Arthur C. D'Andrea*, former Assistant Solicitor General.

R. James George, Jr., argued the cause for respondents. With him on the brief was *John R. McConnell*.*

JUSTICE BREYER delivered the opinion of the Court.

Texas offers automobile owners a choice between ordinary and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or (most commonly) both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Consti-

---

*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Michael DeWine*, Attorney General of Ohio, and *Eric E. Murphy*, Solicitor General; and for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *Christopher A. Brook*; for Americans United for Separation of Church and State by *Ayesha N. Khan* and *Gregory M. Lipper*; for the Becket Fund for Religious Liberty by *Eugene Volokh*, *Mark Rienzi*, and *Eric Rassbach*; for the Cato Institute et al. by *Ilya Shapiro* and *Robert Corn-Revere*; for the Children First Foundation, Inc., by *Jonathan D. Christman* and *Randall L. Wenger*; for the Foundation for Individual Rights in Education by *Greg Lukianoff*; and for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*.

Briefs of *amici curiae* were filed for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Walter M. Weber*, *Jordan A. Sekulow*, and *Kimberlee Wood Colby*; for Choose Life, Wisconsin, Inc., et al. by *Stephen M. Crampton*, *Thomas L. Brejcha*, and *Michael D. Dean*; and for Phil Berger et al. by *Scott W. Gaylord*.

tution's free speech guarantees. See Amdts. 1, 14. We conclude that it did not.

I

A

Texas law requires all motor vehicles operating on the State's roads to display valid license plates. See Tex. Transp. Code Ann. §§502.001 (West Supp. 2014), 504.001 (2013), 504.943 (Supp. 2014). And Texas makes available several kinds of plates. Drivers may choose to display the State's general-issue license plates. See Texas Dept. of Motor Vehicles, Motor Vehicle Registration Manual 9.1 (Apr. 2015). Each of these plates contains the word "Texas," a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan "The Lone Star State." Texas Dept. of Motor Vehicles, The Texas Classic FAQs (July 16, 2012), online at http://www.txdmv.gov/motorists/license-plates (all Internet materials as visited June 16, 2015, and available in Clerk of Court's case file). In the alternative, drivers may choose from an assortment of specialty license plates. §504.008(b) (West 2013). Each of these plates contains the word "Texas," a license plate number, and one of a selection of designs prepared by the State. See *ibid.*; Specialty License Plates, http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (displaying available Texas specialty plates); Create a Plate: Your Design, http://www.myplates.com/BackgroundOnly (same). Finally, Texas law provides for personalized plates (also known as vanity plates). 43 Tex. Admin. Code §217.45(c)(7) (2015). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8."

Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program. Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. See

§ 217.45(b)(2). And Texas selects the designs for specialty plates through three distinct processes.

First, the state legislature may specifically call for the development of a specialty license plate. See Tex. Transp. Code §§ 504.602–504.663 (West 2013 and Supp. 2014). The legislature has enacted statutes authorizing, for example, plates that say "Keep Texas Beautiful" and "Mothers Against Drunk Driving," plates that "honor" the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words "Fight Terrorism." See §§ 504.602, 504.608, 504.626, 504.647.

Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. See §§ 504.6011(a), 504.851(a); 43 Tex. Admin. Code § 217.52(b). Among the plates created through the private-vendor process are plates promoting the "Keller Indians" and plates with the slogan "Get it Sold with RE/MAX."

Third, the Board "may create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor a specialty plate. Tex. Transp. Code Ann. §§ 504.801(a), (b). A nonprofit must include in its application "a draft design of the specialty license plate." 43 Tex. Admin. Code § 217.45(i)(2)(C). And Texas law vests in the Board authority to approve or to disapprove an application. See § 217.45(i)(7). The relevant statute says that the Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public . . . or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c). Specialty plates that the Board has sanctioned through this process include plates featuring the words "The Gator Nation," together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words "SERVICE ABOVE SELF."

B

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV's application included a draft plate design. See Appendix, *infra*. At the bottom of the proposed plate were the words "SONS OF CONFEDERATE VETERANS." At the side was the organization's logo, a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette. The Board's predecessor denied this application.

In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." App. 64. The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." *Id.*, at 65.

In 2012, SCV and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). SCV argued that the Board's decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed. *Texas Div.*,

Sons of Confederate Veterans, Inc. v. *Vandergriff*, 759 F. 3d 388 (2014). It held that Texas' specialty license plate designs are private speech and that the Board, in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination. The dissenting judge argued that Texas' specialty license plate designs are government speech, the content of which the State is free to control.

We granted the Board's petition for certiorari, and we now reverse.

II

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468 (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 235 (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. See *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 559 (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. See *Stromberg* v. *California*, 283 U. S. 359, 369 (1931) (observing that "our constitutional system" seeks to maintain "the opportunity for free political discussion to the end that government may be responsive to the will of the people").

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state gov-

ernment effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey. *Summum*, *supra,* at 468.

We have therefore refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust* v. *Sullivan*, 500 U. S. 173, 194 (1991). We have pointed out that a contrary holding "would render numerous Government programs constitutionally suspect." *Ibid.* Cf. *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 12–13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed"). And we have made clear that "the government can speak for itself." *Southworth*, *supra,* at 229.

That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. *Summum*, *supra,* at 468. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

III

In our view, specialty license plates issued pursuant to Texas' statutory scheme convey government speech. Our

reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem. We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case. See 555 U. S., at 464.

A

In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets. See *id.*, at 464–465. In the park were 15 other permanent displays. *Id.*, at 464. At least 11 of these—including a wishing well, a September 11 monument, a historic granary, the city's first fire station, and a Ten Commandments monument—had been donated to the city by private entities. *Id.*, at 464–465. The religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments. Brief for Respondent in *Pleasant Grove City* v. *Summum*, O. T. 2008, No. 07–665, pp. 2–3, 30–36.

This Court rejected the organization's argument. We held that the city had not "provid[ed] a forum for private speech" with respect to monuments. *Summum*, 555 U. S., at 470. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct." *Id.*, at 476. The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause." *Id.*, at 464.

We based our conclusion on several factors. First, history shows that "[g]overnments have long used monuments to speak to the public." *Id.*, at 470. Thus, we observed that "[w]hen a government entity arranges for the construction

of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Ibid.*

Second, we noted that it "is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.*, at 471. As a result, "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Ibid.* And "observers" of such monuments, as a consequence, ordinarily "appreciate the identity of the speaker." *Ibid.*

Third, we found relevant the fact that the city maintained control over the selection of monuments. We thought it "fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." *Ibid.* And we observed that the city government in *Summum* "'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection." *Id.*, at 473.

In light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech. See *id.*, at 470–472. And, in reaching that conclusion, the Court rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park. See *id.*, at 470–471. Cf. *Rust*, *supra*, at 192–196 (upholding a federal regulation limiting speech in a Government-funded program where the program was established and administered by private parties).

B

Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have

conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. Cf. 555 U. S., at 470 ("Governments have long used monuments to speak to the public"). In 1917, Arizona became the first State to display a graphic on its plates. J. Fox, License Plates of the United States 15 (1997) (Fox); J. Minard & T. Stentiford, A Moving History 56 (2004) (Minard). The State presented a depiction of the head of a Hereford steer. Fox 15; Minard 56. In the years since, New Hampshire plates have featured the profile of the "Old Man of the Mountain," Massachusetts plates have included a representation of the Commonwealth's famous codfish, and Wyoming plates have displayed a rider atop a bucking bronco. *Id.*, at 60, 61, 66.

In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed "Idaho Potatoes" and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. *Id.*, at 61. The brown potato did not catch on, but slogans on license plates did. Over the years, state plates have included the phrases "North to the Future" (Alaska), "Keep Florida Green" (Florida), "Hoosier Hospitality" (Indiana), "The Iodine Products State" (South Carolina), "Green Mountains" (Vermont), and "America's Dairyland" (Wisconsin). Fox 13, 29, 39, 91, 101, 109. States have used license plate slogans to urge action, to promote tourism, and to tout local industries.

Texas, too, has selected various messages to communicate through its license plate designs. By 1919, Texas had begun to display the Lone Star emblem on its plates. Texas Department of Transportation, The History of Texas License Plates 9, 11 (1999). In 1936, the State's general-issue plates featured the first slogan on Texas license plates: the word "Centennial." *Id.*, at 20. In 1968, Texas plates promoted a San Antonio event by including the phrase "Hemisfair 68." *Id.*, at 46. In 1977, Texas replaced the Lone Star with a

small silhouette of the State. *Id.*, at 63. And in 1995, Texas plates celebrated "150 Years of Statehood." *Id.*, at 101. Additionally, the Texas Legislature has specifically authorized specialty plate designs stating, among other things, "Read to Succeed," "Houston Livestock Show and Rodeo," "Texans Conquer Cancer," and "Girl Scouts." Tex. Transp. Code Ann. §§ 504.607, 504.613, 504.620, 504.622. This kind of state speech has appeared on Texas plates for decades.

Second, Texas license plate designs "are often closely identified in the public mind with the [State]." *Summum*, *supra*, at 472. Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. See § 504.943. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. See § 504.002(3). And Texas dictates the manner in which drivers may dispose of unused plates. See § 504.901(c). See also § 504.008(g) (requiring that vehicle owners return unused specialty plates to the State).

Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated." *Summum*, 555 U. S., at 471. Consequently, "persons who observe" designs on IDs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf." *Ibid.*

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individ-

ual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas' license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." § 504.005. The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. 43 Tex. Admin. Code §§ 217.45(i)(7)–(8), 217.52(b). And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Reply Brief 10; Tr. of Oral Arg. 49–51. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection." 555 U. S., at 473 (quoting *Johanns*, 544 U. S., at 560–561).

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. See Tex. Transp. Code Ann. § 504.615. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. See § 504.626. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say "Fight Terrorism." See § 504.647. But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were "permanent" and we observed that "public parks can accommodate only a limited

number of permanent monuments." 555 U. S., at 464, 470, 478. We believed that the speech at issue was government speech rather than private speech in part because we found it "hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." *Id.*, at 479. Here, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial.

But those characteristics of the speech at issue in *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for "the delivery of speeches and the holding of marches and demonstrations" by private citizens. *Id.*, at 478. By contrast, license plates are not traditional public forums for private speech.

And other features of the designs on Texas' specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. "The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.*, at 472.

C

SCV believes that Texas' specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather provides a forum for private speech

by making license plates available to display the private parties' designs. We cannot agree.

We have previously used what we have called "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985). But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas' specialty license plates are not a "traditional public forum," such as a street or a park, "which ha[s] immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983) (internal quotation marks omitted). "The Court has rejected the view that traditional public forum status extends beyond its historic confines." *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 678 (1998). And state-issued specialty license plates lie far beyond those confines.

It is equally clear that Texas' specialty plates are neither a "'designated public forum,'" which exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," *Summum*, *supra*, at 469, nor a "limited public forum," which exists where a government has "reserv[ed a forum] for certain groups or for the discussion of certain topics," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U. S., at 802. And in order "to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public

forum," this Court "has looked to the policy and practice of the government" and to "the nature of the property and its compatibility with expressive activity." *Ibid.*

Texas' policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. See *id.*, at 803–804 (explaining that a school mail system was not a public forum because "[t]he practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted"). Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas' specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678–679 (1992). With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas' specialty license plate designs "are meant to convey and have the effect of conveying a government message." *Summum*, 555 U. S., at 472. They "constitute government speech." *Ibid.*

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider. In *Summum*, private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." *Id.*, at 470–471. Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the "government entity may exercise [its] freedom to express its views" even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.*, at 468. And in this case, as in *Summum*, forum analysis is inapposite. See *id.*, at 480.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. See *id.*, at 471–472. And an *amicus* brief had informed us that there were, at the time, 52 such displays. See Brief for City of New York in *Pleasant Grove City* v. *Summum*, O. T. 2008, No. 07–665, p. 2. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas' desire to communicate numerous messages does not mean that the messages conveyed are not Texas' own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, see, *e. g.*, *Lehman* v. *Shaker Heights*, 418 U. S. 298, 299 (1974) (plurality opinion), the existence of government profit alone is insufficient to

trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Finally, we note that this case does not resemble other cases in which we have identified a nonpublic forum. This case is not like *Perry Ed. Assn.*, where we found a school district's internal mail system to be a nonpublic forum for private speech. See 460 U. S., at 48–49. There, it was undisputed that a number of private organizations, including a teachers' union, had access to the mail system. See *id.*, at 39–40. It was therefore clear that private parties, and not only the government, used the system to communicate. Here, by contrast, each specialty license plate design is formally approved by and stamped with the *imprimatur* of Texas.

Nor is this case like *Lehman*, where we found the advertising space on city buses to be a nonpublic forum. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 390, n. 6 (1992) (identifying *Lehman* as a case about a nonpublic forum). There, the messages were located in a context (advertising space) that is traditionally available for private speech. And the advertising space, in contrast to license plates, bore no indicia that the speech was owned or conveyed by the government.

Nor is this case like *Cornelius*, where we determined that a charitable fundraising program directed at federal employees constituted a nonpublic forum. See 473 U. S., at 804–806. That forum lacked the kind of history present here. The fundraising drive had never been a medium for government speech. Instead, it was established "to bring order to [a] solicitation process" which had previously consisted of ad hoc solicitation by individual charitable organizations.

Id., at 792, 805. The drive "was designed to minimize . . . disruption to the [federal] workplace," *id.*, at 805, not to communicate messages from the government. Further, the charitable solicitations did not appear on a government ID under the government's name. In contrast to the instant case, there was no reason for employees to "interpret [the solicitation] as conveying some message on the [government's] behalf." *Summum*, 555 U. S., at 471.

IV

Our determination that Texas' specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley* v. *Maynard*, 430 U. S. 705, 717, n. 15, 715 (1977) (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message"). And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. See *id.*, at 715; *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943). But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey "the State's ideological message," *Wooley*, *supra*, at 715, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

* * *

For the reasons stated, we hold that Texas' specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates fea-

turing SCV's proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

Reversed.

[Appendix to opinion of the Court follows this page.]

Proposed License Plate Design. App. to Pet. for Cert. 191a.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468 (2009). By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995).

Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not

those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 a.m. on a Monday morning, would you think: "This is the official policy of the State—better to golf than to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR – 24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina)[1] is the official favorite of the state government?

The Court says that all of these messages are government speech. It is essential that government be able to express its own viewpoint, the Court reminds us, because otherwise, how would it promote its programs, like recycling and vaccinations? *Ante*, at 207–208. So when Texas issues a "Rather Be Golfing" plate, but not a "Rather Be Playing Tennis" or "Rather Be Bowling" plate, it is furthering a state policy to promote golf but not tennis or bowling. And when Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e. g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the re-

[1] Elliot, Shifting Gears, Forbes Life, Oct. 2013, pp. 55, 57.

maining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

I

A

Specialty plates like those involved in this case are a recent development. License plates originated solely as a means of identifying vehicles. In 1901, New York became the first State to require automobiles to be licensed, but rather than issue license plates itself, New York required drivers to display their initials on their cars. J. Minard & T. Stentiford, A Moving History 50 (2004). Two years later, Massachusetts became the first State to issue license plates. The plates said "Mass. Automobile Register" and displayed

the vehicle's registration number. *Id.*, at 51. Plates of this type—featuring a registration number, the name of the State, and sometimes the date—were the standard for decades thereafter. See *id.*, at 52–94; see also generally, J. Fox, License Plates of the United States 10–99 (1997).

Texas license plates initially followed this pattern. When the first official state plate appeared in 1917, it featured a number and the abbreviation "TEX." Texas Department of Transportation, The History of Texas License Plates 9 (1999) (History). In 1925, the year of issue was added, and the State began issuing plates that identified certain vehicle types, *e. g.*, "C-M" for commercial trucks (1925), *id.*, at 14–15; "FARM" for farm trucks (1935), *id.*, at 22; "Overwidth" (1949), *id.*, at 32; "House Trailer" (1951), *id.*, at 36. In 1936, a special plate with the word "CENTENNIAL" was created to mark the State's 100th birthday, and the first plate identifying the owner as a "State Official" appeared two years later. *Id.*, at 20, 25. Starting in the 1950's, Texas began issuing plates to identify some other registrants, such as "Amateur Radio Operator" (1954), *id.*, at 38; "State Judge" (1970), *id.*, at 64; and "Disabled Veteran" (1972), *id.*, at 79.

A sesquicentennial plate appeared in 1985, and two years later, legislation was introduced to create a bronze license plate with 14-karat gold-plated lettering, available for a fee of $1,000. *Id.*, at 81. The proposal aimed to make the State a profit, but it failed to pass. *Ibid.*

It was not until 1989 that anything that might be considered a message was featured regularly on Texas plates. The words "The Lone Star State" were added "as a means of bringing favorable recognition to Texas." *Id.*, at 82.

Finally, in the late 1990's, license plates containing a small variety of messages, selected by the State, became available for the first time. *Id.*, at 101. These messages included slogans like "Read to Succeed," "Keep Texas Beautiful," "Animal Friendly," "Big Bend National Park," "Houston Livestock Show and Rodeo," and "Lone Star Proud." *Id.*, at 101,

113. Also issued in the 1990's were plates bearing the names of colleges and universities, and some plates (*e. g.*, "State of the Arts," "State Capitol Restoration") were made available to raise funds for special purposes. *Id.*, at 101.

Once the idea of specialty plates took hold, the number of varieties quickly multiplied, and today, we are told, Texas motorists can choose from more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for-profit businesses through the State's third-party vendor. Brief for Respondents 2; see also Texas Department of Motor Vehicles, online at http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (all Internet materials as visited June 12, 2015, and available in Clerk of Court's case file); http://www.myplates.com.

Drivers can select plates advertising organizations and causes like 4–H, the Boy Scouts, the American Legion, Be a Blood Donor, the Girl Scouts, Insure Texas Kids, Mothers Against Drunk Driving, Marine Mammal Recovery, Save Texas Ocelots, Share the Road, Texas Reads, Texas Realtors ("I am a Texas Realtor"), the Texas State Rifle Association ("WWW.TSRA.COM"), the Texas Trophy Hunters Association, the World Wildlife Fund, the YMCA, and Young Lawyers.[2]

There are plates for fraternities and sororities and for in-state schools, both public (like Texas A&M and Texas Tech) and private (like Trinity University and Baylor). An even larger number of schools from out of State are honored: Arizona State, Brigham Young, Florida State, Michigan State, Alabama, and South Carolina, to name only a few.

There are political slogans, like "Come and Take It" and "Don't Tread on Me," and plates promoting the citrus industry and the "Cotton Boll." Commercial businesses can have specialty plates, too. There are plates advertising Remax

[2] The Appendix, *infra*, reproduces the available specialty plates mentioned throughout this opinion in order of first reference. When categories are referenced, examples from the category have been included.

("Get It Sold with RE/MAX"), Dr Pepper ("Always One of a Kind"), and Mighty Fine Burgers.

B

The Texas Division of Sons of Confederate Veterans (SCV) is an organization composed of descendants of Confederate soldiers. The group applied for a Texas specialty license plate in 2009 and again in 2010. Their proposed design featured a controversial symbol, the Confederate battle flag, surrounded by the words "Sons of Confederate Veterans 1896" and a gold border. App. 29. The Texas Department of Motor Vehicles Board (or Board) invited public comments and considered the plate design at a meeting in April 2011. At that meeting, one board member was absent, and the remaining eight members deadlocked on whether to approve the plate. The Board thus reconsidered the plate at its meeting in November 2011. This time, many opponents of the plate turned out to voice objections. The Board then voted unanimously against approval and issued an order stating:

> "The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." *Id.*, at 64–65.

The Board also saw "a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue." *Id.*, at 65. And it thought that the public interest required rejection of the plate design because the contro-

versy surrounding the plate was so great that "the design could distract or disturb some drivers to the point of being unreasonably dangerous." *Ibid.*

At the same meeting, the Board approved a Buffalo Soldiers plate design by a 5-to-3 vote. Proceeds from fees paid by motorists who select that plate benefit the Buffalo Soldier National Museum in Houston, which is "dedicated primarily to preserving the legacy and honor of the African American soldier." Buffalo Soldier National Museum, online at http://www.buffalosoldiermuseum.com. "Buffalo Soldiers" is a nickname that was originally given to black soldiers in the Army's 10th Cavalry Regiment, which was formed after the Civil War, and the name was later used to describe other black soldiers. W. Leckie & S. Leckie, The Buffalo Soldiers: A Narrative of the Black Cavalry in the West 21, 26–27 (2003). The original Buffalo Soldiers fought with distinction in the Indian Wars, but the "Buffalo Soldiers" plate was opposed by some Native Americans. One leader commented that he felt "'the same way about the Buffalo Soldiers'" as African-Americans felt about the Confederate flag. Scharrer, Specialty License Plates Can Bring in Revenue, But Some Stir Up Controversy, Houston Chronicle, Nov. 26, 2011, p. B2. "'When we see the U. S. Cavalry uniform,'" he explained, "'we are forced to relive an American holocaust.'" *Ibid.*

II

A

Relying almost entirely on one precedent—*Pleasant Grove City* v. *Summum*, 555 U. S. 460—the Court holds that messages that private groups succeed in placing on Texas license plates are government messages. The Court badly misunderstands *Summum*.

In *Summum*, a private group claimed the right to erect a large stone monument in a small city park. *Id.*, at 464. The 2.5-acre park contained 15 permanent displays, 11 of which

had been donated by private parties. *Ibid.* The central question concerned the nature of the municipal government's conduct when it accepted privately donated monuments for placement in its park: Had the city created a forum for private speech, or had it accepted donated monuments that expressed a government message? We held that the monuments represented government speech, and we identified several important factors that led to this conclusion.

First, governments have long used monuments as a means of expressing a government message. As we put it, "[s]ince ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power." *Id.*, at 470. Here in the United States, important public monuments like the Statue of Liberty, the Washington Monument, and the Lincoln Memorial express principles that inspire and bind the Nation together. Thus, long experience has led the public to associate public monuments with government speech.

Second, there is no history of landowners allowing their property to be used by third parties as the site of large permanent monuments that do not express messages that the landowners wish to convey. See *id.*, at 471. While "[a] great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties," "cities and other jurisdictions take some care in accepting donated monuments" and select those that "conve[y] a government message." *Id.*, at 471–472. We were not presented in *Summum* with any examples of public parks that had been thrown open for private groups or individuals to put up whatever monuments they desired.

Third, spatial limitations played a prominent part in our analysis. See *id.*, at 478–479. "[P]ublic parks can accommodate only a limited number of permanent monuments," and consequently permanent monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Ibid.* Because

only a limited number of monuments can be built in any given space, governments do not allow their parks to be cluttered with monuments that do not serve a government purpose, a point well understood by those who visit parks and view the monuments they contain.

These characteristics, which rendered public monuments government speech in *Summum*, are not present in Texas's specialty plate program.

B

1

I begin with history. As we said in *Summum*, governments have used monuments since time immemorial to express important government messages, and there is no history of governments giving equal space to those wishing to express dissenting views. In 1775, when a large gilded equestrian statue of King George III dominated Bowling Green, a small park in lower Manhattan,[3] the colonial governor surely would not have permitted the construction on that land of a monument to the fallen at Lexington and Concord. When the United States accepted the Third French Republic's gift of the Statue of Liberty in 1877, see *id.*, at 477, Congress, it seems safe to say, would not have welcomed a gift of a Statue of Authoritarianism if one had been offered by another country. Nor is it likely that the National Park Service today would be receptive if private groups, pointing to the Lincoln Memorial, the Martin Luther King, Jr., Memorial, and the Vietnam Veterans Memorial on the National Mall, sought permission to put up monuments to Jefferson Davis, Orval Faubus, or the North Vietnamese Army. Governments have always used public monuments to express a government message, and members of the public understand this.

---

[3] The Statue That Was Made Into Bullets, N. Y. Times Magazine, July 21, 1901, p. 6.

The history of messages on license plates is quite different. After the beginning of motor vehicle registration in 1917, more than 70 years passed before the proliferation of specialty plates in Texas. It was not until the 1990's that motorists were allowed to choose from among 10 messages, such as "Read to Succeed" and "Keep Texas Beautiful." History, at 101.

Up to this point, the words on the Texas plates can be considered government speech. The messages were created by the State, and they plausibly promoted state programs.[4] But when, at some point within the last 20 years or so, the State began to allow private entities to secure plates conveying their own messages, Texas crossed the line.

The contrast between the history of public monuments, which have been used to convey government messages for centuries, and the Texas license plate program could not be starker.

In an attempt to gather historical support for its position, the Court relies on plates with the mottos or symbols of other States. As the Court notes, some of these were issued well before "The Lone Star State" made its debut in Texas in 1991. *Id.*, at 82. But this history is irrelevant for present purposes. Like the 1991 Texas plate, these out-of-state plates were created by the States that issued them, and motorists generally had no choice but to accept them. For example, the State of New Hampshire made it a crime to cover up the words "Live Free or Die" on its plates. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977).

The words and symbols on plates of this sort were and are government speech, but plates that are essentially commissioned by private entities (at a cost that exceeds $8,000) and that express a message chosen by those entities are very different—and quite new. Unlike in *Summum*, history here

[4] This opinion does not address whether the unique combination of letters and/or numbers assigned to each vehicle, even when selected by the motorist, is private speech.

does not suggest that the messages at issue are government speech.

2

The Texas specialty plate program also does not exhibit the "selective receptivity" present in *Summum*. 555 U. S., at 471. To the contrary, Texas's program is *not* selective by design. The Board's chairman, who is charged with approving designs, explained that the program's purpose is "to encourage private plates" in order to "generate additional revenue for the state." App. 58. And most of the time, the Board "base[s] [its] decisions on rules that primarily deal with reflectivity and readability." *Ibid.* A department brochure explains: "Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards." *Id.*, at 67.b.

Pressed to come up with any evidence that the State has exercised "selective receptivity," Texas (and the Court) rely primarily on sketchy information not contained in the record, specifically that the Board's predecessor (might have) rejected a "pro-life" plate and perhaps others on the ground that they contained messages that were offensive. See *ante*, at 212 (citing Reply Brief 10 and Tr. of Oral Arg. 49–51). But even if this happened, it shows only that the present case may not be the only one in which the State has exercised viewpoint discrimination.

Texas's only other (also extrarecord) evidence of selectivity concerns a proposed plate that was thought to create a threat to the fair enforcement of the State's motor vehicle laws. Reply Brief 9–10 (citing publicly available Transcript of Texas Department of Motor Vehicles Board Meeting, Aug. 9, 2012, p. 112, online at http://www.txdmv.gov/reports-and-data/doc_download/450-2012-tran-aug9). This proposed plate was a Texas DPS Troopers Foundation (Troopers) plate, proposed in 2012. The Board considered that proposed plate at an August 2012 meeting, at which it approved six other plate designs without discussion, but it rejected the

Troopers plate in a deadlocked vote due to apparent concern that the plate could give the impression that those displaying it would receive favored treatment from state troopers. *Id.*, at 109–112. The constitutionality of this Board action does not necessarily turn on whether approval of this plate would have made the message government speech. If, as I believe, the Texas specialty plate program created a limited public forum, private speech may be excluded if it is inconsistent with the purpose of the forum. *Rosenberger*, 515 U. S., at 829.

Thus, even if Texas's extrarecord information is taken into account, the picture here is different from that in *Summum*. Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some who viewed them.

The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. *Ante*, at 212–213. This is dangerous reasoning. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech. Many private speakers in a forum would welcome a sign of government approval. But in the realm of private speech, government regulation may not favor one viewpoint over another. *Rosenberger*, *supra*, at 828.

3

A final factor that was important in *Summum* was space. A park can accommodate only so many permanent monuments. Often large and made of stone, monuments can last for centuries and are difficult to move. License plates, on the other hand, are small, light, mobile, and designed to last

for only a relatively brief time. The only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too. Today Texas offers more than 350 varieties. In 10 years, might it be 3,500?

In sum, the Texas specialty plate program has none of the factors that were critical in *Summum*, and the Texas program exhibits a very important characteristic that was missing in that case: Individuals who want to display a Texas specialty plate, instead of the standard plate, must pay an increased annual registration fee. See http://www.dmv.org/tx-texas/license-plates.php. How many groups or individuals would clamor to pay $8,000 (the cost of the deposit required to create a new plate) in order to broadcast the government's message as opposed to their own? And if Texas really wants to speak out in support of, say, Iowa State University (but not the University of Iowa) or "Young Lawyers" (but not old ones), why must it be paid to say things that it really wants to say? The fees Texas collects pay for much more than merely the administration of the program.

States have not adopted specialty license plate programs like Texas's because they are now bursting with things they want to say on their license plates. Those programs were adopted because they bring in money. Texas makes public the revenue totals generated by its specialty plate program, and it is apparent that the program brings in many millions of dollars every year. See http://www.txdmv.gov/reports-and-data/doc_download/5050-specialty-plates-revenue-fy-1994-2014.

Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.

III

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i. e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Cf. *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107 (2001). Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. See *Rosenberger*, 515 U. S., at 829 (quoting *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985)). But that is exactly what Texas did here. The Board rejected Texas SCV's design, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." App. 64. These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint.

The Confederate battle flag is a controversial symbol. To the Texas SCV, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. See *id.*, at 15–16. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board's candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board's approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words "Choose Life," but the State of New York rejected such a plate because the message "'[is] so incredibly divisive,'" and the Second Circuit recently sustained that decision. *Children First Foundation, Inc.* v. *Fiala*, 790 F. 3d 328, 352 (2015). Texas allows a specialty plate honoring the Boy Scouts, but the group's refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.

The Board's decision cannot be saved by its suggestion that the plate, if allowed, "could distract or disturb some drivers to the point of being unreasonably dangerous." App. 65. This rationale cannot withstand strict scrutiny. Other States allow specialty plates with the Confederate Battle Flag,[5] and Texas has not pointed to evidence that these plates have led to incidents of road rage or accidents. Texas does not ban bumper stickers bearing the image of the Confederate battle flag. Nor does it ban any of the many other bumper stickers that convey political messages and other messages that are capable of exciting the ire of those who loathe the ideas they express. Cf. *Good News Club*, *supra*, at 111–112.

* * *

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government

---

[5] See http://www.dmv.virginia.gov/vehicles/#splates/category.asp?category=SCITTexas.

speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

[Appendix to opinion of ALITO, J., follows this page.]

APPENDIX TO OPINION OF ALITO, J.

Sample Texas Specialty Plates

All found at http://txdmv.gov/motorists/license-plates/specialty-license-plates

Syllabus

OHIO *v.* CLARK

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 13–1352. Argued March 2, 2015—Decided June 18, 2015

Respondent Darius Clark sent his girlfriend away to engage in prostitution while he cared for her 3-year-old son L. P. and 18-month-old daughter A. T. When L. P.'s preschool teachers noticed marks on his body, he identified Clark as his abuser. Clark was subsequently tried on multiple counts related to the abuse of both children. At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. The trial court denied Clark's motion to exclude the statements under the Sixth Amendment's Confrontation Clause. A jury convicted Clark on all but one count. The state appellate court reversed the conviction on Confrontation Clause grounds, and the Supreme Court of Ohio affirmed.

Held: The introduction of L. P.'s statements at trial did not violate the Confrontation Clause. Pp. 243–251.

(a) This Court's decision in *Crawford* v. *Washington*, 541 U. S. 36, 54, held that the Confrontation Clause generally prohibits the introduction of "testimonial" statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U. S. 344, 358. In making that "primary purpose" determination, courts must consider "all of the relevant circumstances." *Id.*, at 369. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at 359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The Court has recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359; *Crawford*, *supra*, at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause. Pp. 243–246.

(b) Considering all the relevant circumstances, L. P.'s statements were not testimonial. L. P.'s statements were not made with the primary purpose of creating evidence for Clark's prosecution. They oc-

Syllabus

curred in the context of an ongoing emergency involving suspected child abuse. L. P.'s teachers asked questions aimed at identifying and ending a threat. They did not inform the child that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation was informal and spontaneous. L. P.'s age further confirms that the statements in question were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. As a historical matter, moreover, there is strong evidence that statements made in circumstances like these were regularly admitted at common law. Finally, although statements to individuals other than law enforcement officers are not categorically outside the Sixth Amendment's reach, the fact that L. P. was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers. Pp. 246–249.

(c) Clark's arguments to the contrary are unpersuasive. Mandatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. And this Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial. Pp. 249–251.

137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N. E. 2d 592, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 251. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 254.

Matthew E. Meyer argued the cause for petitioner. With him on the briefs were *Michael DeWine*, Attorney General of Ohio, *Eric E. Murphy*, State Solicitor, *Samuel Peterson*, Deputy Solicitor, *Timothy J. McGinty*, and *Katherine E. Mulin*.

Counsel

Ilana H. Eisenstein argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *David M. Lieberman*.

Jeffrey L. Fisher argued the cause for respondent. With him on the brief were *Brian Wolfman*, *Erika Cunliffe*, *Jeffrey M. Gamso*, and *Donald B. Ayer*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of New Mexico et al. by *Gary K. King*, Attorney General of New Mexico, *Joel Jacobsen*, Assistant Attorney General, and *Kay Chopard Cohen*; for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Noah G. Purcell*, Solicitor General, *Anne E. Egeler*, Deputy Solicitor General, and *Dan Schweitzer*, by *John Hoffman*, Acting Attorney General of New Jersey, by *Eugene A. Adams*, Interim Attorney General of the District of Columbia, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Kamala D. Harris* of California, *John William Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pam Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Buddy Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Joseph A. Foster* of New Hampshire, *Mr. King* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Greg Abbott* of Texas, *William H. Sorrell* of Vermont, *Patrick Morrisey* of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; for the American Professional Society on the Abuse of Children by *Daniel B. Levin* and *Jeremy A. Lawrence*; for Child Justice, Inc., by *Elizabeth L. Ritter*, *Victoria A. Bruno*, and *Paul D. Schmitt*; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; for the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) by *John S. Moot*, *Boris Bershteyn*, *Daniele Schiffman*, and *Joan S. Meier*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Lisa Powell*,

JUSTICE ALITO delivered the opinion of the Court.

Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town. A day later, teachers discovered red marks on her 3-year-old son, and the boy identified Clark as his abuser. The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined. Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial.

I

Darius Clark, who went by the nickname "Dee," lived in Cleveland, Ohio, with his girlfriend, T. T., and her two children: L. P., a 3-year-old boy, and A. T., an 18-month-old girl.[1] Clark was also T. T.'s pimp, and he would regularly send her on trips to Washington, D. C., to work as a prostitute. In March 2010, T. T. went on one such trip, and she left the children in Clark's care.

David J. Strom, and *Francisco M. Negrón, Jr.*; and for the Ohio Prosecuting Attorneys Association et al. by *Douglas Dumolt*.

Briefs of *amici curiae* urging affirmance were filed for Arizona Attorneys for Criminal Justice et al. by *Joseph N. Roth*, *Kathleen E. Brody*, *David J. Euchner*, *Vicki H. Hutchinson*, *John B. Whiston*, *Emily Hughes*, and *Robert Rigg*; for the Family Defense Center et al. by *Tacy F. Flint*; for the Innocence Network by *Felicia H. Ellsworth*; for the National Association of Criminal Defense Lawyers by *Stephen A. Miller* and *David M. Porter*; for Bernadette M. Bolan et al. by *Norman M. Garland* and *Michael M. Epstein*, both *pro se*; and for Richard D. Friedman et al. by *Mr. Friedman*, *pro se*.

A brief of *amici curiae* was filed for Fern L. Nesson et al. by *Ms. Nesson* and *Charles R. Nesson*, both *pro se*.

[1] Like the Ohio courts, we identify Clark's victims and their mother by their initials.

The next day, Clark took L. P. to preschool. In the lunchroom, one of L. P.'s teachers, Ramona Whitley, observed that L. P.'s left eye appeared bloodshot. She asked him "'[w]hat happened,'" and he initially said nothing. 137 Ohio St. 3d 346, 347, 2013-Ohio-4731, 999 N. E. 2d 592, 594. Eventually, however, he told the teacher that he "'fell.'" *Ibid.* When they moved into the brighter lights of a classroom, Whitley noticed "'[r]ed marks, like whips of some sort,'" on L. P.'s face. *Ibid.* She notified the lead teacher, Debra Jones, who asked L. P., "'Who did this? What happened to you?'" *Id.*, at 348, 999 N. E. 2d, at 595. According to Jones, L. P. "'seemed kind of bewildered'" and "'said something like, Dee, Dee.'" *Ibid.* Jones asked L. P. whether Dee is "big or little," to which L. P. responded that "Dee is big." App. 60, 64. Jones then brought L. P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse.

When Clark later arrived at the school, he denied responsibility for the injuries and quickly left with L. P. The next day, a social worker found the children at Clark's mother's house and took them to a hospital, where a physician discovered additional injuries suggesting child abuse. L. P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A. T. had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair.

A grand jury indicted Clark on five counts of felonious assault (four related to A. T. and one related to L. P.), two counts of endangering children (one for each child), and two counts of domestic violence (one for each child). At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. Under Ohio law, children younger than 10 years old are incompetent to testify if they "appear incapable of receiving just impres-

sions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio Rule Evid. 601(A) (Lexis 2010). After conducting a hearing, the trial court concluded that L. P. was not competent to testify. But under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L. P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

Clark moved to exclude testimony about L. P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L. P.'s responses were not testimonial statements covered by the Sixth Amendment. The jury found Clark guilty on all counts except for one assault count related to A. T., and it sentenced him to 28 years' imprisonment. Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L. P.'s out-of-court statements violated the Confrontation Clause.

In a 4-to-3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L. P.'s statements qualified as testimonial because the primary purpose of the teachers' questioning "was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution." 137 Ohio St. 3d, at 350, 999 N. E. 2d, at 597. The court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. See *id.*, at 349–350, 999 N. E. 2d, at 596–597. In the court's view, the teachers acted as agents of the State under the mandatory reporting law and "sought facts concerning past criminal activity to identify the person responsible, eliciting statements that 'are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.'" *Id.*, at 355, 999

N. E. 2d, at 600 (quoting *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 310–311 (2009); some internal quotation marks omitted).

We granted certiorari, 573 U. S. 991 (2014), and we now reverse.

II

A

The Sixth Amendment's Confrontation Clause, which is binding on the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), we interpreted the Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate 'indicia of reliability.'" Such indicia are present, we held, if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Ibid.*

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), we adopted a different approach. We explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and we defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*, at 51 (internal quotation marks and alteration omitted). The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.*, at 54. Applying that definition to the facts in *Crawford*, we held that statements by a witness during police questioning at the station house were testimonial and thus could not be admitted. But our decision in *Crawford* did not offer an exhaustive definition of "testimonial" statements. Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a pre-

liminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*, at 68.

Our more recent cases have labored to flesh out what it means for a statement to be "testimonial." In *Davis* v. *Washington* and *Hammon* v. *Indiana*, 547 U. S. 813 (2006), which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse. The victim in *Davis* made statements to a 911 emergency operator during and shortly after her boyfriend's violent attack. In *Hammon*, the victim, after being isolated from her abusive husband, made statements to police that were memorialized in a "'battery affidavit.'" *Id.*, at 820.

We held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not. Announcing what has come to be known as the "primary purpose" test, we explained: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*, at 822. Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause. See *id.*, at 823, n. 2.

In *Michigan* v. *Bryant*, 562 U. S. 344 (2011), we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." *Id.*, at 369. And we reiterated our view in *Davis* that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." 562 U. S., at 358. At the same

time, we noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.*, at 374. Instead, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*, at 366.

One additional factor is "the informality of the situation and the interrogation." *Id.*, at 377. A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. 562 U. S., at 366, 377. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*, at 358–359. In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.*, at 358. Applying these principles in *Bryant*, we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same analysis applies to statements made to individuals other than the police. See *id.*, at 357, n. 3.

Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at

359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359 (2008); *Crawford*, 541 U. S., at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

B

In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L. P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

L. P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When L. P.'s teachers noticed his injuries, they rightly became worried that the 3-year-old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L. P. to his guardian at the end of the day, they needed to determine who might be abusing the child.[2]

[2] In fact, the teachers and a social worker who had come to the school *were* reluctant to release L. P. into Clark's care after the boy identified Clark as his abuser. But after a brief "stare-down" with the social

Thus, the immediate concern was to protect a vulnerable child who needed help. Our holding in *Bryant* is instructive. As in *Bryant*, the emergency in this case was ongoing, and the circumstances were not entirely clear. L. P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L. P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon*, where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.

There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L. P. At no point did the teachers inform L. P. that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L. P. and his teachers was informal and spontaneous. The teachers asked L. P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized stationhouse questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

L. P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young

---

worker, Clark bolted out the door with L. P., and social services were not able to locate the children until the next day. App. 92–102, 150–151.

children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3-year-old child in L. P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

As a historical matter, moreover, there is strong evidence that statements made in circumstances similar to those facing L. P. and his teachers were admissible at common law. See Lyon & LaMagna, The History of Children's Hearsay: From Old Bailey to Post-*Davis*, 82 Ind. L. J. 1029, 1030 (2007); see also *id.*, at 1041–1044 (examining child rape cases from 1687 to 1788); J. Langbein, The Origins of Adversary Criminal Trial 239 (2003) ("The Old Bailey" court in 18th-century London "tolerated flagrant hearsay in rape prosecutions involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath"). And when 18th-century courts excluded statements of this sort, see, *e. g.*, *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K. B. 1779), they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. See Lyon & LaMagna, *supra*, at 1053–1054. It is thus highly doubtful that statements like L. P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence

that was regularly admitted in criminal cases at the time of the founding. Certainly, the statements in this case are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U. S., at 50; see also *Bryant*, 562 U. S., at 358.

Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L. P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. See *id.*, at 369. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. See, *e. g.*, *Giles*, 554 U. S., at 376. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L. P.'s statements at trial.

III

Clark's efforts to avoid this conclusion are all off base. He emphasizes Ohio's mandatory reporting obligations, in an attempt to equate L. P.'s teachers with the police and their caring questions with official interrogations. But the comparison is inapt. The teachers' pressing concern was to protect L. P. and remove him from harm's way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. The statements at issue in *Davis* and *Bryant* supported the defendants' convictions, and the police always have an obligation to ask questions to resolve ongoing emergencies. Yet, we held in those cases that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. Thus, Clark is also wrong to suggest that admitting L. P.'s statements would be fundamentally unfair given that Ohio law does not allow incompetent children to testify. In any Confrontation Clause case, the individual who provided the out-of-court statement is not available as an in-court witness, but the testimony is admissible under an exception to the hearsay rules and is probative of the defendant's guilt. The fact that the witness is unavailable because of a different rule of evidence does not change our analysis.

Finally, Clark asks us to shift our focus from the context of L. P.'s conversation with his teachers to the jury's perception of those statements. Because, in his view, the "jury treated L. P.'s accusation as the functional equivalent of testimony," Clark argues that we must prohibit its introduction. Brief for Respondent 42. Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. The logic of this argument, moreover, would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial. The prosecution is unlikely to offer out-of-court statements unless they tend to support the defendant's guilt, and all such statements could be viewed as a substitute for in-court testimony. We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the "primary purpose of creating an out-of-court substitute

for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial.

IV

We reverse the judgment of the Supreme Court of Ohio and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE GINSBURG joins, concurring in the judgment.

I agree with the Court's holding, and with its refusal to decide two questions quite unnecessary to that holding: what effect Ohio's mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes, and whether a more permissive Confrontation Clause test—one less likely to hold the statements testimonial—should apply to interrogations by private actors. The statements here would not be testimonial under the usual test applicable to informal police interrogation.

L. P.'s primary purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose. At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent. Lyon & LaMagna, The History of Children's Hearsay: From Old Bailey to Post-*Davis*, 82 Ind. L. J. 1029, 1030–1031 (2007). The inconsistency of L. P.'s answers—making him incompetent to testify here—is hardly unusual for a child of his age. And the circumstances of L. P.'s statements objectively indicate that even if he could, as an abstract matter, form such a purpose, he did not. Nor did the teachers have the primary purpose of establishing facts for later prosecution. Instead, they sought to ensure that they did not deliver an abused child

back into imminent harm. Nor did the conversation have the requisite solemnity necessary for testimonial statements. A 3-year-old was asked questions by his teachers at school. That is far from the surroundings adequate to impress upon a declarant the importance of what he is testifying to.

That is all that is necessary to decide the case, and all that today's judgment holds.

I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford* v. *Washington*, 541 U. S. 36 (2004). For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore "'indicia of reliability.'" *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). Prosecutors, past and present, love that flabby test. *Crawford* sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by *witnesses—i. e.*, statements that were *testimonial*. 541 U. S., at 51. We defined testimony as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" *ibid.*—in the context of the Confrontation Clause, a fact "potentially relevant to later criminal prosecution," *Davis* v. *Washington*, 547 U. S. 813, 822 (2006).

Crawford remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than "adopt[ing] a different approach," *ante*, at 243—as though *Crawford* is only a matter of twiddle-dum twiddle-dee preference, and the old, pre-*Crawford* "approach" remains available? The author unabashedly displays his hostility to *Crawford* and its progeny, perhaps aggravated by inability to muster the votes to overrule them. *Crawford* "does not rank on the [author of the opinion's] top-ten list of favorite precedents—and . . . the [author] could not restrain [himself] from saying (and saying and saying) so." *Harris* v. *Quinn*, 573 U. S. 616, 671 (2014) (KAGAN, J., dissenting).

But snide detractions do no harm; they are just indications of motive. Dicta on legal points, however, can do harm, because though they are not binding they can mislead. Take, for example, the opinion's statement that the primary-purpose test is merely *one* of several heretofore unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. *Ante*, at 246. That is absolutely false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not*. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

The opinion asserts that future defendants, and future Confrontation Clause majorities, must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding." *Ante*, at 248–249. This dictum gets the burden precisely backwards—which is of course precisely the idea. Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case without unavailability of the witness and a previous opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence *over* this bar to prove a long-established practice of introducing *specific* kinds of evidence, such as dying declarations, see *Crawford*, *supra*, at 56, n. 6, for which cross-examination was not typically necessary. A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio* v. *Roberts*.

But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors; and that dicta, even calculated dicta, are nothing but dicta. They are enough, however, combined with the peculiar phenomenon of a Supreme Court opinion's aggressive hostility to precedent that it purports to be applying, to prevent my joining the writing for the Court. I concur only in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Ohio mandatory reporters are not agents of law enforcement, that statements made to private persons or by very young children will rarely implicate the Confrontation Clause, and that the admission of the statements at issue here did not implicate that constitutional provision. I nonetheless cannot join the majority's analysis. In the decade since we first sought to return to the original meaning of the Confrontation Clause, see *Crawford* v. *Washington*, 541 U. S. 36 (2004), we have carefully reserved consideration of that Clause's application to statements made to private persons for a case in which it was squarely presented. See, *e. g., Michigan* v. *Bryant*, 562 U. S. 344, 357, n. 3 (2011).

This is that case; yet the majority does not offer clear guidance on the subject, declaring only that "the primary purpose test is a necessary, but not always sufficient, condition" for a statement to fall within the scope of the Confrontation Clause. *Ante,* at 246. The primary purpose test, however, is just as much "an exercise in fiction . . . disconnected from history" for statements made to private persons as it is for statements made to agents of law enforcement, if not more so. *Bryant*, *supra,* at 379 (THOMAS, J., concurring in judgment) (internal quotation marks omitted). I would not apply it here. Nor would I leave the resolution of this important question in doubt.

Instead, I would use the same test for statements to private persons that I have employed for statements to agents

of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial. See *Crawford*, *supra*, at 51; *Davis* v. *Washington*, 547 U. S. 813, 836–837 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). This test is grounded in the history of the common-law right to confrontation, which "developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.*, at 835 (internal quotation marks omitted). Reading the Confrontation Clause in light of this history, we have interpreted the accused's right to confront "the witnesses against him," U. S. Const., Amdt. 6, as the right to confront those who "bear testimony" against him, *Crawford*, 541 U. S., at 51 (relying on the ordinary meaning of "witness"). And because "[t]estimony . . . is . . . a solemn declaration or affirmation made for the purpose of establishing or proving some fact," *ibid.* (internal quotation marks and brackets omitted), an analysis of statements under the Clause must turn in part on their solemnity, *Davis*, *supra*, at 836 (opinion of THOMAS, J.).

I have identified several categories of extrajudicial statements that bear sufficient indicia of solemnity to fall within the original meaning of testimony. Statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" easily qualify. *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (THOMAS, J., concurring in part and concurring in judgment). And statements not contained in such materials may still qualify if they were obtained in "a formalized dialogue"; after the issuance of the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966); while in police custody; or in an attempt to evade confrontation. *Davis*, *supra*, at 840 (opinion of THOMAS, J.); see also *Bryant*, 562 U. S., at 379 (same) (summarizing and applying test). That several of these factors

seem inherently inapplicable to statements made to private persons does not mean that the test is unsuitable for analyzing such statements. All it means is that statements made to private persons rarely resemble the historical abuses that the common-law right to confrontation developed to address, and it is those practices that the test is designed to identify.

Here, L. P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial. They were neither contained in formalized testimonial materials nor obtained as the result of a formalized dialogue initiated by police. Instead, they were elicited during questioning by L. P.'s teachers at his preschool. Nor is there any indication that L. P.'s statements were offered at trial to evade confrontation. To the contrary, the record suggests that the prosecution would have produced L. P. to testify had he been deemed competent to do so. His statements bear no "resemblance to the historical practices that the Confrontation Clause aimed to eliminate." *Ibid.* The admission of L. P.'s extrajudicial statements thus does not implicate the Confrontation Clause.

I respectfully concur in the judgment.

Syllabus

DAVIS, ACTING WARDEN *v.* AYALA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–1428. Argued March 3, 2015—Decided June 18, 2015

During jury selection in respondent Ayala's murder trial, Ayala, who is Hispanic, objected that seven of the prosecution's peremptory challenges were impermissibly race based under *Batson* v. *Kentucky*, 476 U. S. 79. The judge permitted the prosecution to disclose its reasons for the strikes outside the presence of the defense and concluded that the prosecution had valid, race-neutral reasons for the strikes. Ayala was eventually convicted and sentenced to death. On appeal, the California Supreme Court analyzed Ayala's challenge under both *Batson* and its state-law analogue, concluding that it was error, as a matter of state law, to exclude Ayala from the hearings. The court held, however, that the error was harmless under state law and that, if a federal error occurred, it too was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U. S. 18. Ayala subsequently pressed his claims in federal court. There, the District Court held that even if the *ex parte* proceedings violated federal law, the state court's harmlessness finding could not be overturned because it was not contrary to or an unreasonable application of clearly established federal law under 28 U. S. C. § 2254(d). A divided panel of the Ninth Circuit disagreed and granted Ayala habeas relief. The panel majority held that the *ex parte* proceedings violated Ayala's federal constitutional rights and that the error was not harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619, as to at least three of the seven prospective jurors.

Held: Any federal constitutional error that may have occurred by excluding Ayala's attorney from part of the *Batson* hearing was harmless. Pp. 267–286.

(a) Even assuming that Ayala's federal rights were violated, he is entitled to habeas relief only if the prosecution cannot demonstrate harmlessness. *Glebe* v. *Frost*, 574 U. S. 21, 23. Under *Brecht*, federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" 507 U. S., at 637. Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. The *Brecht* standard subsumes the requirements that § 2254(d) imposes when a federal habeas petitioner contests

a state court's determination that a constitutional error was harmless under *Chapman*. *Fry* v. *Pliler*, 551 U. S. 112, 120. But *Brecht* did not abrogate the limitation on federal habeas relief that the Antiterrorism and Effective Death Penalty Act of 1996 plainly sets out. There is no dispute that the California Supreme Court held that any federal error was harmless under *Chapman*, and this decision was an "adjudication on the merits" of Ayala's claim. Accordingly, a federal court cannot grant Ayala relief unless the state court's rejection of his claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts. Pp. 267–270.

(b) Any federal constitutional error was harmless with respect to all seven prospective jurors. Pp. 270–286.

(1) The prosecution stated that it struck Olanders D., an African-American man, because it was concerned that he could not impose the death penalty and because of the poor quality of his responses. As the trial court and State Supreme Court found, the record amply supports the prosecution's concerns, and Ayala cannot establish that the *ex parte* hearing prejudiced him. The Ninth Circuit misunderstood the role of a federal court in a habeas case. That role is not to conduct *de novo* review of factual findings and substitute the federal court's own opinions for the determination made on the scene by the trial judge. Pp. 271–276.

(2) The prosecution stated that it struck Gerardo O., a Hispanic man, because he had a poor grasp of English, his answers suggested an unwillingness to impose the death penalty, and he did not appear to get along with other jurors. Each of these reasons was amply supported by the record, and there is no basis for finding that the absence of defense counsel affected the trial judge's evaluation of the strike. Ayala cannot establish that the *ex parte* hearing actually prejudiced him or that no fairminded jurist could agree with the state court's application of *Chapman*. Once again, the Ninth Circuit's decision was based on a misapplication of basic rules regarding harmless error. The inquiry is not whether the federal habeas court could definitively say that the defense could make no winning arguments, but whether the evidence in the record raised "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal* v. *McAninch*, 513 U. S. 432, 436. That standard was not met in this case. Pp. 276–281.

(3) The prosecution stated that it struck Robert M., a Hispanic man, because it was concerned that he could not impose the death penalty and because he had followed a controversial murder trial. Not only was the Ninth Circuit incorrect to suppose that the presence of Ayala's counsel at the hearing would have made a difference in the trial court's

evaluation of the strike, but the Ninth Circuit failed to mention that defense counsel specifically addressed the issue during *voir dire* and reminded the judge that Robert M. also made several statements favorable to the death penalty. Thus, the trial judge heard counsel's arguments and concluded that the record supplied a legitimate basis for the prosecution's concern. That defense counsel did not have the opportunity to repeat that argument does not create grave doubt about whether the trial court would have decided the issue differently. Pp. 281–283.

(4) With regard to Ayala's *Batson* objection about the four remaining prospective jurors who were struck, he does not come close to establishing "actual prejudice" under *Brecht* or that no fairminded jurist could agree with the California Supreme Court's decision that excluding counsel was harmless. Pp. 283–286.

756 F. 3d 656, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., *post*, p. 286, and THOMAS, J., *post*, p. 290, filed concurring opinions. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 290.

Robin Urbanski, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Kamala D. Harris*, Attorney General, *Edward C. DuMont*, Solicitor General, *Gerald A. Engler*, Chief Assistant Attorney General, *Julie L. Garland*, Senior Assistant Attorney General, *Joshua A. Klein*, Deputy Solicitor General, and *Holly D. Wilkens*, Supervising Deputy Attorney General.

Anthony J. Dain argued the cause for respondent. With him on the brief was *Robin L. Phillips*.

JUSTICE ALITO delivered the opinion of the Court.

A quarter-century after a California jury convicted Hector Ayala of triple murder and sentenced him to death, the Court of Appeals for the Ninth Circuit granted Ayala's application for a writ of habeas corpus and ordered the State to retry or release him. The Ninth Circuit's decision was based on the procedure used by the trial judge in ruling on Ayala's objections under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), to some of the prosecution's peremptory challenges of

prospective jurors. The trial judge allowed the prosecutor to explain the basis for those strikes outside the presence of the defense so as not to disclose trial strategy. On direct appeal, the California Supreme Court found that if this procedure violated any federal constitutional right, the error was harmless beyond a reasonable doubt. The Ninth Circuit, however, held that the error was harmful.

The Ninth Circuit's decision was based on the misapplication of basic rules regarding harmless error. Assuming without deciding that a federal constitutional error occurred, the error was harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d).

I

A

Ayala's conviction resulted from the attempted robbery of an automobile body shop in San Diego, California, in April 1985. The prosecution charged Ayala with three counts of murder, one count of attempted murder, one count of robbery, and three counts of attempted robbery. The prosecution also announced that it would seek the death penalty on the murder counts.

Jury selection lasted more than three months, and during this time the court and the parties interviewed the prospective jurors and then called back a subset for general *voir dire*. As part of the jury selection process, more than 200 potential jurors completed a 77-question, 17-page questionnaire. Potential jurors were then questioned in court regarding their ability to follow the law. Jurors who were not dismissed for cause were called back in groups for *voir dire*, and the parties exercised their peremptory challenges.

Each side was allowed 20 peremptories, and the prosecution used 18 of its allotment. It used seven peremptories to strike all of the African-Americans and Hispanics who were

available for service. Ayala, who is Hispanic, raised *Batson* objections to those challenges.

Ayala first objected after the prosecution peremptorily challenged two African-Americans, Olanders D. and Galileo S. The trial judge stated that these two strikes failed to establish a prima facie case of racial discrimination, but he nevertheless required the prosecution to reveal the reasons for the strikes. The prosecutor asked to do this outside the presence of the defense so as not to disclose trial strategy, and over Ayala's objection, the judge granted the request. The prosecution then offered several reasons for striking Olanders D., including uncertainty about his willingness to impose the death penalty. The prosecution stated that it dismissed Galileo S. primarily because he had been arrested numerous times and had not informed the court about all his prior arrests. After hearing and evaluating these explanations, the judge concluded that the prosecution had valid, race-neutral reasons for these strikes.

Ayala again raised *Batson* objections when the prosecution used peremptory challenges to dismiss two Hispanics, Gerardo O. and Luis M. As before, the judge found that the defense had not made out a prima facie case, but ordered the prosecution to reveal the reasons for the strikes. This was again done *ex parte*, but this time the defense did not expressly object. The prosecution explained that it had challenged Gerardo O. and Luis M. in part because it was unsure that they could impose the death penalty. The prosecution also emphasized that Gerardo O.'s English proficiency was limited and that Luis M. had independently investigated the case. The trial court concluded a second time that the prosecution had legitimate race-neutral reasons for the strikes.

Ayala raised *Batson* objections for a third and final time when the prosecution challenged Robert M., who was Hispanic; George S., whose ethnicity was disputed; and Barbara S., who was African-American. At this point, the trial court

agreed that Ayala had made a prima facie *Batson* showing. Ayala's counsel argued that the strikes were in fact based on race. Ayala's counsel contended that the challenged jurors were "not significantly different from the white jurors that the prosecution ha[d] chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence." App. 306. Ayala's counsel then reviewed the questionnaire answers and *voir dire* testimony of Barbara S. and Robert M., as well as the statements made by three of the prospective jurors who had been the subject of the prior *Batson* objections, Galileo S., Gerardo O., and Luis M. Counsel argued that their answers showed that they could impose the death penalty. The trial court stated that it would hear the prosecution's response outside the presence of the jury, and Ayala once more did not object to that ruling. The prosecution then explained that it had dismissed the prospective jurors in question for several race-neutral reasons, including uncertainty that Robert M., George S., or Barbara S. would be open to imposing the death penalty. The prosecution also emphasized (among other points) that Robert M. had followed a controversial trial, that George S. had been a holdout on a prior jury, and that Barbara S. had given the impression during *voir dire* that she was under the influence of drugs. The trial court concluded, for a third time, that the prosecution's peremptory challenges were based on race-neutral criteria.

In August 1989, the jury convicted Ayala of all the charges except one of the three attempted robberies. With respect to the three murder convictions, the jury found two special circumstances: Ayala committed multiple murders, and he killed during the course of an attempted robbery. The jury returned a verdict of death on all three murder counts, and the trial court entered judgment consistent with that verdict.

B

Ayala appealed his conviction and sentence, and counsel was appointed to represent him in January 1993. Between 1993 and 1999, Ayala filed 20 applications for an extension of time, 11 of which requested additional time to file his opening brief. After the California Supreme Court eventually ruled that no further extensions would be granted, Ayala filed his opening brief in April 1998, nine years after he was convicted. The State filed its brief in September 1998, and Ayala then asked for four extensions of time to file his reply brief. After the court declared that it would grant him no further extensions, he filed his reply brief in May 1999.

In August 2000, the California Supreme Court affirmed Ayala's conviction and death sentence. *People* v. *Ayala*, 24 Cal. 4th 243, 6 P. 3d 193. In an opinion joined by five justices, the State Supreme Court rejected Ayala's contention that the trial court committed reversible error by excluding the defense from part of the *Batson* hearing. The court understood Ayala to challenge the peremptory strikes under both *Batson* and its state-law analogue, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978). The court first concluded that the prosecution had not offered matters of trial strategy at the *ex parte* hearing and that, "as a matter of state law, it was [error]" to bar Ayala's attorney from the hearing. 24 Cal. 4th, at 262, 6 P. 3d, at 203.

Turning to the question of prejudice, the court stated:

> "We have concluded that error occurred under state law, and we have noted [the suggestion in *United States* v. *Thompson*, 827 F. 2d 1254 (CA9 1987),] that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People* v. *Watson* (1956) 46 Cal. 2d 818, 836), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U. S. 18,

> 24) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons." *Id.*, at 264, 6 P. 3d, at 204.

The court then reviewed the prosecution's reasons for striking the seven prospective jurors and found that "[o]n this well-developed record, . . . we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." *Id.*, at 268, 6 P. 3d, at 207. The court concluded that the record supported the trial judge's implicit determination that the prosecution's justifications were not fabricated and were instead "grounded in fact." *Id.*, at 267, 6 P. 3d, at 206. And the court emphasized that the "trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." *Id.*, at 266–267, 6 P. 3d, at 206.

The California Supreme Court also rejected Ayala's argument that his conviction should be vacated because most of the questionnaires filled out by prospective jurors who did not serve had been lost at some point during the decade that had passed since the end of the trial. The court wrote that "the record is sufficiently complete for us to be able to conclude that [the prospective jurors who were the subject of the contested peremptories] were not challenged and excused on the basis of forbidden group bias." *Id.*, at 270, 6 P. 3d, at 208. And even if the loss of the questionnaires was error under federal or state law, the court held, the error was harmless under *Chapman* v. *California*, 386 U. S. 18 (1967), and its state-law analogue. Two justices of the State Supreme Court dissented. We then denied certiorari. *Ayala* v. *California*, 532 U. S. 1029 (2001).

C

After the California Supreme Court summarily denied a habeas petition, Ayala turned to federal court. He filed his

initial federal habeas petition in 2002, but then went back to state court to exhaust several claims. In December 2004, he filed the operative federal petition and argued, among other things, that the *ex parte* hearings and loss of the questionnaires violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

In 2006, the District Court denied Ayala relief on those claims. The District Court read the decision of the California Supreme Court to mean that the state court had not decided whether the *ex parte* proceedings violated federal law, and the District Court expressed doubt "whether the trial court's procedure was constitutionally defective as a matter of clearly established Federal law." App. to Pet. for Cert. 145a. But even if such a violation occurred, the District Court held, the state court's finding of harmlessness was not contrary to or an unreasonable application of clearly established law and thus could not be overturned under AEDPA. The District Court also rejected Ayala's argument about the lost questionnaires, concluding that, even without them, the record was sufficient to resolve Ayala's other claims.

In 2013, a divided panel of the Ninth Circuit granted Ayala federal habeas corpus relief and required California either to release or retry him. *Ayala* v. *Wong*, 756 F. 3d 656 (2014). Because Ayala's federal petition is subject to the requirements of AEDPA, the panel majority began its analysis by inquiring whether the state court had adjudicated Ayala's claims on the merits. Applying *de novo* review,[1] the panel held that the *ex parte* proceedings violated the Federal Constitution, and that the loss of the questionnaires violated Ayala's federal due process rights if that loss deprived him of "the ability to meaningfully appeal the denial of his *Batson* claim." *Id.*, at 671. The panel folded this inquiry into its

[1] The panel decided this question *de novo* because it concluded that the California Supreme Court either did not decide whether the *ex parte* proceedings violated the Federal Constitution or silently decided that question in Ayala's favor. 756 F. 3d, at 666–670.

analysis of the question whether the error regarding the *ex parte* proceedings was harmless.

Turning to the question of harmlessness, the panel identified the applicable standard of review as that set out in *Brecht* and added: "We apply the *Brecht* test without regard for the state court's harmlessness determination." 756 F. 3d, at 674 (internal quotation marks omitted).[2] The panel used the following complicated formulation to express its understanding of *Brecht*'s application to Ayala's claims: "If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ." 756 F. 3d, at 676. Applying this test, the panel majority found that the error was not harmless, at least with respect to three of the seven prospective jurors. The panel asserted that the absence of Ayala and his counsel had interfered with the trial court's ability to evaluate the prosecution's proffered justifications for those strikes and had impeded appellate review, and that the loss of the questionnaires had compounded this impairment.

Judge Callahan dissented. She explained that the California Supreme Court's decision that any federal error was harmless constituted a merits adjudication of Ayala's federal claims. She then reviewed the prosecution's explanations for its contested peremptory challenges and concluded that federal habeas relief was barred because "fairminded jurists can concur in the California Supreme Court's determination of harmless error." *Id.*, at 706.

The Ninth Circuit denied rehearing en banc, but Judge Ikuta wrote a dissent from denial that was joined by seven other judges. Like Judge Callahan, Judge Ikuta concluded

---

[2] In a footnote, however, the panel stated: "In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense." *Id.*, at 674, n. 13.

that the California Supreme Court adjudicated the merits of Ayala's federal claims. Instead of the panel's "de novo review of the record that piles speculation upon speculation," she would have found that the state court's harmlessness determination was not an unreasonable application of *Chapman*. 756 F. 3d, at 723.

We granted certiorari. 574 U. S. 958 (2014).

II

Ayala contends that his federal constitutional rights were violated when the trial court heard the prosecution's justifications for its strikes outside the presence of the defense, but we find it unnecessary to decide that question. We assume for the sake of argument that Ayala's federal rights were violated, but that does not necessarily mean that he is entitled to habeas relief. In the absence of "the rare type of error" that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness. *Glebe* v. *Frost*, 574 U. S. 21, 23 (2014) (*per curiam*). The Ninth Circuit did not hold—and Ayala does not now contend—that the error here falls into that narrow category, and therefore Ayala is entitled to relief only if the error was not harmless.

The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman*, 386 U. S. 18: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24.

In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U. S., at 637 (quoting *United States* v. *Lane*, 474 U. S. 438, 449 (1986)). Under this test, relief is proper only

if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal* v. *McAninch*, 513 U. S. 432, 436 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht*, *supra*, at 637 (internal quotation marks omitted). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon* v. *Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*).

Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. In *Fry* v. *Pliler*, 551 U. S. 112, 120 (2007), we held that the *Brecht* standard "subsumes" the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*. The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out. While a federal habeas court need not "formal[ly]" apply both *Brecht* and "AEDPA/*Chapman*," AEDPA nevertheless "sets forth a precondition to the grant of habeas relief." *Fry*, *supra*, at 119–120.

Under AEDPA, 28 U. S. C. § 2254(d):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

lished Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Section 2254(d) thus demands an inquiry into whether a prisoner's "claim" has been "adjudicated on the merits" in state court; if it has, AEDPA's highly deferential standards kick in. *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011).

At issue here is Ayala's claim that the *ex parte* portion of the *Batson* hearings violated the Federal Constitution. There is no dispute that the California Supreme Court held that any federal error was harmless beyond a reasonable doubt under *Chapman*, and this decision undoubtedly constitutes an adjudication of Ayala's constitutional claim "on the merits." See, *e. g.*, *Mitchell* v. *Esparza*, 540 U. S. 12, 17–18 (2003) (*per curiam*). Accordingly, a federal habeas court cannot grant Ayala relief unless the state court's rejection of his claim (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts. Because the highly deferential AEDPA standard applies, we may not overturn the California Supreme Court's decision unless that court applied *Chapman* "in an 'objectively unreasonable' manner." 540 U. S., at 18 (quoting *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003)). When a *Chapman* decision is reviewed under AEDPA, "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry*, *supra*, at 119 (emphasis in original). And a state-court decision is not unreasonable if "'fairminded jurists could disagree' on [its] correctness." *Richter*, *supra*, at 101 (quoting *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004)). Ayala therefore must show that the state court's decision to reject his claim "was so lacking in justification that there was an error

well understood and comprehended in existing law beyond any possibility for fairminded disagreement." 562 U. S., at 103.

In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA. *Fry*, *supra*, at 119–120.

III

With this background in mind, we turn to the question whether Ayala was harmed by the trial court's decision to receive the prosecution's explanation for its challenged strikes without the defense present. In order for this argument to succeed, Ayala must show that he was actually prejudiced by this procedure, a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme Court's decision that this procedure met the *Chapman* standard of harmlessness. Evaluation of these questions requires consideration of the trial court's grounds for rejecting Ayala's *Batson* challenges.

A

Batson held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges on the basis of race. 476 U. S., at 89. When adjudicating a *Batson* claim, trial courts follow a three-step process:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder* v. *Louisiana*, 552 U. S. 472, 476–477 (2008) (internal quotation marks and alterations omitted).

The opponent of the strike bears the burden of persuasion regarding racial motivation, *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) (*per curiam*), and a trial court finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference,'" *Felkner* v. *Jackson*, 562 U. S. 594, 598 (2011) (*per curiam*) (quoting *Batson*, *supra*, at 98, n. 21). On direct appeal, those findings may be reversed only if the trial judge is shown to have committed clear error. *Rice* v. *Collins*, 546 U. S. 333, 338 (2006). Under AEDPA, even more must be shown. A federal habeas court must accept a state-court finding unless it was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). "State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.*, at 338–339 (quoting §2254(e)(1)).

In this case, Ayala challenged seven of the prosecution's peremptory challenges. As explained above, the Ninth Circuit granted relief based on the dismissal of three potential jurors. The dissent discusses only one, Olanders D. We will devote most of our analysis to the three individuals discussed by the Ninth Circuit, but we hold that any error was harmless with respect to all seven strikes.

B

1

Ayala first contests the prosecution's decision to challenge Olanders D., an African-American man. The prosecution stated that its "primary" reason for striking Olanders D. was uncertainty about whether he could impose the death penalty, and the prosecutor noted that Olanders D. had written on his questionnaire that he did not "believe in the death penalty." 50 Reporter's Tr. on Appeal 6185 (hereinafter Tr.). Providing additional reasons for this strike, the prosecutor first stated that Olanders D.'s responses "did not make

a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well." App. 283. The prosecutor also voiced doubt that Olanders D. "could actively participate in a meaningful way in deliberations with other jurors" and might have lacked the "ability to fit in with a cohesive group of 12 people." *Ibid.*

The trial court concluded that the strike was race neutral. The judge stated: "Certainly with reference to whether or not he would get along with 12 people, it may well be that he would get along very well with 12 people. I think the other observations of counsel are accurate and borne out by the record." 50 Tr. 6186. The California Supreme Court found that the evidence of Olanders D.'s views on the death penalty provided adequate support for the trial judge's finding that the strike exercised against him was not based on race, and the court further found that defense counsel's presence would not have affected the outcome of the *Batson* hearing. The Ninth Circuit reversed, but its decision rested on a misapplication of the applicable harmless-error standards.

2

As the trial court and the State Supreme Court found, Olanders D.'s *voir dire* responses amply support the prosecution's concern that he might not have been willing to impose the death penalty. During *voir dire*, Olanders D. acknowledged that he wrote on his questionnaire, "'I don't believe in the death penalty,'" App. 179, and he agreed that he had at one time "thought that [the death penalty] was completely wrong," *id.*, at 177. Although he stated during the *voir dire* that he had reconsidered his views, it was reasonable for the prosecution and the trial court to find that he did not clearly or adequately explain the reason or reasons for this change. When asked about this, Olanders D. gave a vague and rambling reply: "Well, I think it's—one thing would be the—the—I mean, examining it more closely, I think, and becoming more familiar with the laws and the—and the behavior, I

mean, the change in the people, I think. All of those things contributed to the changes." *Id.*, at 178.

The Ninth Circuit reversed because it speculated that defense counsel, if present when the prosecution explained the basis for this strike, "could have pointed to seated white jurors who had expressed similar or greater hesitancy" in imposing the death penalty. 756 F. 3d, at 678. The Ninth Circuit wrote that a seated white juror named Ana L. was "indistinguishable from Olanders D. in this regard" and that she had "made almost precisely the same statement in her questionnaire." *Ibid.*

The responses of Olanders D. and Ana L., however, were by no means "indistinguishable." Olanders D. initially voiced unequivocal opposition to the death penalty, stating flatly: "I don't believe in the death penalty." He also revealed that he had once thought it was "completely wrong." Ana L., by contrast, wrote on the questionnaire that she "*probably* would not be able to vote for the death penalty," App. 109 (emphasis added), and she then later said at *voir dire* that she could vote for a verdict of death.

In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller-El* v. *Dretke*, 545 U. S. 231, 252 (2005) (citing *Batson*, 476 U. S., at 106 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder*, 552 U. S., at 477. A trial court is best situated to evaluate both the words and the

demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins*, 546 U. S., at 343 (BREYER, J., concurring).

The upshot is that even if "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility, . . . on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.*, at 341–342 (majority opinion). Here, any similarity between the responses of Olanders D. and Ana L. is insufficient to compel an inference of racial discrimination under *Brecht* or AEDPA.

Ayala contends that the presence of defense counsel might have made a difference because defense counsel might have been able to identify white jurors who were not stricken by the prosecution even though they had "expressed similar or greater hesitancy" about the death penalty. We see no basis for this argument. The questionnaires of all the jurors who sat and all the alternates are in the record, and Ana L., whom we just discussed, is apparently the white juror whose answers come the closest to those of Olanders D. Since neither Ayala nor the Ninth Circuit identified a white juror whose statements better support their argument, there is no reason to think that defense counsel could have pointed to a superior comparator at the *ex parte* proceeding.

3

In rejecting the argument that the prosecutor peremptorily challenged Olanders D. because of his race, the California Supreme Court appears to have interpreted the prosecutor's explanation of this strike to mean that Olanders D.'s

views on the death penalty were alone sufficient to convince him to exercise a strike, see 24 Cal. 4th, at 266, 6 P. 3d, at 206, and this was certainly an interpretation of the record that must be sustained under 28 U. S. C. § 2254(d)(2). As a result, it is not necessary for us to consider the prosecutor's supplementary reason for this strike—the poor quality of Olanders D.'s responses—but in any event, the Ninth Circuit's evaluation of this reason is also flawed.

The Ninth Circuit wrote that its independent "review of the voir dire transcript reveal[ed] nothing that supports the prosecution's claim: Olanders D.'s answers were responsive and complete." 756 F. 3d, at 679. The record, however, provides sufficient support for the trial court's determination. Olanders D.'s incoherent explanation during *voir dire* of the reasons for his change of opinion about the death penalty was quoted above. He also provided a chronology of the evolution of his views on the subject that did not hold together. He stated that he had been "completely against the death sentence" 10 years earlier but seemed to suggest that his views had changed over the course of the intervening decade. See App. 176–177. However, on the questionnaire, which he had completed just a month before the *voir dire*, he wrote unequivocally: "I don't believe in the death penalty." *Id.*, at 179. And then, at the time of the *voir dire*, he said that he would be willing to impose the death penalty in some cases. *Id.*, at 180. He explained his answer on the questionnaire as follows: "I answered that kind of fast[.] [N]ormally, I wouldn't answer that question that way, but I mean, I really went through that kind of fast. I should have done better than that." *Id.*, at 179–180. These answers during *voir dire* provide more than sufficient support for the prosecutor's observation, which the trial court implicitly credited, that Olanders D.'s statements "did not make a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well."

In ordering federal habeas relief based on their assessment of the responsiveness and completeness of Olanders D.'s answers, the members of the panel majority misunderstood the role of a federal court in a habeas case. The role of a federal habeas court is to "'guard against extreme malfunctions in the state criminal justice systems,'" *Richter*, 562 U. S., at 102–103 (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)), not to apply *de novo* review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge.

C

Ayala next challenges the prosecution's use of a peremptory challenge to strike Gerardo O., a Hispanic man. The prosecution offered three reasons for this strike: Gerardo O. had a poor grasp of English; his answers during *voir dire* and on his questionnaire suggested that he might not be willing to impose the death penalty; and he did not appear to get along with the other prospective jurors. The trial judge accepted this explanation, as did the State Supreme Court.

The Ninth Circuit, however, rejected the state courts' determinations based on speculation that defense counsel, if present at the *in camera* hearing, "likely could have called into question all of the prosecution's stated reasons for striking Gerardo O." 756 F. 3d, at 680. The Ninth Circuit thought that it could grant Ayala relief simply because it "[could not] say that Ayala would not have shown that the trial court would or should have determined that the prosecution's strike of Gerardo O. violated *Batson*." *Id.*, at 682. But that is not the test. The inquiry under *Brecht* is not whether the federal habeas court could definitively say that there were no winning arguments that the defense could have made. Instead, the evidence in the record must raise "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal*, 513 U. S., at 436. This requires much more than a "reasonable possibility" that the result of the hearing would have been different. *Brecht*, 507 U. S., at

637 (internal quotation marks omitted). And on the record in this case, Ayala cannot establish actual prejudice or that no fairminded jurist could agree with the state court's application of *Chapman*.

We begin with the prosecution's explanation that it challenged Gerardo O. because of his limited English proficiency. During *voir dire*, Gerardo O. acknowledged that someone else had written the answers for him on his questionnaire "[b]ecause I couldn't—I cannot read—I cannot spell that well." App. 163. He added that he "didn't get" some of the words on the questionnaire. *Ibid.* Gerardo O.'s testimony also revealed that he might well have been unable to follow what was said at trial. When asked whether he could understand spoken English, he responded: "It depends if you make long words. If you make—if you go—if you say it straight out, then I might understand. If you beat around the bush, I won't." *Id.*, at 166. At that point, defense counsel and Gerardo O. engaged in a colloquy that suggests that defense counsel recognized that he lacked the ability to understand words not used in basic everyday speech, "legal words," and rapid speech in English:

> "Q: I'll try not to talk—use any legal words or lawyer talk—
>
> "A: Okay.
>
> "Q: —and talk regular with you. If you don't understand anything I say, stop me and tell me, okay?
>
> "A: Okay.
>
> "Q: If you're selected as a juror during the trial, and you know you're serving as a juror and listening to witnesses, can we have your promise that if a witness uses a word you don't understand, you'll put your hand up and let us know?
>
> "A: Yeah.
>
> . . . . .
>
> "Q: There's one more problem that you're going to have with me, and that is that sometimes . . . I talk real fast . . . ." *Id.*, at 166–167.

It is understandable for a prosecutor to strike a potential juror who might have difficulty understanding English.[3] The jurors who were ultimately selected heard many days of testimony, and the instructions at both the guilt and the penalty phases included "legal words" and words not common in everyday speech. The prosecution had an obvious reason to worry that service on this jury would have strained Gerardo O.'s linguistic capability.

The Ninth Circuit reached a contrary conclusion by distorting the record and the applicable law. The Ninth Circuit first suggested that Gerardo O.'s English-language deficiencies were limited to reading and writing, 756 F. 3d, at 680, but as the portions of the *voir dire* quoted above make clear, that was not true; the record shows that his ability to understand spoken English was also limited. The Ninth Circuit then suggested that "[t]he prosecution's purported reason for striking Gerardo O. . . . was directly related to his status as someone who spoke Spanish as his first language," *ibid.*, but the prosecutor voiced no concern about Gerardo O.'s ability to speak Spanish or about the fact that Spanish was his first language. The prosecution's objection concerned Gerardo O.'s limited proficiency in *English*. The Ninth Circuit quoted the following statement from *Hernandez* v. *New York*, 500 U. S. 352, 363 (1991) (plurality opinion): "'[T]he prosecutor's frank admission that his ground for excusing th[is] juror[ ] related to [his] ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact [was a]

[3] The California Supreme Court has held that "[i]nsufficient command of the English language to allow full understanding of the words employed in instructions and full participation in deliberations clearly . . . render[s] a juror 'unable to perform his duty' " within the meaning of the California Penal Code. *People* v. *Lomax*, 49 Cal. 4th 530, 566, 234 P. 3d 377, 407 (2010). See also Cal. Civ. Proc. Code Ann. § 203(a)(6) (West 2006). The seating of jurors whose lack of English proficiency was only somewhat more pronounced than Gerardo O.'s has been held to be error. See *People* v. *Szymanski*, 109 Cal. App. 4th 1126, 135 Cal. Rptr. 2d 691 (2003).

race-based peremptory challenge[ ].' " 756 F. 3d, at 680 (alterations in original). This statement, however, did not concern a peremptory exercised due to a prospective juror's lack of English proficiency. Instead, it concerned the dismissal of Spanish-speaking members of the venire for fear that, if seated, they might not follow the English translation of testimony given in Spanish. See 500 U. S., at 360. The Ninth Circuit's decision regarding Gerardo O. was thus based on a misreading of the record and a distortion of our case law. And neither Ayala nor the Ninth Circuit has identified anything that defense counsel might have done at the *ex parte* hearing to show that the prosecutor's concern about Gerardo O.'s limited English proficiency was pretextual.

The prosecution's second proffered reason for striking Gerardo O. was concern about his willingness to impose the death penalty, and as the trial court found, this observation was also supported by the record. Indeed, when asked in *voir dire* how he felt about imposing the death penalty, Gerardo O. responded that he was "[k]ind of shaky about it. . . . I'm not too sure if I can take someone else's life in my hands and say that; say, you know, 'death,' or something." App. 168. In response to another question about his thoughts on the death penalty, he replied: "I don't know yet. It's kind of hard, you know, to pick it up like that and say how I feel about the death penalty." 15 Tr. 1052. Answering a question about whether his thoughts on the death penalty would affect how he viewed the evidence presented at trial, he responded, "I don't know, sir, to tell you the truth." App. 165. And when asked if he had "any feeling that [he] would be unable to vote for the death penalty if [he] thought it was a case that called for it," Gerardo O. responded once again, "I don't know." 15 Tr. 1043. While Gerardo O. did say at one point that he might be willing to impose the death penalty, he qualified that statement by adding that he would be comforted by the fact that "there's eleven more other persons on the jury." App. 170.

What we said above regarding jurors who express doubts about their openness to a death verdict applies as well here. The prosecution's reluctance to take a chance that Gerardo O. would ultimately be willing to consider the death penalty in accordance with state law did not compel the trial judge to find that the strike of Gerardo O. was based on race.

Nor is there a basis for finding that the absence of defense counsel affected the trial judge's evaluation of the sincerity of this proffered ground for the strike. Defense counsel had a full opportunity during *voir dire* to create a record regarding Gerardo O.'s openness to the death penalty. And defense counsel had the opportunity prior to the *ex parte* proceeding on the Gerardo O. strike to compare the minority jurors dismissed by the prosecution with white jurors who were seated. Counsel argued that the answers on the death penalty given by the minority jurors were "not significantly different from [those of] the white jurors that the prosecution ha[d] chosen to leave on the jury." *Id.*, at 306. The trial judge asked counsel for "particulars," and counsel discussed Gerardo O., albeit briefly. *Id.*, at 307–308. Thus, there is no reason to believe that counsel could have made a more persuasive argument at the *ex parte* proceeding than he made during this exchange.

The prosecution's final reason for striking Gerardo O. was that he appeared to be "a standoffish type of individual" whose "dress and . . . mannerisms . . . were not in keeping with the other jurors" and who "did not appear to be socializing or mixing with any of the other jurors." *Id.*, at 298. The trial judge did not dispute that the prosecution's reflections were borne out by the record. The California Supreme Court affirmed and also emphasized that "the trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." 24 Cal. 4th, at 266–267, 6 P. 3d, at 206.

In light of the strength of the prosecution's first two reasons for striking Gerardo O., it is not at all clear that the prosecution proffered this final reason as an essential factor in its decision to strike, but in any event, there is no support for the suggestion that Ayala's attorney, if allowed to attend the *ex parte* hearing, would have been able to convince the judge that this reason was pretextual. The Ninth Circuit, however, was content to speculate about what might have been. Mixing guesswork with armchair sociology, the Ninth Circuit mused that "[i]t is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980's Hispanic males in San Diego County were more likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt." 756 F. 3d, at 680–681. As for the prosecution's observation that Gerardo O. did not socialize with other jurors, the Ninth Circuit posited that, "perhaps, unbeknownst to the trial judge, Gerardo O. did 'socializ[e] or mix[ ]' with a number of other jurors, and had even organized a dinner for some of them at his favorite Mexican restaurant." *Id.*, at 681.

This is not how habeas review is supposed to work. The record provides no basis for the Ninth Circuit's flight of fancy. *Brecht* requires more than speculation about what extrarecord information defense counsel might have mentioned. And speculation of that type is not enough to show that a State Supreme Court's rejection of the argument regarding Gerardo O. was unreasonable.

D

The final prospective juror specifically discussed in the Ninth Circuit's decision was Robert M., who is Hispanic. The prosecution's primary proffered reason for striking Robert M. was concern that he would not impose the death penalty, though the prosecution added that it was troubled that he had followed the Sagon Penn case, a high-profile prosecu-

tion in San Diego in which an alleged murderer was acquitted amid allegations of misconduct by police and prosecutors. In addition, the prosecution also explained to the trial court that Robert M. scored poorly on its 10-point scale for evaluating prospective jurors. The trial court accepted the prosecutor's explanation of the strike.

With respect to the prosecution's concern that Robert M. might not be willing to impose the death penalty, the Ninth Circuit found that defense counsel, if permitted to attend the *in camera* proceeding, could have compared Robert M.'s statements about the death penalty to those of other jurors and could have reminded the judge that Robert M. had "repeatedly stated during voir dire that he believed in the death penalty and could personally vote to impose it." 756 F. 3d, at 682. But as with Olanders D. and Gerardo O., we cannot say that the prosecution had no basis for doubting Robert M.'s willingness to impose the death penalty. For example, when asked at one point whether he could vote for death, Robert M. responded: "Well, I've though[t] about that, but it's a difficult question, and yeah, it is difficult for me to say, you know, one way or the other. I believe in it, but for me to be involved in it is—is hard. It's hard to accept that aspect of it, do you know what I mean?" App. 149–150. In response to another question, he said: "It would be hard, but I think I could, yes. It's—it's hard to say, you know—and I don't care who the person is—to say that they have to put somebody away, you know. It's very hard." *Id.*, at 154. These are hardly answers that would inspire confidence in the minds of prosecutors in a capital case.

While the Ninth Circuit argued that defense counsel's absence at the *in camera* hearing prejudiced the trial judge's ability to assess this reason for the strike of Robert M., the Ninth Circuit failed to mention that defense counsel specifically addressed this issue during *voir dire*. At that time, he pointedly reminded the judge that Robert M. had made several statements during *voir dire* that were favorable to the

death penalty. *Id.*, at 307. The trial judge thus heard defense counsel's arguments but nevertheless concluded that the record supplied a basis for a legitimate concern about whether Robert M. could impose the death penalty. That Ayala's attorney did not have the opportunity to repeat this same argument once more at the *in camera* proceeding does not create grave doubt about whether the trial court would have decided the issue differently.

As for the prosecution's second proffered reason for striking Robert M.—that he had followed the Sagon Penn case[4]—the Ninth Circuit placed great emphasis on the fact that a seated white juror had followed a different murder trial, that of Robert Alton Harris.[5] But the Penn and Harris cases were quite different. Harris was convicted while Penn was acquitted; and since the Harris case was much older, the experience of following it was less likely to have an effect at the time of the trial in this case.

E

Ayala raised a *Batson* objection about the prosecution's use of peremptory challenges on four additional jurors, George S., Barbara S., Galileo S., and Luis M. The Ninth Circuit did not address these prospective jurors at length, and we need not dwell long on them. With respect to all four of these prospective jurors, we conclude that any constitutional error was harmless.

Of these four additional jurors, Ayala's brief in this Court develops an argument with respect to only two, George S. and Barbara S. And while Ayala's attorney claimed that George S. was Hispanic, the prosecutor said that he thought that George S. was Greek. In any event, the prosecution offered several reasons for striking George S. The prosecutor noted that one of his responses "was essentially, 'you probably don't want me to be a juror on this case.'" *Id.*, at

[4] See Man Acquitted of Killing Officer, N. Y. Times, July 17, 1987, p. B8.
[5] See *People* v. *Harris*, 28 Cal. 3d 935, 623 P. 2d 240 (1981).

312. The prosecutor was also concerned about whether he would vote for death or even a life sentence and whether he would follow the law as opposed to his personal religious beliefs. In addition, the prosecutor noted that George S. had previously been the sole holdout on a jury and that his prior application to be a police officer had been rejected, for reasons that were not clear. The trial court accepted these explanations.

Ayala contests only two of these justifications. He quibbles that George S. had not been a "'holdout,'" but instead had been the dissenting juror in a civil case on which unanimity was not required. This observation does not render the prosecution's proffered justification "false or pretextual." Brief for Respondent 46. The fact that George S. had been willing to dissent from a jury verdict could reasonably give a prosecutor pause in a capital case since a single holdout juror could prevent a guilty verdict or death sentence. The most that Ayala can establish is that reasonable minds can disagree about whether the prosecution's fears were well founded, but this does not come close to establishing "actual prejudice" under *Brecht*. Nor does it meet the AEDPA standard. Ayala also points out that a seated white juror, Charles C., had been rejected by a police force, but George S. admitted that he had applied to law enforcement because he was "trying to get out of the Army," App. 222, and the reasons for his rejection were not clear. Charles C., by contrast, had received a qualifying score on a law enforcement exam but was not hired because a position was not available.

As for Barbara S., the prosecution struck her because, during *voir dire*, she appeared to be "under the influence of drugs" and disconnected from the proceedings. *Id.*, at 314. The prosecution emphasized that she had "an empty look in her eyes, slow responses, a lack of really being totally in tune with what was going on." *Ibid.* It added that she appeared "somewhat angry," "manifest[ed] a great deal of nervousness," and seemed like someone who would be unlikely

to closely follow the trial. *Ibid.* The trial judge thought that Barbara S. appeared nervous rather than hostile, but he agreed that she gave incomplete answers that were sometimes "non sequiturs." *Id.*, at 315. He concluded, "I certainly cannot quarrel . . . with your subjective impression, and the use of your peremptory challenge based upon her individual manifestation, as opposed to her ethnicity." *Ibid.* Ayala points to the trial court's disagreement with the prosecutor's impression that Barbara S. was hostile, but this ruling illustrates the trial judge's recollection of the demeanor of the prospective jurors and his careful evaluation of each of the prosecutor's proffered reasons for strikes. And the fact that the trial judge's impression of Barbara S.'s demeanor was somewhat different from the prosecutor's hardly shows that the prosecutor's reasons were pretextual. It is not at all unusual for individuals to come to different conclusions in attempting to read another person's attitude or mood.

IV

The pattern of peremptory challenges in this case was sufficient to raise suspicions about the prosecution's motives and to call for the prosecution to explain its strikes. As we have held, the Fourteenth Amendment prohibits a prosecutor from striking potential jurors based on race. Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice.

In *Batson*, this Court adopted a procedure for ferreting out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue

were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A Federal District Judge denied federal habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fair-minded jurist could agree.

For the reasons explained above, it was the Ninth Circuit that erred. The exclusion of Ayala's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that Ayala suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

My join in the Court's opinion is unqualified; for, in my view, it is complete and correct in all respects. This separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.

In response to a question, respondent's counsel advised the Court that, since being sentenced to death in 1989, Ayala has served the great majority of his more than 25 years in custody in "administrative segregation" or, as it is better known, solitary confinement. Tr. of Oral Arg. 43–44. Counsel for petitioner did not have a clear opportunity to enter the discussion, and the precise details of respondent's conditions of confinement are not established in the record. Yet if his solitary confinement follows the usual pattern, it is likely re-

spondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone. *Ibid.*; see also *Wilkinson* v. *Austin*, 545 U. S. 209, 218 (2005); Amnesty International, Entombed: Isolation in the U. S. Federal Prison System 2 (2014). It is estimated that 25,000 inmates in the United States are currently serving their sentence in whole or substantial part in solitary confinement, many regardless of their conduct in prison. *Ibid.*

The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. Eighteenth-century British prison reformer John Howard wrote "that criminals who had affected an air of boldness during their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears when brought to these darksome solitary abodes." The State of the Prisons in England and Wales 152 (1777). In literature, Charles Dickens recounted the toil of Dr. Manette, whose 18 years of isolation in One Hundred and Five, North Tower, caused him, even years after his release, to lapse in and out of a mindless state with almost no awareness or appreciation for time or his surroundings. A Tale of Two Cities (1859). And even Manette, while imprisoned, had a workbench and tools to make shoes, a type of diversion no doubt denied many of today's inmates.

One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears "a further terror and peculiar mark of infamy." *In re Medley*, 134 U. S. 160, 170 (1890); see also *id.*, at 168 ("A considerable number of the prisoners fell, after even a short [solitary] confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide"). The past centuries' experience and

consideration of this issue is discussed at length in texts such as The Oxford History of the Prison: The Practice of Punishment in Western Society (1995), a joint disciplinary work edited by law professor Norval Morris and professor of medicine and psychiatry David Rothman that discusses the deprivations attendant to solitary confinement. *Id.*, at 184.

Yet despite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. To be sure, cases on prison procedures and conditions do reach the courts. See, *e. g.*, *Brown* v. *Plata*, 563 U. S. 493 (2011); *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards"); *Weems* v. *United States*, 217 U. S. 349, 365–367 (1910). Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: "In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference.

Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies,

while most lawyers and judges assumed these matters were for the policymakers and correctional experts.

There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular. See, *e. g.*, Gonnerman, Before the Law, The New Yorker, Oct. 6, 2014, p. 26 (detailing multiyear solitary confinement of Kalief Browder, who was held—but never tried—for stealing a backpack); Schwirtz & Winerip, Man, Held at Rikers for 3 Years Without Trial, Kills Himself, N. Y. Times, June 9, 2015, p. A18. And penology and psychology experts, including scholars in the legal academy, continue to offer essential information and analysis. See, *e. g.*, Simon & Sparks, Punishment and Society: The Emergence of an Academic Field, in The SAGE Handbook of Punishment and Society (2013); see also Venters et al., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 Am. J. Pub. Health 442 (Mar. 2014); Metzner & Fellner, Solitary Confinement and Mental Illness in U. S. Prisons: A Challenge for Medical Ethics, 38 J. Am. Academy Psychiatry and Law 104–108 (2010).

These are but a few examples of the expert scholarship that, along with continued attention from the legal community, no doubt will aid in the consideration of the many issues solitary confinement presents. And consideration of these issues is needed. Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. See, *e. g.*, Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Pol'y 325 (2006) (common side effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors). In a case that presented the

issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Over 150 years ago, Dostoyevsky wrote, "The degree of civilization in a society can be judged by entering its prisons." The Yale Book of Quotations 210 (F. Shapiro ed. 2006). There is truth to this in our own time.

JUSTICE THOMAS, concurring.

I join the Court's opinion explaining why Ayala is not entitled to a writ of habeas corpus from this or any other federal court. I write separately only to point out, in response to the separate opinion of JUSTICE KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.

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

At Hector Ayala's trial, the prosecution exercised its peremptory strikes to dismiss all seven of the potential black and Hispanic jurors. In his federal habeas petition, Ayala challenged the state trial court's failure to permit his attorneys to participate in hearings regarding the legitimacy of the prosecution's alleged race-neutral reasons for its strikes. See *Batson* v. *Kentucky*, 476 U. S. 79, 97–98 (1986). The Court assumes that defense counsel's exclusion from these proceedings violated Ayala's constitutional rights, but concludes that the Ninth Circuit erred in granting habeas relief because there is insufficient reason to believe that counsel

could have convinced the trial court to reject the prosecution's proffered reasons. I respectfully dissent. Given the strength of Ayala's prima facie case and the comparative juror analysis his attorneys could have developed if given the opportunity to do so, little doubt exists that counsel's exclusion from Ayala's *Batson* hearings substantially influenced the outcome.

I

My disagreement with the Court does not stem from its discussion of the applicable standard of review, which simply restates the holding of *Fry* v. *Pliler*, 551 U. S. 112 (2007). *Fry* rejected the argument that the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. § 2254, compels federal courts to apply any standard other than that set forth in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), when assessing the harmlessness of a constitutional error on habeas review. 551 U. S., at 120. *Brecht*, in turn, held that the harmlessness standard federal courts must apply in collateral proceedings is more difficult to meet than the "'beyond a reasonable doubt'" standard applicable on direct review. 507 U. S., at 622–623 (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). More specifically, under *Brecht*, a federal court can grant habeas relief only when it concludes that a constitutional error had a "'substantial and injurious effect or influence'" on either a jury verdict or a trial court decision. 507 U. S., at 623. Later, *O'Neal* v. *McAninch*, 513 U. S. 432 (1995), clarified that this standard is satisfied when a reviewing judge "is in grave doubt about whether" the error is harmless; that is, when "the matter is so evenly balanced that [a judge] feels himself in virtual equipoise as to the harmlessness of the error." *Id.*, at 435 (emphasis deleted). See also *ante*, at 268 (quoting *O'Neal*, 513 U. S., at 436). Put differently, when a federal court is in equipoise as to whether an error was actually prejudicial, it must "treat the error, not as if it were harmless, but as if it affected the

verdict (*i. e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.*, at 435.

In addition to confirming the *Brecht* standard's continued vitality, *Fry* established its exclusivity. *Fry* expressly held that federal habeas courts need not first assess whether a state court unreasonably applied *Chapman* before deciding whether that error was prejudicial under *Brecht*. Such a requirement would "mak[e] no sense . . . when the latter [standard] obviously subsumes the former." *Fry*, 551 U. S., at 120. Nothing in the Court's opinion today calls into question this aspect of *Fry*'s holding. If a trial error is prejudicial under *Brecht*'s standard, a state court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable. See *ante*, at 268–270.

II

A

To apply *Brecht* to the facts of this case, it is essential to understand the contours of Ayala's underlying constitutional claim or—perhaps more importantly—to appreciate what his claim is not. Trial judges assess criminal defendants' challenges to prosecutors' use of peremptory strikes using the three-part procedure first announced in *Batson*. After a defendant makes a "prima facie showing that a peremptory challenge [was] . . . exercised on the basis of race," the prosecution is given an opportunity to "offer a race-neutral basis for striking the juror in question," *Miller-El* v. *Cockrell*, 537 U. S. 322, 328 (2003). The court then "decid[es] whether it was more likely than not that the challenge was improperly motivated." *Johnson* v. *California*, 545 U. S. 162, 169, 170 (2005). This determination is a factual one, which—as the Court correctly notes—reviewing courts must accord " 'great deference.' " *Ante*, at 271 (quoting *Felkner* v. *Jackson*, 562 U. S. 594, 598 (2011) (*per curiam*)).

Here, Ayala does not claim that the trial court wrongly rejected his *Batson* challenges based on the record before it.

Rather, Ayala's claim centers on the exclusion of his attorneys from the *Batson* hearings. Ayala contends that there is at least a grave doubt as to whether the trial or appellate court's consideration of his *Batson* challenges was substantially influenced by the trial court's erroneous refusal to permit his attorneys to appear at the hearings at which those challenges were adjudicated. Ayala's conviction must be vacated if there is grave doubt as to whether even just one of his *Batson* challenges would have been sustained had the defense been present. *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (reversing a conviction after concluding that use of one peremptory strike was racially motivated).

B

The Court's *Brecht* application begins and ends with a discussion of particular arguments the Ninth Circuit posited Ayala's lawyers could have raised had they been present at his *Batson* hearings. This approach fails to account for the basic background principle that must inform the application of *Brecht* to Ayala's procedural *Batson* claim: the "[c]ommon sense" insight "that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides." *Kaley* v. *United States*, 571 U. S. 320, 355 (2014) (ROBERTS, C. J., dissenting). Our entire criminal justice system was founded on the premise that "[t]ruth . . . is best discovered by powerful statements on both sides of the question." *United States* v. *Cronic*, 466 U. S. 648, 655 (1984) (internal quotation marks omitted). There is no reason to believe that *Batson* hearings are the rare exception to this rule. Instead, defense counsel could have played at least two critical roles had they been present at Ayala's *Batson* hearings.

First, Ayala's attorneys would have been able to call into question the credibility of the prosecution's asserted race-neutral justifications for the use of its peremptory strikes. Of course, a trial court may identify some pretextual reasons

on its own, but *Snyder* held that when assessing a claimed *Batson* error, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U. S., at 478. Absent an adversarial presentation, a diligent judge may overlook relevant facts or legal arguments in even a straightforward case. There is also great probative force to a "comparative juror analysis"—an analysis of whether the prosecution's reasons for using its peremptory strikes against nonwhite jurors apply equally to white jurors whom it would have allowed to serve. *Miller-El* v. *Dretke*, 545 U. S. 231, 241 (2005). See also *Snyder*, 552 U. S., at 483 (emphasizing importance of conducting a comparative juror analysis in the trial court). Trial courts are ill suited to perform this intensive inquiry without defense counsel's assistance.

The risk that important arguments will not be considered rises close to a certainty in a capital case like Ayala's, where jury selection spanned more than three months, involved more than 200 prospective jurors, and generated a record that is massive by any standard. See *Ayala* v. *Wong*, 756 F. 3d 656, 660, 676 (CA9 2014) (case below). It strains credulity to suggest that a court confronted with this mountain of information necessarily considered all of the facts that would have informed its credibility determination without the presence of defense counsel to help bring them to its attention.

Second, not only did the exclusion of defense counsel from Ayala's *Batson* hearings prevent him from making his strongest arguments before the person best situated to assess their merit, it also impeded his ability to raise these claims on appeal. Because Ayala's lawyers were not afforded any opportunity to respond to the prosecution's race-neutral reasons, we are left to speculate as to whether the trial court actually considered any of the points the defense would have made before it accepted the prosecution's proffered explanations. Moreover, even if we could divine which of the possible considerations the trial judge took into account, our review would still be unduly constrained by a record that lacks

whatever material facts the defense would have preserved had it been on notice of the assertions that it needed to challenge. Perhaps some of these facts, such as the jurors' appearance and demeanor, were known to the trial judge, but appellate courts "can only serve [their] function when the record is clear as to the relevant facts" or when they can rely on "defense counsel['s] fail[ure] to point out any such facts after learning of the prosecutor's reasons." *United States* v. *Thompson*, 827 F. 2d 1254, 1261 (CA9 1987). Neither of these conditions is met here.

For the reasons described above, the fact that counsel was wrongfully excluded from Ayala's *Batson* hearings on its own raises doubt as to whether the outcome of these proceedings—or the appellate courts' review of them—would have been the same had counsel been present.[1] This doubt is exacerbated by the loss of the vast majority of the questionnaires that jurors completed at the start of *voir dire*, including those filled out by the seven black and Hispanic jurors against whom the prosecution exercised its peremptory strikes. The prosecution cited these questionnaires in support of its alleged race-neutral reasons at the *ex parte Batson* hearings. See, *e. g.*, App. 283, 298, 312, 314, 316. Without the underlying documents, however, it is impossible to assess whether the prosecution's characterizations of those prospective jurors' responses were fair and accurate. The loss of the questionnaires has also precluded every court that has reviewed this case from performing a comprehensive comparative juror analysis. The Court today analyzes

[1] Indeed, in a future case arising in a direct review posture, the Court may have occasion to consider whether the error that the Court assumes here gives rise to "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States* v. *Cronic*, 466 U. S. 648, 658 (1984). See also *Mickens* v. *Taylor*, 535 U. S. 162, 166 (2002) (noting that we have "presumed [prejudicial] effec[t] where assistance of counsel has been denied entirely or during a critical stage of the proceeding").

how the prosecution's statements at the *ex parte Batson* hearings regarding the black and Hispanic jurors' questionnaires stack up against the actual questionnaires completed by the white seated jurors and alternates. But there is no way to discern how these representations compare with the answers that were given by white jurors whom the prosecution would have permitted to serve but whom the defense ultimately struck. See *Miller-El* v. *Dretke*, 545 U. S., at 244–245 (comparing a juror struck by the prosecution with a juror challenged only by the defense).

C

The above-described consequences of the trial court's procedural error and the fact that the prosecution struck every potential black or Hispanic juror go a long way toward establishing the degree of uncertainty that *Brecht* requires. Keeping these considerations in mind, the next step is to assess the arguments that Ayala's attorneys may have raised had they been allowed to participate at his *Batson* hearings. As explained above, Ayala is entitled to habeas relief if a reviewing judge is in "equipoise" as to whether his lawyers' exclusion from the *Batson* hearings had an "injurious effect" on the trial court's failure to find by a preponderance of the evidence that any of the prosecution's peremptory strikes was racially motivated. With the inquiry so framed, it is easy to see that the Ninth Circuit correctly found that Ayala was actually prejudiced by the trial court's constitutional error. In particular, there is a substantial likelihood that if defense counsel had been present, Ayala could at least have convinced the trial court that the race-neutral reasons the prosecution put forward for dismissing a black juror, Olanders D., were pretextual.[2]

---

[2] Because Ayala was actually prejudiced by his counsel's exclusion from the *Batson* hearing on Olanders D., there is no need to address his claims concerning the other black and Hispanic jurors. That said, Ayala's attor-

The prosecution offered three justifications for striking Olanders D.: (1) He might be unable to vote for the death penalty because he had written in his questionnaire that "he does not believe [in] it" and had failed to fully explain a subsequent change in position; (2) his questionnaire answers were poor; and, (3) he might lack the "ability to fit in with a cohesive group of 12 people." App. 283. The trial court rejected the third of these reasons outright, noting that "it may well . . . be that he would get along very well with 12 people." *Id.*, at 283–284. I have grave misgivings as to whether the trial judge would have found it more likely than not that the first two purported bases were legitimate had defense counsel been given an opportunity to respond to them.

Ayala's attorneys could have challenged the prosecution's claim that Olanders D. would hesitate to impose the death penalty by pointing to a seated juror—Ana L.—who made remarkably similar statements concerning capital punishment. Based on his remarks during *voir dire*, it appears that Olanders D. suggested on his questionnaire that he was or had been opposed to the death penalty.[3] *Id.*, at 176, 179. Ana L.'s questionnaire contained numerous comparable statements. When asked to express her "feelings about the death penalty," she wrote: "I don't believe in taking a life." *Id.*, at 108. And, in response to a question regarding

---

neys may have had strong arguments with respect to those jurors too. Moreover, Ayala's *Batson* challenge to Olanders D. would have been even stronger had counsel been given the opportunity to demonstrate that some of the reasons given for striking the other black and Hispanic jurors were pretextual. See *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (observing that courts should "consider the strike of [one juror] for the bearing it might have upon the strike of [a second juror]").

[3] It is, of course, impossible to verify what Olanders D. said in his questionnaire because that document is not in the record. If Ayala's lawyers had been present at Olanders D.'s *Batson* hearing, they may have argued that his questionnaire showed that his position on capital punishment had changed over time. See Part III, *infra*.

whether she "would like to serve as a juror and why?," Ana L. said: "no—If I am selected as a Juror and all Jurors voted for the death penalty I probably would not be able to vote for the death penalty." *Id.*, at 109. Finally, on her questionnaire, Ana L. indicated that she believes the death penalty is imposed "[t]oo often" and that she strongly disagrees with the "adage, 'An eye for any eye,' " which she understood to mean,"[a] criminal took a life[,] now [it] is our turn to take his." *Id.*, at 108–109.

A direct comparison of Olanders D.'s and Ana L.'s *voir dire* answers is equally telling. During *voir dire*, Olanders D. clarified that he had not intended his questionnaire to reflect that he was categorically opposed to the death penalty, but only that his views on the topic had evolved over the prior decade and that he had come to believe that the death penalty "would be an appropriate sentence under certain circumstances." *Id.*, at 176. To account for this change in his position, Olanders D. cited a number of considerations, including a new understanding of what his religion required, *ibid.*, "more familiar[ity] with the laws," *id.*, at 178, increased violence in our society, *ibid.*, and conversations with his immediate family, *id.*, at 180. Ana L., by contrast, stated at *voir dire* that she "strongly . . . did not believe in the death penalty" up until she "[f]illed out the questionnaire." *Id.*, at 193. And, only after repeated attempts by both the defense and the prosecution to get her to pinpoint what caused this sudden about-face, Ana L. said that she had "listen[ed] to the Bundy evidence that was said and his being put to death, and I started to think; and I said if they were guilty maybe there is a death sentence for these people." *Id.*, at 202.[4]

---

[4] The Court claims that Olanders D. was less than eloquent in describing his thought process. *Ante*, at 272–273. But it is not difficult to understand what he meant. In any event, as the Court later concedes, prospective jurors are likely to struggle when asked to express their views on the death penalty. *Ante*, at 273. Ana L. was no exception. For instance, when defense counsel first asked her to describe her thought process, she

Based on this record, it requires little speculation to see that defense counsel could have made a powerful argument that Ana L. was equally or even less likely to impose the death penalty than Olanders D. While both jurors had opposed the death penalty at some point in the past, Olanders D. stated that he had come to believe in capital punishment after a period of sustained deliberation. Ana L., however, purported to change her view due only to one recent execution and the fact that she had been called to serve as a juror on a capital case. Moreover, there is no basis to think that the trial court accounted for the similarities between Ana L. and Olanders D. Approximately two months passed between Olanders D.'s and Ana L.'s *voir dire* hearings and the date on which the prosecution exercised its peremptory strike against Olanders D. Without the benefit of defense counsel to help jog his recollection, it is absurd to proceed as if the trial judge actually considered one of more than 200 prospective jurors' statements concerning the death penalty when ruling on Ayala's *Batson* motion. Taken together, it seems highly likely that these arguments—had they been raised—would have convinced the trial judge that the prosecution's first alleged reason for striking Olanders D. was pretextual.

As for the prosecution's second purported justification—that his questionnaire responses "were poor," App. 283—it is impossible to know what winning arguments the defense could have raised because the questionnaire itself is missing from the record.[5] Indeed, for all that is known, counsel may

---

responded, "Up to [when I filled out my questionnaire], I did not believe in putting someone to death." App. 194. She continued: "But being that you've given me the—the opportunity to come over here, seeing something that is not correct in the system, it wouldn't be no problem . . . for me to give to come to a decision on the death penalty anymore." *Ibid.*

[5] The Court states that the prosecution's second purported race-neutral reason for striking Olanders D. was that his "responses" were poor, but it conveniently neglects to mention that the responses to which the prosecution referred were clearly those Olanders D. gave on his question-

have had a compelling argument that Olanders D.'s answers were cogent and complete. Even if some of them were lacking, however, counsel could still have drawn the trial judge's attention to weak questionnaires completed by several of the seated jurors. For instance, if the prosecution's claim was that Olanders D.'s questionnaire answers were conclusory, Ayala's counsel could have referred the court to seated juror Charles G.'s questionnaire. In response to a prompt asking prospective jurors to explain why they would or would not like to be empaneled in Ayala's case, Charles G. wrote only "No." *Id.*, at 71. Alternatively, if the prosecution's concern was that Olanders D.'s answer to a particular question demonstrated an inability to clearly express himself, the defense could have directed the court's attention to the questionnaire completed by seated juror Thomas B. When asked to share his "impressions or feelings . . . about gangs based on what [he had] read or s[een]," Thomas B. stated: "I feel the only media coverage they get is bad, however, those whom do constructive events usually seek out positive media coverage." *Id.*, at 30. Finally, it bears noting that if Ayala's lawyers had been able to respond at the *Batson* hearing, they would have had the questionnaires of many more comparable jurors at their disposal. It is entirely possible that some of the questionnaires completed by prospective jurors who were accepted by the prosecution but dismissed by the defense were weaker than those completed by Charles G. and Thomas B.

In short, it is probable that had Ayala's lawyers been present at the *Batson* hearing on Olanders D., his strong *Batson* claim would have turned out to be a winning one. The trial judge rejected one of the reasons advanced by the prosecution on its own and the defense had numerous persuasive

---

naire. *Ante*, at 271; see App. 283 ("My observations in reading his questionnaire and before even making note of his racial orientation was that his responses were poor").

arguments that it could have leveled against the remaining two justifications had it been given the opportunity to do so.

III

The Court concludes that Ayala is not entitled to habeas relief because it finds that there is little or no reason to doubt that the trial judge would have accepted both of the above-discussed reasons for striking Olanders D. even if counsel participated at Ayala's *Batson* hearings. The Court's analysis, however, misunderstands the record and mistakes Ayala's procedural *Batson* claim for a direct challenge to a trial court's denial of a *Batson* motion.

In defense of the prosecution's first basis for striking Olanders D.—that he was uncomfortable with the death penalty—the Court begins by asserting that Ana L. was insufficiently similar to Olanders D. to have cast any doubt on the prosecution's position. Olanders D., the Court maintains, "initially voiced unequivocal opposition to the death penalty," whereas Ana L. "wrote on [her] questionnaire that she '*probably* would not be able to vote for the death penalty.'" *Ante*, at 273 (emphasis in original). But the Court has plucked one arguably ambiguous statement from Ana L.'s questionnaire while ignoring others (described above) suggesting that she fundamentally opposed capital punishment. More importantly, the Court is not comparing apples with apples. Because Olanders D.'s questionnaire has been lost, there is no way to know the extent to which the views he expressed there were "unequivocal." Consequently, in support of its contention that Olanders D. originally wrote that he was categorically opposed to the death penalty, the Court relies on his response to a question posed by the prosecution during *voir dire*. To be sure, when asked whether he had stated that he did not "believe in the death penalty" on his questionnaire, Olanders D. responded: "That's correct." App. 179. During *voir dire*, however, Ana L. described the position she had taken in her questionnaire in identical

terms, stating: "I remember saying [on my questionnaire] that I didn't believe in the death penalty." *Id.*, at 201.

Given the difficulty of differentiating between Ana L.'s and Olanders D.'s views toward the death penalty based on the record before us, the Court understandably does not press this factual point further. Instead, it commits a legal error by contending that the trial court's determination is entitled to deference because the judge—unlike this Court—had the benefit of observing both Olanders D.'s and the prosecution's demeanor. *Ante*, at 273–274. Deference may be warranted when reviewing a substantive *Batson* claim. By suggesting that a trial judge can make a sound credibility determination without the benefit of an adversarial proceeding, however, the Court ignores the procedural nature of the constitutional error whose existence it purports to assume. Courts defer to credibility findings not only because of trial judges' proximity to courtroom events, but also because of the expectations regarding the procedures used in the proceedings that they oversee. A decision to credit a prosecution's race-neutral basis for striking a juror is entitled to great weight if that reason has "survive[d] the crucible of meaningful adversarial testing." *Cronic*, 466 U. S., at 656. It warrants substantially less—if any—deference where, as here, it is made in the absence of the "fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll* v. *President and Comm'rs of Princess Anne*, 393 U. S. 175, 183 (1968); see also *Kaley*, 571 U. S., at 355 (ROBERTS, C. J., dissenting) ("It takes little imagination to see that . . . *ex parte* proceedings create a heightened risk of error").[6]

---

[6] None of the cases the Court cites are inconsistent with this logic. *Miller-El* v. *Dretke*, 545 U. S. 231, 236–237 (2005), *Snyder*, 552 U. S., at 474, and *Rice* v. *Collins*, 546 U. S. 333, 336 (2006), all concerned direct challenges to a trial court's denial of a *Batson* motion as opposed to procedural *Batson* claims.

The Court's analysis of the second reason put forward for striking Olanders D.—that his questionnaire was faulty—fares no better. As a preliminary matter, perhaps because Olanders D.'s questionnaire has been lost, the Court characterizes the prosecution's second proffered reason for dismissing Olanders D. as an objection to *all* of his "responses" as opposed to simply the responses on his *questionnaire*. *Ante*, at 271. But even if the prosecution had relied on the rationale that the Court now substitutes, there is a real likelihood that the defense would still have been able to undermine its credibility.

The Court asserts that Olanders D.'s "responses" were misleading because he had "unequivocally" stated that he did not believe in the death penalty on his questionnaire, but at *voir dire* he said that his views on capital punishment had changed over the previous 10 years. *Ante*, at 275. The Court's argument thus hinges on the premise that Olanders D.'s questionnaire clearly stated that he was opposed to the death penalty. At least one person, however, did not construe Olander D.'s questionnaire to express such a categorical view: defense counsel. During *voir dire*, one of Ayala's lawyers remarked that she thought Olanders D.'s questionnaire "indicated that [he] had had some change in [his] feelings about the death penalty." App. 176. "[M]y understanding," she said, "is that at one time [he] felt one way, and—and then at some point [he] felt differently." *Ibid.* Thus, if (as the Court now hypothesizes) the trial court was inclined to accept the prosecution's second reason for striking Olanders D. based on apparent tension between his questionnaire and his statements during *voir dire* (a proposition that is itself uncertain), the defense may have been able to argue persuasively that any claimed inconsistency was illusory.

* * *

Batson recognized that it is fundamentally unfair to permit racial considerations to drive the use of peremptory chal-

lenges against jurors. When the prosecution strikes every potential black and Hispanic juror, a reviewing court has a responsibility to ensure that the trial court's denial of the defendant's *Batson* motion was not influenced by constitutional error. But there is neither a factual nor a legal basis for the Court's confidence that the prosecution's race-neutral reasons for striking Olanders D. were unassailable. Because the Court overlooks that Ayala raised a procedural *Batson* claim, it scours the record for possible support for the trial court's credibility determination without accounting for the flaws in the process that led to it. The proper inquiry is not whether the trial court's determination can be sustained, but whether it may have been different had counsel been present. Given the strength of Ayala's prima facie case and the arguments his counsel would have been able to make based even on the limited existing record, grave doubts exist as to whether counsel's exclusion from Ayala's *Batson* hearings was harmless. Accordingly, I respectfully dissent.

Syllabus

BRUMFIELD *v.* CAIN, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–1433. Argued March 30, 2015—Decided June 18, 2015

Petitioner Kevan Brumfield was convicted of murder in a Louisiana court and sentenced to death before this Court held that the Eighth Amendment prohibits execution of the intellectually disabled, *Atkins* v. *Virginia*, 536 U. S. 304. Implementing *Atkins*' mandate, see *id.*, at 317, the Louisiana Supreme Court determined that an evidentiary hearing is required when a defendant "provide[s] objective factors" sufficient to raise a "'reasonable ground'" to believe that he has an intellectual disability, which the court defined as "(1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage." *State* v. *Williams*, 2001–1650 (La. 11/1/02), 831 So. 2d 835, 857, 861, 854.

Soon after the *Williams* decision, Brumfield amended his pending state postconviction petition to raise an *Atkins* claim. Seeking an evidentiary hearing, he pointed to evidence introduced at sentencing that he had an IQ of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having a learning disability, and had been placed in special education classes. The trial court dismissed Brumfield's petition without holding a hearing or granting funds to conduct additional investigation. Brumfield subsequently sought federal habeas relief. The District Court found that the state court's rejection of Brumfield's claim was both "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court and "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§ 2254(d)(1), (2). The court went on to determine that Brumfield was intellectually disabled. The Fifth Circuit found that Brumfield's petition failed to satisfy either of § 2254(d)'s requirements and reversed.

Held: Because Brumfield satisfied § 2254(d)(2)'s requirements, he was entitled to have his *Atkins* claim considered on the merits in federal court. Pp. 312–324.

(a) The two underlying factual determinations on which the state trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he pre-

sented no evidence of adaptive impairment—were unreasonable under § 2254(d)(2). Because that standard is satisfied, the Court need not address § 2254(d)(1). Pp. 312–322.

(1) Expert trial testimony that Brumfield scored a 75 on an IQ test is entirely consistent with intellectual disability. Every IQ score has a margin of error. Accounting for that margin of error, the sources on which the *Williams* court relied in defining subaverage intelligence describe a score of 75 as consistent with an intellectual disability diagnosis. There was no evidence presented to the trial court of any other IQ test that was sufficiently rigorous to preclude the possibility that Brumfield possessed subaverage intelligence. Pp. 314–316.

(2) The state-court record contains sufficient evidence to suggest that Brumfield would meet the criteria for adaptive impairment. Under the test most favorable to the State, an individual like Brumfield must show a "substantial functional limitation" in three of six "areas of major life activity." *Williams*, 831 So. 2d, at 854. Brumfield—who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level—would seem to be deficient in two of those areas: "[u]nderstanding and use of language" and "[l]earning." *Ibid.* His low birth weight, his commitment to mental health facilities at a young age, and officials' administration of antipsychotic and sedative drugs to him at that time all indicate that he may well have had significant deficits in at least one of the remaining four areas. In light of that evidence, the fact that the record contains some contrary evidence cannot be said to foreclose all reasonable doubt as to his intellectual disability. And given that Brumfield's trial occurred before *Atkins*, the trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. Pp. 317–322.

(b) The State's two additional arguments are rejected. Because the State did not press below the theory that § 2254(e)(1) supplies the governing standard when evaluating whether a habeas petitioner has satisfied § 2254(d)(2)'s requirements, that issue is not addressed here. And because the state trial court made no finding that Brumfield had failed to produce evidence suggesting he could meet the "manifestations . . . in the developmental stage" requirement for intellectual disability, there is no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied § 2254(d). In any event, the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood. Pp. 322–323.

744 F. 3d 918, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in all but Part I–C of which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined, *post*, p. 324. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, *post*, p. 350.

Michael B. DeSanctis argued the cause for petitioner. With him on the briefs were *Adam G. Unikowsky*, *R. Trent McCotter*, *Nicholas J. Trenticosta*, and *Susan Herrero*.

Premila Burns argued the cause for respondent. With her on the brief were *Monisa L. Thompson*, *Thomas R. McCarthy*, *William S. Consovoy*, and *J. Michael Connolly*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Atkins* v. *Virginia*, 536 U. S. 304 (2002), this Court recognized that the execution of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment. After *Atkins* was decided, petitioner, a Louisiana death-row inmate, requested an opportunity to prove he was intellectually disabled in state court. Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner's claim. That decision, we hold, was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court.

I

Petitioner Kevan Brumfield was sentenced to death for the 1993 murder of off-duty Baton Rouge police officer Betty Smothers. Brumfield, accompanied by another individual, shot and killed Officer Smothers while she was escorting the manager of a grocery store to the bank.

**Ted Brett Brunson* and *Sarah Ottinger* filed a brief for Pascal F. Calogero, Jr., et al. as *amici curiae* urging reversal.

At the time of Brumfield's trial, this Court's precedent permitted the imposition of the death penalty on intellectually disabled persons. See *Penry* v. *Lynaugh*, 492 U. S. 302, 340 (1989) (opinion of O'Connor, J.). But in *Atkins*, this Court subsequently held that "in the light of . . . 'evolving standards of decency,'" the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U. S., at 321 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986)).[1] Acknowledging the "disagreement" regarding how to "determin[e] which offenders are in fact" intellectually disabled, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U. S., at 317 (internal quotation marks omitted; some alterations in original).

The Louisiana Supreme Court took up the charge of implementing *Atkins*' mandate in *State* v. *Williams*, 2001–1650 (La. 11/1/02), 831 So. 2d 835. The court held that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage." *Id.*, at 854 (relying on, *inter alia*, American Association of Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002) (AAMR), and American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (rev. 4th ed. 2000) (DSM–IV)); see also La. Code Crim. Proc. Ann., Art. 905.5.1(H)(1) (West Cum. Supp. 2015) (subsequently enacted statute governing *Atkins* claims adopting the three *Williams* criteria). The *Williams* court also clarified that "not everyone faced with a death penalty sentence" would "automatically be entitled

[1] While this Court formerly employed the phrase "mentally retarded," we now "us[e] the term 'intellectual disability' to describe the identical phenomenon." *Hall* v. *Florida*, 572 U. S. 701, 704 (2014).

to a post-*Atkins* hearing"; rather, it would "be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation." 831 So. 2d, at 857. Borrowing from the state statutory standard for determining when a pretrial competency inquiry is necessary, the court held that an *Atkins* evidentiary hearing is required when an inmate has put forward sufficient evidence to raise a "'reasonable ground'" to believe him to be intellectually disabled. See 831 So. 2d, at 861; see also *id.*, at 858, n. 33 (characterizing the requisite showing as one raising a "'reasonable doubt'").[2]

Shortly after the *Williams* decision, Brumfield amended his pending state postconviction petition to raise an *Atkins* claim. He sought an evidentiary hearing on the issue, asserting that his case was "accompanied by a host of objective facts which raise the issue of mental retardation." App. 203a.

In support, Brumfield pointed to mitigation evidence introduced at the sentencing phase of his trial. He focused on the testimony of three witnesses in particular: his mother; Dr. Cecile Guin, a social worker who had compiled a history of Brumfield by consulting available records and conducting interviews with family members and teachers; and Dr. John Bolter, a clinical neuropsychologist who had performed a number of cognitive tests on Brumfield. A psychologist, Dr. Brian Jordan, had also examined Brumfield and prepared a report, but did not testify at trial. Brumfield contended that this evidence showed, among other things, that he had

---

[2] Although Louisiana subsequently adopted a statute governing the adjudication of *Atkins* claims, see La. Code Crim. Proc. Ann., Art. 905.5.1 (West Cum. Supp. 2015), the parties agree that the procedures set forth in *Williams* governed this case. See Brief for Petitioner 26, n. 7; Brief for Respondent 13, n. 6; see also *State* v. *Dunn*, 2007–0878 (La. 1/25/08), 974 So. 2d 658, 662 (holding that this statute does not "establis[h] a procedure to be used for *Atkins* hearings conducted post-trial and/or post-sentencing").

registered an IQ score of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having some form of learning disability, and had been placed in special education classes. See *id.*, at 203a–204a. Brumfield further requested "all the resources necessary to the proper presentation of his case," asserting that until he was able to "retain the services of various experts," it would be "premature for [the court] to address [his] claims." *Id.*, at 207a.

Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed Brumfield's petition. With respect to the request for an *Atkins* hearing, the court stated:

> "I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's [*sic*] testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan's report.
>
> "Dr. Bolter in particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an antisocial personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out." App. to Pet. for Cert. 171a–172a.

After the Louisiana Supreme Court summarily denied his application for a supervisory writ to review the trial court's ruling, *Brumfield* v. *State*, 2004–0081 (La. 10/29/04), 885 So.

2d 580, Brumfield filed a petition for habeas corpus in federal court, again pressing his *Atkins* claim. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Brumfield could secure relief only if the state court's rejection of his claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§2254(d)(1), (2).

The District Court found that both of these requirements had been met. 854 F. Supp. 2d 366, 383–384 (MD La. 2012). First, the District Court held that denying Brumfield an evidentiary hearing without first granting him funding to develop his *Atkins* claim "represented an unreasonable application of then-existing due process law," thus satisfying §2254(d)(1). 854 F. Supp. 2d, at 379. Second, and in the alternative, the District Court found that the state court's decision denying Brumfield a hearing "suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceeding in violation of §2254(d)(2)." *Ibid.*

The District Court further determined Brumfield to be intellectually disabled based on the extensive evidence it received during an evidentiary hearing. *Id.*, at 406; see *Cullen* v. *Pinholster*, 563 U. S. 170, 185 (2011) (recognizing that federal habeas courts may "take new evidence in an evidentiary hearing" when §2254(d) does not bar relief). This evidence included the results of various IQ tests—which, when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70, 854 F. Supp. 2d, at 392—testimony and expert reports regarding Brumfield's adaptive behavior and "significantly limited conceptual skills," *id.*, at 401, and proof that these deficits in intellectual functioning had exhibited themselves before Brumfield reached adulthood, *id.*, at 405. Thus, the District Court

held, Brumfield had "demonstrated he is mentally retarded as defined by Louisiana law" and was "ineligible for execution." *Id.*, at 406.

The United States Court of Appeals for the Fifth Circuit reversed. 744 F. 3d 918, 927 (2014). It held that Brumfield's federal habeas petition failed to satisfy either of § 2254(d)'s requirements. With respect to the District Court's conclusion that the state court had unreasonably applied clearly established federal law, the Fifth Circuit rejected the notion that any of this Court's precedents required a state court to grant an *Atkins* claimant the funds necessary to make a threshold showing of intellectual disability. See 744 F. 3d, at 925–926. As for the District Court's holding that the state court's decision rested on an unreasonable determination of the facts, the Fifth Circuit declared that its "review of the record persuad[ed it] that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing." *Id.*, at 926. Having found that Brumfield's petition failed to clear § 2254(d)'s hurdle, the Fifth Circuit did not review the District Court's conclusion that Brumfield is, in fact, intellectually disabled. See *id.*, at 927, and n. 8.

We granted certiorari on both aspects of the Fifth Circuit's § 2254(d) analysis, 574 U. S. 1045 (2014), and now vacate its decision and remand for further proceedings.

II

Before this Court, Brumfield advances both of the rationales on which the District Court relied in holding § 2254(d) to be satisfied. Because we agree that the state court's rejection of Brumfield's request for an *Atkins* hearing was premised on an "unreasonable determination of the facts" within the meaning of § 2254(d)(2), we need not address whether its refusal to grant him expert funding, or at least the opportunity to seek *pro bono* expert assistance to further his threshold showing, reflected an "unreasonable application of . . . clearly established Federal law," § 2254(d)(1).

In conducting the § 2254(d)(2) inquiry, we, like the courts below, "look through" the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an *Atkins* evidentiary hearing. See *Johnson* v. *Williams*, 568 U. S. 289, 297, n. 1 (2013); *Ylst* v. *Nunnemaker*, 501 U. S. 797, 806 (1991). Like Brumfield, we do not question the propriety of the legal standard the trial court applied, and presume that a rule according an evidentiary hearing only to those capital defendants who raise a "reasonable doubt" as to their intellectual disability is consistent with our decision in *Atkins*. Instead, we train our attention on the two underlying factual determinations on which the trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment. App. to Pet. for Cert. 171a–172a.[3]

We may not characterize these state-court factual determinations as unreasonable "merely because [we] would have

---

[3] The dissent accuses us of "recasting legal determinations as factual ones." *Post*, at 337 (opinion of THOMAS, J.) (emphasis deleted) (hereinafter the dissent). But we subject these determinations to review under § 2254(d)(2) instead of § 2254(d)(1) because we are concerned here not with the adequacy of the procedures and standards the state court applied in rejecting Brumfield's *Atkins* claim, but with the underlying factual conclusions the court reached when it determined that the record evidence was inconsistent with intellectual disability. See *Maggio* v. *Fulford*, 462 U. S. 111, 117 (1983) (*per curiam*) (reviewing under the predecessor to § 2254(d)(2) the "factual conclusions" underlying a state court's conclusion that a criminal defendant had raised no doubt as to his competency to stand trial). We look to Louisiana case law only because it provides the framework in which these factual determinations were made, and makes clear that the state court's decision rejecting Brumfield's *Atkins* claim was premised on those determinations. And we apply § 2254(d)(2) at the behest of the State itself, which invokes that provision (and § 2254(e)(1)'s similarly fact-focused standard) in contending that AEDPA bars Brumfield's *Atkins* claim, and characterizes the determinations we review here as "highly factual." Brief for Respondent 25.

reached a different conclusion in the first instance." *Wood* v. *Allen*, 558 U. S. 290, 301 (2010). Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference. If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Ibid.* (quoting *Rice* v. *Collins*, 546 U. S. 333, 341–342 (2006)). As we have also observed, however, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (2003). Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.

A

The state trial court's rejection of Brumfield's request for an *Atkins* hearing rested, first, on Dr. Bolter's testimony that Brumfield scored 75 on an IQ test and may have scored higher on another test. See App. to Pet. for Cert. 171a. These scores, the state court apparently believed, belied the claim that Brumfield was intellectually disabled because they necessarily precluded any possibility that he possessed subaverage intelligence—the first of the three criteria necessary for a finding of intellectual disability. But in fact, this evidence was entirely consistent with intellectual disability.

To qualify as "significantly subaverage in general intellectual functioning" in Louisiana, "one must be more than two standard deviations below the mean for the test of intellectual functioning." *Williams*, 831 So. 2d, at 853 (internal quotation marks omitted). On the Wechsler scale for IQ—the scale employed by Dr. Bolter—that would equate to a score of 70 or less. See *id.*, at 853–854, n. 26.

As the Louisiana Supreme Court cautioned in *Williams*, however, an IQ test result cannot be assessed in a vacuum. In accord with sound statistical methods, the court ex-

plained: "[T]he assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement." *Ibid.* Thus, *Williams* held, "[a]lthough Louisiana's definition of significantly subaverage intellectual functioning does not specifically use the word 'approximately,' because of the SEM [(standard error of measurement)], any IQ test score has a margin of error and is only a factor in assessing mental retardation." *Id.*, at 855, n. 29.

Accounting for this margin of error, Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability. The sources on which *Williams* relied in defining subaverage intelligence both describe a score of 75 as being consistent with such a diagnosis. See AAMR, at 59; DSM–IV, at 41–42; see also *State* v. *Dunn*, 2001–1635 (La. 5/11/10), 41 So. 3d 454, 470 ("The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis").[4] Relying on similar authorities, this Court observed in *Atkins* that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U. S., at 309, n. 5. Indeed, in adopting these definitions, the Louisiana Supreme Court anticipated our holding in *Hall* v. *Florida*, 572 U. S. 701 (2014), that it is unconstitutional to foreclose "all further exploration of intellectual disability" simply because a capital defendant is deemed to have an IQ above 70. *Id.*, at 704; see also *id.*, at 714 ("For professionals to diagnose—and for the law then

[4] The dissent insists that we have ignored language in *Williams* establishing that "the requisite IQ could range 'from 66 to 74.'" *Post*, at 340 (quoting *Williams*, 831 So. 2d, at 854, n. 26). But the dissent wrenches the quoted language out of context. The *Williams* Court actually said: "One SEM is plus or minus a specified number of IQ points. Thus, an IQ of 70 could range from 66 to 74 assuming an SEM of 4." *Id.*, at 854, n. 26. *Williams* did not thereby hold that an SEM of 4, and a resultant range of 66 to 74, must be used; it was simply using this example to illustrate the concept of SEM.

to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning"). To conclude, as the state trial court did, that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts.

Nor was there evidence of any higher IQ test score that could render the state court's determination reasonable. The state court claimed that Dr. Jordan, who examined Brumfield but never testified at trial, "came up with a little bit higher IQ." App. to Pet. for Cert. 171a. At trial, the existence of such a test score was mentioned only during the cross-examination of Dr. Bolter, who had simply acknowledged the following: "Dr. Jordan rated his intelligence just a little higher than I did. But Dr. Jordan also only did a screening test and I gave a standardized measure of intellectual functioning." App. 133a. And in fact, Dr. Jordan's written report provides no IQ score. See *id.*, at 429a.[5] The state court therefore could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence. See *State* v. *Dunn*, 2001–1635 (La. 11/1/02), 831 So. 2d 862, 886, n. 9 (ordering *Atkins* evidentiary hearing even though "prison records indicate[d]" the defendant had an "'estimated IQ of 76,'" emphasizing testimony that prison officials "did not do the formal IQ testing").

---

[5] There is some question whether Dr. Jordan's report, which was introduced in federal habeas proceedings, was ever entered into the state-court record. See 854 F. Supp. 2d 366, 380, n. 13 (MD La. 2012) (accepting counsel's representation that the report was not in the state-court record); but see Tr. of Oral Arg. 50 (State's counsel asserting that it was). We see no need to resolve this dispute, though we note that the report is not currently contained in the state-court record lodged with the District Court.

B

The state court's refusal to grant Brumfield's request for an *Atkins* evidentiary hearing rested, next, on its conclusion that the record failed to raise any question as to Brumfield's "impairment . . . in adaptive skills." App. to Pet. for Cert. 171a. That determination was also unreasonable.

The adaptive impairment prong of an intellectual disability diagnosis requires an evaluation of the individual's ability to function across a variety of dimensions. The Louisiana Supreme Court in *Williams* described three separate sets of criteria that may be utilized in making this assessment. See 831 So. 2d, at 852–854. Although Louisiana courts appear to utilize all three of these tests in evaluating adaptive impairment, see *Dunn*, 41 So. 3d, at 458–459, 463, for the sake of simplicity we will assume that the third of these tests, derived from Louisiana statutory law, governed here, as it appears to be the most favorable to the State.[6] Under that standard, an individual may be intellectually disabled if he has "substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care. (ii) Understanding and use of language. (iii) Learning. (iv) Mobility. (v) Self-direction. (vi) Capacity for independent living." *Williams*, 831 So. 2d, at 854 (quoting then La. Rev. Stat. Ann. §28:381(12) (repealed 2005)).

The record before the state court contained sufficient evidence to raise a question as to whether Brumfield met these criteria. During the sentencing hearing, Brumfield's

---

[6] The other two standards set forth in *Williams* were: the AAMR criteria, which require "'limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work,'" 831 So. 2d, at 852, n. 22; and the DSM–IV criteria, which similarly require "'significant limitations'" in "'at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety,'" *id.*, at 853, n. 25.

mother testified that Brumfield had been born prematurely at a very low birth weight. App. 28a. She also recounted that he had been taken out of school in the fifth grade and hospitalized due to his behavior, and recalled an incident in which he suffered a seizure. *Id.*, at 34a–38a, 41a, 47a.

Social worker Dr. Guin elaborated on this testimony, explaining that Brumfield's low birth weight indicated "that something ha[d] gone wrong during the pregnancy," that medical records suggested Brumfield had "slower responses than normal babies," and that "they knew that something was wrong at that point." *Id.*, at 75a–76a. Dr. Guin also confirmed that, beginning in fifth grade, Brumfield had been placed in special classes in school and in multiple mental health facilities, and had been prescribed antipsychotics and sedatives. *Id.*, at 89a, 93a–94a.[7] Moreover, one report Dr. Guin reviewed from a facility that treated Brumfield as a child "questioned his intellectual functions," and opined that "he probably had a learning disability related to some type of slowness in motor development, some type of physiological [problem]." *Id.*, at 89a. Dr. Guin herself reached a similar conclusion, stating that Brumfield "obviously did have a physiologically linked learning disability that he was born with," and that his "basic problem was that he . . . could not process information." *Id.*, at 90a, 98a.

Finally, Dr. Bolter, who had performed "a comprehensive battery of tests," confirmed that Brumfield had a "borderline general level of intelligence." *Id.*, at 127a–128a. His low intellect manifested itself in a fourth-grade reading level—and he reached that level, Dr. Bolter elaborated, only with respect to "simple word recognition," and "not even comprehension." *Id.*, at 128a; see also *id.*, at 134a. In a written report submitted to the state court, Dr. Bolter further noted

---

[7] While the dissent contends that the record shows Brumfield's placement in special education classes was simply due to his misbehavior, *post*, at 341, Dr. Guin testified that Brumfield's behavioral problems were in part a function of a learning disability, see App. 86a.

that Brumfield had deficiencies "frequently seen in individuals with a history of learning disabilities," and "clearly" had "learning characteristics that make it more difficult for him to acquire new information." *Id.*, at 418a, 420a. Dr. Bolter also testified that Brumfield's low birth weight had "place[d] him [at] a risk of some form of potential neurological trauma," and affirmed that the medications administered to Brumfield as a child were generally reserved for "severe cases." *Id.*, at 130a, 132a.

All told, then, the evidence in the state-court record provided substantial grounds to question Brumfield's adaptive functioning. An individual, like Brumfield, who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level, certainly would seem to be deficient in both "[u]nderstanding and use of language" and "[l]earning"—two of the six "areas of major life activity" identified in *Williams*. 831 So. 2d, at 854. And the evidence of his low birth weight, of his commitment to mental health facilities at a young age, and of officials' administration of antipsychotic and sedative drugs to him at that time, all indicate that Brumfield may well have had significant deficits in at least one of the remaining four areas. See *ibid.*

In advancing its contrary view of the record, the state court noted that Dr. Bolter had described Brumfield as someone with "an antisocial personality." App. 127a; see App. to Pet. for Cert. 171a. The relevance of this diagnosis is, however, unclear, as an antisocial personality is not inconsistent with any of the above-mentioned areas of adaptive impairment, or with intellectual disability more generally. The DSM–IV—one of the sources on which the *Williams* court relied in defining intellectual disability—provides: "The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder." DSM–IV, at 47; see also AAMR, at 172 (noting that

individuals with intellectual disability also tend to have a number of other mental health disorders, including personality disorders).

To be sure, as the dissent emphasizes, *post*, at 336–337, 341, other evidence in the record before the state court may have cut against Brumfield's claim of intellectual disability. Perhaps most significant, in his written report Dr. Bolter stated that Brumfield "appears to be normal from a neurocognitive perspective," with a "normal capacity to learn and acquire information when given the opportunity for repetition," and "problem solving and reasoning skills" that were "adequate." App. 421a. Likewise, the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns. But cf. AAMR, at 8 (intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation").

It is critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a "reasonable doubt" as to his intellectual disability to be entitled to an evidentiary hearing. See *Williams*, 831 So. 2d, at 858, n. 33. The Louisiana Supreme Court's decision in *Williams* illustrated how low the threshold for an evidentiary hearing was intended to be: There, the court held that the defendant was entitled to a hearing on his *Atkins* claim notwithstanding the fact that "the defense's own expert testified unequivocally, at both the guilt and penalty phases of trial, that [the] defendant is not mentally retarded," an assessment "based on the fact that [the] defendant [was] not deficient in adaptive functioning." 831 So. 2d, at 855; see also *Dunn*, 831 So. 2d, at 885, 887 (ordering hear-

ing despite expert testimony that the defendant "had never been identified as a child who was a slow learner," and had "received college credit for courses completed during his incarceration"). Similarly, in light of the evidence of Brumfield's deficiencies, none of the countervailing evidence could be said to foreclose all reasonable doubt. An individual who points to evidence that he was at risk of "neurological trauma" at birth, was diagnosed with a learning disability and placed in special education classes, was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot "process information" has raised substantial reason to believe that he suffers from adaptive impairments.

That these facts were alone sufficient to raise a doubt as to Brumfield's adaptive impairments is all the more apparent given that Brumfield had not yet had the opportunity to develop the record for the purpose of proving an intellectual disability claim. At his pre-*Atkins* trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability. In fact, had he done so at the penalty phase, he ran the risk that it would "enhance the likelihood . . . future dangerousness [would] be found by the jury." *Atkins*, 536 U. S., at 321. Thus, given that the evidence from trial provided good reason to think Brumfield suffered from an intellectual disability, there was even greater cause to believe he might prove such a claim in a full evidentiary hearing. Indeed, the Louisiana Supreme Court had made clear that a capital defendant in Brumfield's position should be accorded this additional benefit of the doubt when it defined the standard for assessing whether a hearing is required. Echoing *Atkins*' observation that penalty-phase evidence of intellectual disability can be a "two-edged sword," *ibid.*, *Williams* noted that where a trial "was conducted prior to *Atkins*," the defense's "trial strategy may have been to shift the focus away from any diagnosis of mental retardation." 831 So. 2d, at 856, n. 31. For that reason, the *Williams*

court considered the fact that the defendant "ha[d] not had the issue of mental retardation put before the fact finder in light of the *Atkins* restriction on the death penalty" as a factor supporting the requisite threshold showing that "entitled [him] to an evidentiary hearing." *Id.*, at 857; accord, *Dunn*, 831 So. 2d, at 886. Here, the state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. The court's failure to do so resulted in an unreasonable determination of the facts.

III

A

Urging affirmance of the decision below, the State advances two additional arguments that we need discuss only briefly.

First, the State suggests that rather than being evaluated pursuant to § 2254(d)(2)'s "unreasonable determination of the facts" standard, Brumfield's attack on the state trial court's decision should instead be "'reviewed under the arguably more deferential standard set out in § 2254(e)(1).'" Brief for Respondent 30 (quoting *Wood*, 558 U. S., at 301).[8] We have not yet "defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," *Burt* v. *Titlow*, 571 U. S. 12, 18 (2013), and we need not do so here. The State did not press below the theory that § 2254(e)(1) supplies the governing standard when a court evaluates whether a habeas petitioner has satisfied § 2254(d)(2)'s requirements, the Fifth Circuit did not address that possibility, and the State in its brief in opposition to certiorari failed to advance any specific argument that

[8] Section 2254(e)(1) provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

the decision below could be supported by invocation of that statutory provision. See Brief in Opposition 60–64. The argument is therefore "properly 'deemed waived.'" *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 306 (2010) (quoting this Court's Rule 15.2).

Second, the State contends that Brumfield's request for an *Atkins* hearing was properly rejected because the record evidence failed to show that Brumfield's intellectual deficiencies manifested while he was in the "developmental stage"—that is, before he reached adulthood. *Williams*, 831 So. 2d, at 854. But the state trial court never made any finding that Brumfield had failed to produce evidence suggesting he could meet this age-of-onset requirement. There is thus no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied §2254(d). See *Panetti* v. *Quarterman*, 551 U. S. 930, 953–954 (2007); compare, *e. g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003) (reviewing *de novo* the question whether petitioner had suffered prejudice where state court's reasoned decision rejecting claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984), was premised solely on conclusion that attorney's performance had not been constitutionally deficient), with *Harrington* v. *Richter*, 562 U. S. 86, 98 (2011) (requiring federal habeas court to defer to hypothetical reasons state court might have given for rejecting federal claim where there is no "opinion explaining the reasons relief has been denied"). In any event, the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood: Both Dr. Guin and Dr. Bolter testified at length about Brumfield's intellectual shortcomings as a child and their possible connection to his low birth weight. If Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child.

B

Finally, we offer a few additional words in response to JUSTICE THOMAS' dissent. We do not deny that Brumfield's crimes were terrible, causing untold pain for the victims and their families. But we are called upon today to resolve a different issue. There has already been one death that society rightly condemns. The question here is whether Brumfield cleared AEDPA's procedural hurdles, and was thus entitled to a hearing to show that he so lacked the capacity for self-determination that it would violate the Eighth Amendment to permit the State to impose the "law's most severe sentence," *Hall*, 572 U. S., at 709, and take his life as well. That question, and that question alone, we answer in the affirmative.

* * *

We hold that Brumfield has satisfied the requirements of § 2254(d). The judgment of the United States Court of Appeals for the Fifth Circuit is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join as to all but Part I–C, dissenting.

Federal collateral review of state convictions interrupts the enforcement of state criminal laws and undermines the finality of state-court judgments. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) addresses that interference by constraining the ability of federal courts to grant relief to state prisoners. Today, the Court oversteps those limits in a decision that fails to respect the Louisiana state courts and our precedents. I respectfully dissent.

I

This case is a study in contrasts. On the one hand, we have Kevan Brumfield, a man who murdered Louisiana police officer Betty Smothers and who has spent the last 20 years claiming that his actions were the product of circumstances beyond his control. On the other hand, we have Warrick Dunn, the eldest son of Corporal Smothers, who responded to circumstances beyond his control by caring for his family, building a professional football career, and turning his success on the field into charitable work off the field.

A

Given that the majority devotes a single sentence to a description of the crime for which a Louisiana jury sentenced Brumfield to death, I begin there.

Corporal Smothers, a 14-year veteran of the Baton Rouge Police Department, was working a second job to support her family when she was murdered just after midnight on January 7, 1993. Following a 10-hour shift at the department on January 6, Corporal Smothers reported to a local grocery store, where she served as a uniformed security officer with the official authorization of the department. She monitored the security of the grocery store and waited to escort the assistant manager, Kimen Lee, to a local bank to make the store's nightly deposit.

Corporal Smothers followed her usual practice of driving Lee to the bank in her police cruiser. Shortly after midnight, they arrived at the bank's night depository. As Lee leaned out of the passenger side door to make the deposit, she heard the racking of the slide on a handgun. Brumfield and his accomplice, Henri Broadway, then opened fire on the two women.

Brumfield fired seven rounds from a .380-caliber handgun at close range from the left side of the cruiser, while Broadway fired five rounds from a .25-caliber handgun from the

right rear of the cruiser. Brumfield hit Corporal Smothers five times in the forearm, chest, and head. Lee was hit multiple times as well, causing 11 entrance and exit wounds, but she somehow managed to slide over on the bench seat and take control of the police car. She drove to a nearby convenience store, where she was able to call for help and to describe Broadway to police. Emergency responders transported both women to the hospital. Corporal Smothers was pronounced dead on arrival. Lee survived.

On January 11, 1993, Baton Rouge police arrested Brumfield for Corporal Smothers' murder. After several hours of police interrogation, during which he denied involvement in the murder, Brumfield eventually gave a videotaped confession.[1] He admitted that, after riding around at night looking for a "hustle," he had come up with the idea to steal the grocery store's deposit. He described how he and Broadway hid in the bushes waiting for the car to arrive, and how, when Lee looked back while trying to make the deposit, he started shooting. He admitted that he had fired seven rounds from his .380-caliber handgun, that Broadway had fired five shots with the .25-caliber handgun, and that a third man had served as the getaway driver.

A Louisiana jury convicted Brumfield of first-degree murder. In addition to his videotaped confession, the State introduced evidence that Brumfield had spoken about committing a robbery to several people in the weeks leading up to the murder. He was facing sentencing on unrelated charges and had promised his pregnant girlfriend that he would obtain money to support her, their baby, and her child from a previous relationship while he was in jail. The State also introduced evidence that Brumfield had told an acquaintance right after the murder that he had just killed "a son of a bitch." Record 3566.

---

[1] The videotaped confession can be found at http://www.supremecourt.gov/media/media.aspx.

B

At the penalty phase, the State sought a death sentence. It reintroduced the evidence from the guilt phase, along with evidence of Brumfield's other criminal acts.[2] The felony convictions for which Brumfield was awaiting sentencing when he murdered Corporal Smothers were for attempted possession of cocaine and felony theft of a gun. Brumfield had worked only three months in his adult life because, as he had admitted to his psychologist, he found drug dealing a far more effective way to make money. In fact, he had been involved a few years earlier in the fatal shooting of a fellow drug dealer in a deal gone bad. And 10 months after he murdered Corporal Smothers, Brumfield battered another police officer while in prison.

The State also explained that Brumfield's murder of Corporal Smothers was the culmination of a 2-week crime spree. On Christmas Day 1992, Brumfield robbed Anthony Miller at gunpoint after giving him a ride. He forced Miller out of the car, put a gun to Miller's head, and pulled the trigger. Fortunately for Miller, the gun misfired, and he survived. One week later, Brumfield robbed Edna Marie Perry and her daughter Trina Perkins at gunpoint as they were walking along the side of the road. Brumfield pulled alongside them, pointed a sawed-off shotgun at Perry, and said, "Hand it over, bitch." *Id.*, at 3790. Perry turned over her purse, but pleaded with Brumfield to give back the pictures from her

[2] Although not introduced at trial, it is worth noting that the night of Corporal Smothers' murder was apparently not her first interaction with Brumfield. Six years earlier, she had caught him stealing and had given him a chance to turn his life around, a chance he unfortunately did not take. See W. Dunn & D. Yaeger, Running for My Life: My Journey in the Game of Football and Beyond 12 (2008). As Corporal Smothers' eldest son recounted, "[Brumfield] told me a story that in 1987, my mother, working security at a store, caught him stealing and made him put back whatever he took. . . . Brumfield said my mom could have made an example of him that day, but she elected not to. I thought to myself, that was Mom—always giving people second chances to do right." *Ibid.*

deceased son's funeral that she carried in the purse. He responded none too courteously, "Bitch, you dead," and drove away. *Ibid.*

The State also introduced evidence about the murder's broader impact. In addition to serving as a police officer, Corporal Smothers was a single mother to six children and a volunteer coach at a local track club. Her children, who ranged from 10 to 18 years old, went to live with their grandmother after the murder. The loss of their mother weighed heavily on all of them. It was particularly hard on Corporal Smothers' eldest son, Warrick, who had been especially close to his mother, and on her second eldest son, Derrick Green, who had been hoping to spend more time with her after Warrick went off to college. Derrick was deprived of that chance, and he and Warrick had to take on extra responsibilities to care for their younger siblings.

For his part, Brumfield introduced evidence that his crimes were "beyond his control," a product of his disadvantaged background. *Id.*, at 3927. He was born at a low birth weight, and his mother testified that he spent several months in the hospital shortly after his birth. His father left the family, and his stepfather would make him sit in the corner on hot rice, whip him, and hit him over the head with a telephone book. His brother eventually decided to go live with their biological father. Brumfield opted to stay with his mother and stepfather.

When he was around seven or eight years old, Brumfield began to have behavioral problems. He had trouble staying in his seat at school, was disruptive, easily distracted, and prone to fighting. He was eventually taken to a psychiatric hospital to address his hyperactivity. Although he was a straight-A student until the third grade, his time in four or five group homes educated him in the criminal lifestyle, and his grades began to suffer.

Dr. Cecile Guin, a social worker, testified that Brumfield's hyperactivity and acting out could be traced largely to his

low birth weight, lack of a supportive home environment, and abusive stepfather. Although she was not a medical doctor, she concluded that Brumfield had a "neurologically based hyperactive or learning disability problem." *Id.*, at 3886. She acknowledged, however, that his school records described him as having a behavior disorder—"a pattern situation or inappropriate behavior extended over a long period of time which cannot be explained by intellectual, sensory, neurological or other general factors." *Id.*, at 3882. She also admitted on cross-examination that a psychologist, Brian T. Jordan, had not diagnosed Brumfield as suffering from any neurological disorder, but instead from "a sociopathic personality disorder, antisocial type, poor impulse control, especially in the area of aggression." *Id.*, at 3897–3898.

Dr. John Bolter, a clinical neuropsychologist, testified on behalf of the defense that Brumfield suffered from an antisocial personality disorder. Based on a battery of tests employed to determine whether Brumfield suffered from "any kind of neurological deficits in cognitive functions," Dr. Bolter concluded that Brumfield early on in life "manifest[ed] . . . a conduct disorder with extreme levels of aggressivity and a disregard for the basic rights of others," along with "an attention deficit disorder of some type." *Id.*, at 3904. Over time, he "emerged into what looks more like an antisocial personality," and he continued to have "attention difficulty" and "borderline general level of intelligence." *Ibid.* Brumfield's IQ score was a 75, placing him at about the seventh percentile of the general population or "on the low end of intelligence." *Ibid.* His reading skills were at about a fourth-grade level, while his math and spelling skills were at about a sixth-grade level. On the other hand, Dr. Bolter concluded that Brumfield's "problem solving, judgment and reasoning skills [we]re sufficient to meet the demands of everyday adulthood and he [wa]s not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or

mental illness." *Id.*, at 275. Dr. Bolter had also reviewed Dr. Jordan's report, and he testified that the only inconsistency in their conclusions was that Dr. Jordan rated Brumfield's intelligence "just a little higher than" he did. *Id.*, at 3907.

The jury unanimously recommended that Brumfield be sentenced to death. It found three statutory aggravators that made him eligible for that penalty: He was engaged in the attempted perpetration of an armed robbery; he knowingly created a risk of death or great bodily harm to more than one person; and the victim was a peace officer engaged in her lawful duties. The jury found no statutory mitigators.

C

Brumfield's argument that his actions were the product of his disadvantaged background is striking in light of the conduct of Corporal Smothers' children following her murder. Most widely known is that of Warrick. Though he had turned 18 just two days before Brumfield murdered his mother, he quickly stepped into the role of father figure to his younger siblings.[3] In his view, it "was up to [him] to make sure that everybody grew up to be somebody." W. Dunn & D. Yaeger, Running for My Life: My Journey in the Game of Football and Beyond 37 (2008).

To that end, Warrick led by example, becoming a star running back at Florida State University and then in the National Football League (NFL). During his time at Florida State, he set records on the field while coping with the loss of his mother. *Id.*, at 71, 111, 117. Though separated from his family in Louisiana, he called his brothers and sisters

[3] Like Brumfield, Warrick's father was not a part of his life. *Id.*, at 51. But, unlike Brumfield, Warrick did not use the absence of a father figure as a justification for murder. *Ibid.* Instead, he recognized that his mother had been "the family patriarch" when she was alive, *ibid.*, and that he had a responsibility to take on that role after her death, *id.*, at 37.

regularly,[4] sought parenting advice from his coach, and returned home when he could. *Id.*, at 111–113. He kept his mother's pearl earrings, stained with her blood from the night she was murdered, in a box on his dresser. *Id.*, at 71. After four years at Florida State, Dunn was drafted by the Tampa Bay Buccaneers. Concerned that some of his siblings were struggling in Baton Rouge, he moved the three youngest into his home in Tampa Bay. *Id.*, at 139. Although the strain of playing for the Buccaneers and raising his family weighed on him, he "accepted it as [his] responsibility . . . to make sure they stayed on the right path." *Ibid.*

While balancing football and family, Dunn still found time for others. He started Homes for the Holidays, a charitable organization that decorates and fully furnishes—down to the toothbrush—homes obtained by single mothers through first-time homeowner assistance programs. Dunn was inspired by his own mother, who spent years working toward the purchase of a home for her family, but, thanks to Brumfield, did not live to reach her goal. *Id.*, at 152.

Dunn's contributions did not end there. After joining the Atlanta Falcons in 2002, he expanded the reach of Homes for the Holidays, *id.*, at 157; traveled overseas to visit our Armed Forces, *id.*, at 200–201; led an effort to raise money from the NFL to help respond to the tragic effects of Hurricane Katrina, *id.*, at 202–205; and became a founding member of Athletes for Hope, an organization dedicated to helping athletes find and pursue charitable opportunities, *id.*, at 207–208. Following his retirement from professional football in

---

[4] In a letter to Brumfield, one of Corporal Smothers' daughters, Summer, later wrote: "Can you imagine life at 14 without your mother, no father to step up and take responsibility for his seed? Not knowing where your next meal will come from, or where you are going to lay your head at night, or even who's going to sacrifice their life to raise six children because of someone's selfish acts? Do you know what this can [do to] a 14-year-old's physical, emotional, and mental state of mind?" *Id.*, at 13 (italics deleted).

2008, Dunn launched two more charitable organizations in honor of his mother: Betty's Hope, a mobile bereavement program that offers no-cost grief counseling services to children in the Baton Rouge area, and Homes for Service, a program dedicated to helping servicemembers, police officers, and firefighters achieve home ownership. As Dunn once remarked, "I knew that was what my mother would have been most proud of: not my records, not my awards, but the way I used my worldly success to give something back." *Id.*, at 157.

D

Brumfield, meanwhile, has spent the last 20 years engaged in a ceaseless campaign of review proceedings. He raised numerous challenges on direct appeal to the trial court's discovery orders, admission of evidence, jury instructions, and preservation of the record; the prosecutor's references during the penalty phase; and the alleged deficiencies of his trial counsel. The Louisiana Supreme Court rejected each of these claims, *State* v. *Brumfield*, 96–2667 (La. 10/20/98), 737 So. 2d 660, and this Court denied his petition for a writ of certiorari, *Brumfield* v. *Louisiana*, 526 U. S. 1025 (1999).

In 2000, Brumfield filed his first petition for state postconviction relief. In that petition, among other things, he alleged 9 instances of prosecutorial misconduct, over 18 instances of ineffective assistance of counsel, and at least 17 constitutional errors in the jury instructions at the guilt phase of his trial.

Brumfield sought and received multiple extensions of time before finally filing his amended petition for state postconviction relief in 2003. He raised many of the same claims as he had in his initial petition, but also asserted for the first time that he was mentally retarded and therefore ineligible for the death penalty under *Atkins* v. *Virginia*, 536 U. S. 304 (2002). In support of that claim, he alleged that his IQ score was 75, that his reading level was that of a fourth grader,

that he was born prematurely with a low birth weight and indications of slower responses than normal babies, that he had suffered seizures and been prescribed a variety of medications since childhood, that he was twice treated in psychiatric hospitals during childhood and adolescence, and that he had been diagnosed with a learning disability.

The state court denied Brumfield's petition. In a ruling from the bench, the court explained that not every defendant who requests an evidentiary hearing on an *Atkins* claim is entitled to one. Based on its review of "the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's [*sic*] testimony, which refers to and discusses Dr. Jordan's report," App. to Pet. for Cert. 171a, it concluded that Brumfield had not met his burden to make a threshold showing of mental retardation. In particular, the court noted that Brumfield had an IQ score of 75 or higher and had demonstrated no impairment in adaptive skills. Although Brumfield had requested fees to develop his *Atkins* claim, the trial court did not explicitly rule on the motion, and Brumfield's counsel did not prompt him to do so.

Brumfield then sought federal collateral review. In his first habeas application, he repeated many of his claims, including the claim that he is ineligible to be executed under *Atkins*. He requested funds to develop that claim in an evidentiary hearing. The District Court dismissed all of his claims except for the *Atkins* one and ordered an evidentiary hearing. As the majority describes, the District Court eventually granted a writ of habeas corpus. It concluded that the state court had based its denial of Brumfield's *Atkins* claim on an unreasonable determination of the facts and had unreasonably applied clearly established Supreme Court precedent in denying him funds to develop the claim. The U. S. Court of Appeals for the Fifth Circuit reversed, concluding that the District Court should not have conducted an evidentiary hearing and that AEDPA did not afford relief on

either of the grounds identified by the District Court. 744 F. 3d 918, 926–927 (2014).

II

AEDPA limits "the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen* v. *Pinholster*, 563 U. S. 170, 181 (2011). As relevant here, 28 U. S. C. § 2254(d) provides that a federal court may not grant an application

> "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In applying this "highly deferential standard for evaluating state-court rulings, . . . state-court decisions [must] be given the benefit of the doubt." *Pinholster*, 563 U. S., at 181 (internal quotation marks omitted). They must be reviewed solely on "the record that was before the state court that adjudicated the claim on the merits." *Id.*, at 181, 185, and n. 7. And the prisoner must rebut any state-court factual findings he seeks to challenge by clear and convincing evidence under § 2254(e)(1). *Burt* v. *Titlow*, 571 U. S. 12, 18 (2013).

Brumfield presents two grounds for relief under this framework. First, he argues that the Louisiana state court denied his *Atkins* claim based on an unreasonable determination of the facts, § 2254(d)(2).[5] Second, he argues that the

[5] Although this question presented in his petition is framed as one of law—"[w]hether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's

Louisiana state court violated clearly established federal law as determined by this Court when it denied him funding to develop evidence for that claim, § 2254(d)(1).

III

The majority resolves the case solely on Brumfield's first ground, so I begin there.

A

The Louisiana state court's decision to deny Brumfield's *Atkins* claim was not based on an unreasonable determination of the facts. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood* v. *Allen*, 558 U. S. 290, 301 (2010). Where the record supports a state court's factual determinations, the prisoner cannot make that showing. See, *e. g.*, *Titlow*, *supra*, at 19–20. Here, the state court rejected Brumfield's *Atkins* claim in an oral ruling as follows:

> "Dr. Bolter in particular found [Brumfield] had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden [of] placing the claim of mental retardation at issue." App. to Pet. for Cert. 171a–172a.

---

claim of mental retardation under *Atkins v. Virginia*, 536 U. S. 304 (2002), has based its decision on an unreasonable determination of the facts under 28 U. S. C. § 2254(d)(2)," Pet. for Cert. i—Brumfield reframed his question at oral argument as purely one based on the factual determinations made in his case, Tr. of Oral Arg. 27–28. He properly conceded that a court does not necessarily make its decision based on an unreasonable determination of the facts when it rejects an *Atkins* claim based on a record developed before *Atkins*. Tr. of Oral Arg. 7–8.

That statement contains three factual determinations: (1) Brumfield's IQ was at least 75; (2) Brumfield had not demonstrated impairment in adaptive skills; and (3) Brumfield has an antisocial personality disorder. Each of these facts is amply supported by the state-court record.

To begin, the record justifies a finding that Brumfield's IQ is 75, if not a bit higher. Dr. Bolter testified, without contradiction, that Brumfield scored a 75 on the IQ test he administered and that "Dr. Jordan rated [Brumfield's] intelligence just a little higher than I did." Record 3907. Dr. Bolter's report similarly shows that Brumfield's test results were "lower than estimated by Dr. Jordan in January of this year," but it notes that "Dr. Jordan was using a screening measure which proves to be less reliable." *Id.*, at 272. The parties dispute whether Dr. Jordan's report was made part of the record, but to the extent it was, it confirms Dr. Bolter's testimony. Although it does not specify an IQ score, Dr. Jordan's report states that Brumfield's "intellectual function is slightly limited but generally close to the Average Range" and that a psychological test showed him "to be intellectually functioning generally in the low Average Range." App. 428a–429a. Because two thirds of all IQs are expected to lie between 85 and 115, a fair reading of Dr. Jordan's statements would suggest an IQ score closer to 85. See American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 37 (9th ed. 1992).

The record likewise supports the state court's finding that Brumfield is not impaired in adaptive skills. Under *Atkins*, the relevant adaptive skill areas are "'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.'" 536 U. S., at 308, n. 3. Dr. Bolter reported that Brumfield's speech was "intelligible and prosodic" without "evidence of thought derailment," Record 271, and that his writing appeared "normal," *id.*, at 273. Brumfield lived independently

before his arrest, often staying with his pregnant girlfriend, and had been able to maintain a job for approximately three months before quitting "because his earnings were better through distributing drugs and selling firearms." *Id.*, at 271. Although Brumfield reads at a fourth-grade level and spells and performs arithmetic at a sixth-grade level, Dr. Bolter concluded that he "has a normal capacity to learn and acquire information when given the opportunity for repetition." *Id.*, at 276.

Finally, the record supports a finding that Brumfield has an antisocial personality disorder. Dr. Bolter testified, without contradiction, that what manifested in childhood as a conduct disorder had developed in adulthood into an antisocial personality disorder. He described that disorder as "an absence of a conscience" and "the ability to disregard the rights and feelings of others in favor of what you want" without any "sense of compunction or remorse." *Id.*, at 3909. Dr. Guin acknowledged that Dr. Jordan had reached a similar diagnosis. Brumfield presented no medical evidence disputing it. That the majority disputes "[t]he relevance of this diagnosis," *ante*, at 319, does not make it any less supported by the record.

Brumfield thus not only has failed to rebut the state court's factual findings by clear and convincing evidence, § 2254(e)(1), he has failed to show that they were anything other than eminently reasonable. Under any fairminded application of § 2254(d)(2), he would not be entitled to relief.

B

1

The majority reaches the opposite result with a bit of legerdemain, recasting *legal* determinations as *factual* ones. It contends that the state court erred in denying Brumfield's claim because the evidence Brumfield presented "was entirely consistent with intellectual disability" as defined in Louisiana and thus sufficient to entitle him to an evidentiary

hearing. *Ante*, at 314. That argument betrays the legal nature of the majority's dispute with the state court's decision: The majority does not—because it cannot—disagree that each of the state court's factual findings was supported by the record. See *ante*, at 315–316 (not disputing Brumfield's IQ score); *ante*, at 320 (not disputing Brumfield's diagnosed antisocial personality disorder); *ibid.* (acknowledging that "evidence in the record before the state court may have cut against Brumfield's claim of intellectual disability"); *ibid.* (acknowledging that "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills"). Instead, the majority disagrees with the state court's *conclusion* that Brumfield had not made a sufficient threshold showing of mental retardation to be entitled to an evidentiary hearing on his claim. *Ante*, at 320–321.

That conclusion, however, is properly characterized as one based on the application of law to fact, not on the determination of the facts themselves.[6] As we have explained, "The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice* v. *Collins*, 546 U. S. 333, 342 (2006). No one can dispute that Brumfield's IQ score, adaptive skills, and antisocial personality disorder are facts. By contrast, the question whether Brumfield has met the legal standard for relief on, or at least an evidentiary hearing with regard to, his *Atkins* claim requires the application of law to those facts. See *Panetti* v. *Quarterman*, 551 U. S. 930, 948–952 (2007) (applying § 2254(d)(1) to conclude that a state court unreason-

[6] The majority attempts to defend its recharacterization of the inquiry on the ground that the State invoked § 2254(d)(2). The State invoked that provision because that is the basis upon which Brumfield sought federal collateral relief. But, Brumfield is not entitled to that relief unless he can show that the state court based its decision to deny his *Atkins* claim on unreasonable factual determinations. Rather than address those determinations, the majority addresses something else entirely.

ably applied clearly established federal law when it failed to provide a prisoner with a competency hearing after he made "'a substantial threshold showing of insanity'").[7] Indeed, in discussing each of these "factual determinations," the majority turns first to state law to determine what showing a prisoner must make to qualify as mentally retarded. *Ante*, at 314, 317 (citing *State* v. *Williams*, 2001–165 (La. 11/1/02), 831 So. 2d 835). If the majority's disagreement with the state court's decision were truly based on "factual determinations," it is hard to understand what relevance state law would have.

2

Even on its own terms, the majority's so-called "factual" analysis fails. The majority holds that the record supported a finding that Brumfield qualified for a hearing on mental retardation under *state* law. To reiterate, even if true, this state-law-based *legal* analysis cannot overcome AEDPA's bar to relief under § 2254(d)(2). To make matters worse, the majority gets the state law wrong.

The Louisiana Supreme Court's decision in *Williams* instructed state courts to use the statutory standard for determining when a pretrial competency hearing is necessary—when there is "'reasonable ground to doubt the defendant's mental capacity to proceed.'" 831 So. 2d, at 858, n. 33 (quot-

[7] To be sure, the question whether someone is mentally retarded is one of fact. But that is not the question at issue in an *Atkins* claim. *Atkins* held that a category of mentally retarded offenders could not be executed consistent with the Eighth Amendment because a national consensus had developed against such executions. It acknowledged that there was disagreement about how to define mentally retarded offenders and clarified that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U. S., at 317. Thus, when a prisoner brings an *Atkins* claim, he bears the burden to establish not just the "fact" of his mental retardation, but also that he is sufficiently impaired to fall within the category of persons identified in *Atkins* as legally beyond a State's power to execute.

ing La. Code Crim. Proc. Ann., Art. 643 (West 2003)).[8] It made clear that "reasonable ground to doubt" is "*not* a reference to proof beyond a reasonable doubt in the guilt phase of the trial," 831 So. 2d, at 858, n. 33 (emphasis added),[9] and that the burden was on the prisoner to bring forward objective evidence to put his mental retardation at issue.

Brumfield's IQ test score failed to meet the standard for significantly subaverage intellectual functioning under Louisiana law. As *Williams* explained, Louisiana statutes defined "'significantly subaverage general intellectual functioning'" as "'more than two standard deviations below the mean for the test of intellectual functioning,'" and a person with intellectual functioning two standard deviations below the mean "would have an IQ of 70 using the Wechsler scale." *Id.*, at 853, and n. 26. Accounting for the standard error of measurement, *Williams* explained that the requisite IQ could range "from 66 to 74." *Id.*, at 854, n. 26.[10] The majority prefers to avoid this language, focusing instead on "[t]he sources on which *Williams* relied in defining subaverage intelligence." *Ante*, at 315. But the way to apply a state

---

[8] It is unclear whether *Williams* even continued to supply the governing state law at the time the state court acted, for the Louisiana Legislature had established a procedure for adjudicating claims of mental retardation in capital cases three months before Brumfield's hearing. See 2003 La. Acts p. 698 (enacting La. Code Crim. Proc. Ann., Art. 905.5.1 (West Supp. 2015)). Because that law did not specifically address the circumstances under which capital defendants would be entitled to a hearing on such claims, however, I assume for the sake of argument that *Williams* supplies the applicable state law.

[9] The majority's persistent characterization of this standard as a "reasonable doubt" standard is quite misleading. *Ante*, at 313, 321, 323.

[10] As the majority points out, the Court in *Williams* was "using this example to illustrate the concept of [the standard error of measurement]," *ante*, at 315, n. 4, but it was illustrating the standard error of measurement *as it related* to the Louisiana law defining significantly subaverage general intellectual functioning as "'more than two standard deviations below the mean for the test of intellectual functioning,'" *Williams*, 831 So. 2d, at 853, and n. 26 (quoting then La. Rev. Stat. Ann. §28:381(42) (repealed 2005)).

court's decision is to apply what the state court said, and, at 75 and higher, Brumfield's IQ scores exceeded the cutoff for significantly subaverage general intellectual functioning under that decision.

Brumfield's evidence of alleged deficits in adaptive skills similarly failed to meet the requisite standards under Louisiana law. *Williams* defined deficits in adaptive skills as "'substantial functional limitations in three or more of the following areas of major life activity:'" (1) self-care, (2) understanding and use of language, (3) learning, (4) mobility, (5) self-direction, and (6) capacity for independent living. 831 So. 2d, at 854 (quoting then La. Rev. Stat. Ann. 28:381(12) (repealed 2005)). The only evidence Brumfield presented that is even potentially relevant to these factors was evidence of his poor reading skills and behavioral problems in school. But, once again, Dr. Bolter's report confirmed that he had "a normal capacity to learn and acquire information when given the opportunity for repetition" and that Brumfield's behavioral problems were attributable to "a conduct disorder that . . . progressed into an antisocial personality disorder." Record 276. The majority places special weight on Brumfield's placement in "special education" classes, *ante*, at 310, 318, n. 7, 319, 321, but the record explains that he was placed in *behavioral disorder* classes not because he had a low capacity to learn, but because he had a high capacity to make trouble, Record 3846–3847.[11] The state court could reasonably have found that Brumfield had not provided evidence of "substantial functional limitations" in any of these categories, let alone the *three* required by state law.

---

[11] The majority places great reliance on the testimony of Dr. Guin, who was *not* a medical doctor, that Brumfield's "out of control behavior" in the classroom, Record 3879, was a function in part of a learning disability, *ante*, at 318. But, Dr. Guin was not qualified to make that diagnosis, and she acknowledged that the school had diagnosed him only with a behavioral disorder. Record 3882.

Absent objective evidence of either significantly subaverage intellectual functioning or deficits in adaptive behavior, Brumfield was not entitled to an evidentiary hearing under *Williams*. The majority's analysis is erroneous: It takes a meritless state-law claim, recasts it as two factual determinations, and then awards relief, despite ample evidence in the record to support each of the state court's *actual* factual determinations.

C

The majority engages in such maneuvering because Brumfield argued *only* that the state court based its decision to deny his *Atkins* claim on an unreasonable determination of the facts, § 2254(d)(2), not an unreasonable application of clearly established federal law as determined by this Court, § 2254(d)(1). Brumfield, for his part, presented his claim in this way to avoid AEDPA's additional restrictions on relief for alleged legal errors. As explained below, overcoming § 2254(d)(1)'s bar based on an alleged legal error is particularly demanding. Brumfield's arguments, even if presented properly as legal ones, would not meet the bar.

Under § 2254(d)(1), a federal court may not award relief for a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." "Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *White* v. *Woodall*, 572 U. S. 415, 419 (2014) (internal quotation marks and alteration omitted). A state court's decision is therefore not "contrary to" our decisions unless its holding contradicts our holdings, or it "'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Mitchell* v. *Esparza*, 540 U. S. 12, 15–16 (2003) (*per curiam*). A state

court's decision is not "'an unreasonable application'" of our decisions if it merely "'decline[s] to apply a specific legal rule that has not been squarely established by this Court.'" *Harrington* v. *Richter*, 562 U. S. 86, 101 (2011). Instead, the Court must evaluate the application of our holdings in the context of the rule's specificity: "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.* (internal quotation marks omitted). "[W]here the precise contours of [a] right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *Woodall*, *supra*, at 424 (internal quotation marks omitted).

"If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U. S., at 102. "'Federal habeas review of state convictions . . . disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Id.*, at 103. Although AEDPA "stops short of imposing a complete bar" on this type of review, it does require "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*, at 102–103. Brumfield cannot meet this standard.

1

The state court's decision to deny Brumfield's *Atkins* claim was not contrary to any holding of this Court. The state court recognized that *Atkins* precludes the execution of mentally retarded offenders and then concluded that Brumfield did not qualify as a mentally retarded offender. Because this Court has never confronted a set of facts that are materially indistinguishable from the facts in this case and arrived at a different result, the state court's decision was not

"contrary to" clearly established federal law as determined by this Court.

Nor is the decision of the state court to deny a *hearing* on the claim contrary to such clearly established law. In *Atkins*, this Court held that the Eighth Amendment precludes the execution of mentally retarded offenders, but "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restrictions upon their execution of sentences." 536 U. S., at 317 (internal quotation marks and brackets omitted). This Court did not so much as mention an evidentiary hearing, let alone hold that prisoners raising *Atkins* claims are entitled to one. To be sure, *Atkins* cited this Court's decision in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), when it explained that it was leaving the enforcement of the right to the States. See 536 U. S., at 316–317. Justice Powell's controlling concurrence in *Ford* required a court to afford a prisoner a hearing on the claim that he is insane and therefore ineligible to be executed after a prisoner made a "substantial threshold showing of insanity." 477 U. S., at 426 (opinion concurring in part and concurring in judgment). The citation in *Atkins*, however, not only was not to that portion of *Ford*, it was not even to Justice Powell's *opinion* in *Ford*. Compare *Atkins*, *supra*, at 317 (citing *Ford*, *supra*, at 405 (majority opinion), 416–417 (opinion of Marshall, J.)), with *Ford*, *supra*, at 426 (opinion of Powell, J.). *Atkins* thus did not imply—let alone hold—that a prisoner is entitled to a hearing on an *Atkins* claim. There being no mention of a hearing, the state court's decision to deny Brumfield such a hearing could not be "contrary to . . . clearly established Federal law." § 2254(d)(1).

Even if *Atkins did* establish a right to an evidentiary hearing upon a threshold showing of mental retardation, the state court's decision to deny Brumfield a hearing would not be contrary to that rule. After all, the state court took the position that Brumfield would have been entitled to an evidentiary hearing if he had made a threshold showing of men-

tal retardation; it simply concluded that he had not made that showing. This Court has never confronted a set of materially indistinguishable facts and found the threshold showing satisfied. Thus, as with its rejection of the *Atkins* claim itself, the state court's decision to deny Brumfield an *Atkins* hearing was not contrary to clearly established federal law as determined by this Court.

2

The state court's decision here likewise was not an unreasonable application of *Atkins*. The *Atkins* Court did not clearly define the category "of mentally retarded offenders about whom there is a national consensus." 536 U. S., at 317. It offered guidance in the form of several clinical definitions of mental retardation as "'subaverage intellectual functioning'" accompanied by "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.*, at 318. It gave conflicting indications of the IQ score necessary for "subaverage intellectual functioning," defining mild mental retardation as the term used to describe "people with an IQ level of 50–55 to approximately 70," *id.*, at 308, n. 3; and citing one source that reports 70 or less as the statistical criterion for mental retardation, *id.*, at 309, n. 5; see 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2589 (B. Sadock & V. Sadock eds., 7th ed. 2000); but commenting that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," 536 U. S., at 309, n. 5. It offered no greater specificity with respect to "significant limitations in adaptive skills," though it remarked that, "by definition," mentally retarded offenders "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control

impulses, and to understand the reactions of others." *Id.*, at 318.

The state court here reasonably applied the general rule announced in *Atkins* when it rejected Brumfield's claim. Brumfield achieved a 75 on the IQ test administered to him by Dr. Bolter, 5 points above the score identified by *Atkins* as the upper end of "'[m]ild'" mental retardation, *id.*, at 308, n. 3, and by clinical definitions as the criterion for mental retardation. He also scored somewhat higher on the IQ tests administered to him by Dr. Jordan. In addition, he demonstrated no impairment in adaptive skills. To the contrary, his test results "indicate[d] that his problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." Record 275. Based on this record, the state court reasonably concluded that Brumfield had not come forward with evidence that he fell within the category of mentally retarded offenders about whom a national consensus against execution had developed.

For the same reasons, even if one were to mischaracterize *Atkins* as clearly establishing a right to an evidentiary hearing upon a substantial threshold showing of mental retardation, the state court did not unreasonably apply that rule. *Atkins* did not define the showing necessary, and the state court reasonably concluded that, on this record, Brumfield had not met it.[12]

---

[12] It is worth reiterating that the majority's analysis of state law would afford no basis for relief under § 2254(d)(1), even if Brumfield had requested relief under that provision. Section 2254(d)(1) serves as a basis for relief only when a state court reached a decision that involved an "unreasonable application of . . . clearly established *Federal* law, as determined by [*this*] Court." (Emphasis added.) And even if Brumfield could show a violation of state law, which he cannot for the reasons I discussed

D

In sum, § 2254(d) bars Brumfield's *Atkins* claim. The facts upon which the state court rejected his claim are amply supported by the record and thus not unreasonable. In concluding otherwise, the majority conflates questions of fact with questions about the application of law to fact. That conflation may help it get around the inconveniences of "clearly established Federal law as determined by th[is Court]," § 2254(d)(1), but it does violence to the statute and to our ordinary understanding of "facts." Indeed, we have summarily reversed lower courts for making that same error. See, *e. g.*, *Lopez* v. *Smith*, 574 U. S. 1, 8 (2014) (*per curiam*) ("Although the Ninth Circuit claimed its disagreement with the state court was factual in nature, in reality its grant of relief was based on a legal conclusion about the adequacy of the notice provided"). We should hold ourselves to the same standard.

IV

The majority's willingness to afford relief on Brumfield's first ground of alleged error in the state court's dismissal of his *Atkins* claim obviates its need to resolve his second, which focuses on the state court's denial of funding to develop that claim. Because I would conclude that AEDPA bars relief on the first ground, I must also address the second. AEDPA's standards make short work of that ground as well.

The state court's denial of funding to Brumfield was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by this Court. *No* precedent of this Court addresses whether and under what circumstances a state prisoner must be afforded funds to develop an *Atkins* claim. *Atkins* left "to the States the task

---

above, such a violation would "provide no basis for federal habeas relief." *Estelle* v. *McGuire*, 502 U. S. 62, 68, n. 2 (1991).

of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U. S., at 317 (internal quotation marks and brackets omitted). None of our decisions since *Atkins* have even purported to address constitutional requirements for funding of these claims.

Brumfield believes that the decision was contrary to, and involved an unreasonable application of, *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), and *Ford* v. *Wainwright*, 477 U. S. 399, but neither of those decisions even involved protections for mentally retarded offenders. Instead, both decisions addressed protections for prisoners asserting *insanity—Ake* in the context of insanity as a defense to a crime, 470 U. S., at 70, 77, and *Ford* in the context of insanity as a limitation on the State's power to execute a prisoner, 477 U. S., at 418 (Powell, J., concurring in part and concurring in judgment). Neither involved the question whether a prisoner is entitled to funds to develop an insanity claim before he has made a substantial threshold showing of that claim. Only *Ake* addressed the question of funds at all, and it held that an indigent defendant has a right of "access" to a competent psychiatrist to assist in the preparation of his insanity defense, *not* that an "indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U. S., at 83.

The state court fully complied with this Court's decisions when it declined to award Brumfield funds. Brumfield did not meet his burden to make a substantial threshold showing of mental retardation. No decision of this Court requires a State to afford a defendant funds to do so.

* * *

Over 20 years ago, Brumfield deprived the people of Baton Rouge of one of their police officers and six children of their mother. A jury of his peers found Brumfield guilty of the crime and sentenced him to death. The Louisiana

courts afforded him full appellate and collateral-review proceedings.

Today, the majority tosses those proceedings aside, concluding that the state court based its decision to deny Brumfield's *Atkins* claim on an "unreasonable determination of the facts," even as it concedes that the record includes evidence supporting that court's factual findings. Under AEDPA, that concession should bar relief for Brumfield. In concluding otherwise, the majority distorts federal law and intrudes upon Louisiana's sovereign right to enforce its criminal laws and its courts' judgments. Such willfulness is disheartening.

What is perhaps more disheartening than the majority's disregard for both AEDPA and our precedents is its disregard for the human cost of its decision. It spares not a thought for the 20 years of judicial proceedings that its decision so casually extends. It spares no more than a sentence to describe the crime for which a Louisiana jury sentenced Brumfield to death. It barely spares the two words necessary to identify Brumfield's victim, Betty Smothers, by name. She and her family—not to mention our legal system—deserve better.

I respectfully dissent.

[Appendix to opinion of THOMAS, J., follows this page.]

APPENDIX

W. Dunn & D. Yaeger, Running for My Life: My Journey in the Game of Football and Beyond (2008).

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

I join all but Part I–C of JUSTICE THOMAS' dissent. The story recounted in that Part is inspiring and will serve a very beneficial purpose if widely read, but I do not want to suggest that it is essential to the legal analysis in this case.

Syllabus

HORNE ET AL. *v.* DEPARTMENT OF AGRICULTURE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14–275. Argued April 22, 2015—Decided June 22, 2015

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. The marketing order for raisins established a Raisin Administrative Committee that imposes a reserve requirement—a requirement that growers set aside a certain percentage of their crop for the account of the Government, free of charge. The Government makes use of those raisins by selling them in noncompetitive markets, donating them, or disposing of them by any means consistent with the purposes of the program. If any profits are left over after subtracting the Government's expenses from administering the program, the net proceeds are distributed back to the raisin growers. In 2002–2003, raisin growers were required to set aside 47 percent of their raisin crop under the reserve requirement. In 2003–2004, 30 percent. Marvin Horne, Laura Horne, and their family are raisin growers who refused to set aside any raisins for the Government on the ground that the reserve requirement was an unconstitutional taking of their property for public use without just compensation. The Government fined the Hornes the fair market value of the raisins as well as additional civil penalties for their failure to obey the raisin marketing order.

The Hornes sought relief in federal court, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. On remand from this Court over the issue of jurisdiction, *Horne* v. *Department of Agriculture*, 569 U. S. 513, the Ninth Circuit held that the reserve requirement was not a Fifth Amendment taking. The court determined that the requirement was not a *per se* taking because personal property is afforded less protection under the Takings Clause than real property and because the Hornes, who retained an interest in any net proceeds, were not completely divested of their property. The Ninth Circuit held that, as in cases allowing the government to set conditions on land use and development, the Government imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market). It held that the Hornes could avoid relinquishing large percentages of their crop by "planting different crops." 750 F. 3d 1128, 1143.

Syllabus

Held: The Fifth Amendment requires that the Government pay just compensation when it takes personal property, just as when it takes real property. Any net proceeds the raisin growers receive from the sale of the reserve raisins goes to the amount of compensation they have received for that taking—it does not mean the raisins have not been appropriated for Government use. Nor can the Government make raisin growers relinquish their property without just compensation as a condition of selling their raisins in interstate commerce. Pp. 357–370.

(a) The Fifth Amendment applies to personal property as well as real property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home. Pp. 357–362.

(1) This principle, dating back as far as Magna Carta, was codified in the Takings Clause in part because of property appropriations by both sides during the Revolutionary War. This Court has noted that an owner of personal property may expect that new regulation of the use of property could "render his property economically worthless." *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1027–1028. But there is still a "longstanding distinction" between regulations concerning the use of property and government acquisition of property. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 323. When it comes to physical appropriations, people do not expect their property, real or personal, to be actually occupied or taken away. Pp. 357–361.

(2) The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee disposes of those raisins as it wishes, to promote the purposes of the raisin marketing order. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 432. Pp. 361–362.

(b) The fact that the growers are entitled to the net proceeds of the raisin sales does not mean that there has been no taking at all. When there has been a physical appropriation, "we do not ask . . . whether it deprives the owner of all economically valuable use" of the item taken. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323. The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no taking, particularly when that interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here. *Andrus* v. *Allard*, 444 U. S. 51,

Syllabus

distinguished. Once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation. Pp. 362–364.

(c) The taking in this case also cannot be characterized as part of a voluntary exchange for a valuable government benefit. In one of the years at issue, the Government insisted that the Hornes part with 47 percent of their crop for the privilege of selling the rest. But the ability to sell produce in interstate commerce, although certainly subject to reasonable government regulation, is not a "benefit" that the Government may withhold unless growers waive constitutional protections. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, and *Leonard & Leonard* v. *Earle*, 279 U. S. 392, distinguished. Pp. 364–367.

(d) The Hornes are not required to first pay the fine and then seek compensation under the Tucker Act. See *Horne*, 569 U. S., at 527–528. Because they have the full economic interest in the raisins the Government alleges should have been set aside for its account—*i. e.*, they own the raisins they grew as well as the raisins they handled, having paid the growers for all of their raisins, not just their free-tonnage raisins—they may raise a takings-based defense to the fine levied against them. There is no need for the Ninth Circuit to calculate the just compensation due on remand. The clear and administrable rule is that "just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *United States* v. *50 Acres of Land*, 469 U. S. 24, 29. Here, the Government already calculated that amount when it fined the Hornes the fair market value of the raisins. Pp. 367–370.

750 F. 3d 1128, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, BREYER, and KAGAN, JJ., joined as to Parts I and II. THOMAS, J., filed a concurring opinion, *post*, p. 370. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 371. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 377.

Michael W. McConnell argued the cause for petitioners. With him on the briefs were *John C. O'Quinn*, *Stephen S. Schwartz*, and *Brian C. Leighton*.

Deputy Solicitor General Kneedler argued the cause for respondent. With him on the brief were *Solicitor General*

Verrilli, *Acting Assistant Attorney General Mizer*, *Elizabeth B. Preglogar*, *Michael S. Raab*, and *Carrie F. Ricci*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the United States Department of Agriculture's California Raisin Marketing Order, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is whether the Takings Clause of the Fifth Amendment bars the Government from im-

---

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Charles E. Roy*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Dustin M. Howell*, Assistant Solicitor General, and by the Attorneys General of their respective States as follows: *Mark Brnovich* of Arizona and *Wayne Stenehjem* of North Dakota; for the Cato Institute et al. by *Steffen N. Johnson*, *William P. Ferranti*, *Ilya Shapiro*, *Karen R. Harned*, *Elizabeth Milito*, *Luke A. Wake*, *Manuel S. Klausner*, *Thomas J. Ward*, *Devala A. Janardan*, and *Shannon L. Goessling*; for the Center for Constitutional Jurisprudence by *Timothy S. Bishop*, *Kevin Ranlett*, *John C. Eastman*, and *Anthony T. Caso*; for the Chamber of Commerce of the United States of America by *John P. Elwood*, *Jeremy C. Marwell*, *Kate Comerford Todd*, and *Sheldon Gilbert*; for Constitutional and Property Law Scholars by *James C. Ho* and *Prerak Shah*; for the DKT Liberty Project et al. by *Jessica Ring Amunson*; for the Federal Circuit Bar Association by *Jerry Stouck* and *Edgar H. Haug*; for the Institute for Justice by *Michael M. Berger*, *Scott G. Bullock*, *Dana Berliner*, *Jeffrey T. Rowes*, *Robert J. McNamara*, and *Mahesha P. Subbaraman*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Foundation by *J. David Breemer* and *James S. Burling*; for The Rutherford Institute by *John W. Whitehead*; for the Washington Legal Foundation by *Richard A. Samp*; and for Baylen J. Linnekin et al. by *Mr. Linnekin*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the International Municipal Lawyers Association by *John D. Echeverria*; and for Sun-Maid Growers of California et al. by *Edward M. Ruckert* and *M. Miller Baker*.

posing such a demand on the growers without just compensation.

I

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the Government, free of charge. The required allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture. In 2002–2003, this Committee ordered raisin growers to turn over 47 percent of their crop. In 2003–2004, 30 percent.

Growers generally ship their raisins to a raisin "handler," who physically separates the raisins due the Government (called "reserve raisins"), pays the growers only for the remainder ("free-tonnage raisins"), and packs and sells the free-tonnage raisins. The Raisin Committee acquires title to the reserve raisins that have been set aside, and decides how to dispose of them in its discretion. It sells them in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by "any other means" consistent with the purposes of the raisin program. 7 CFR § 989.67(b)(5) (2015). Proceeds from Committee sales are principally used to subsidize handlers who sell raisins for export (not including the Hornes, who are not raisin exporters). Raisin growers retain an interest in any net proceeds from sales the Raisin Committee makes, after deductions for the export subsidies and the Committee's administrative expenses. In the years at issue in this case, those proceeds were less than the cost of producing the crop one year, and nothing at all the next.

The Hornes—Marvin Horne, Laura Horne, and their family—are both raisin growers and handlers. They "handled" not only their own raisins but also those produced by other growers, paying those growers in full for all of their raisins, not just the free-tonnage portion. In 2002, the Hornes refused to set aside any raisins for the Government, believing they were not legally bound to do so. The Government sent trucks to the Hornes' facility at eight o'clock one morning to pick up the raisins, but the Hornes refused entry. App. 31; cf. *post*, at 386–387 (SOTOMAYOR, J., dissenting). The Government then assessed against the Hornes a fine equal to the market value of the missing raisins—some $480,000—as well as an additional civil penalty of just over $200,000 for disobeying the order to turn them over.

When the Government sought to collect the fine, the Hornes turned to the courts, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. Their case eventually made it to this Court when the Government argued that the lower courts had no jurisdiction to consider the Hornes' constitutional defense to the fine. *Horne* v. *Department of Agriculture*, 569 U. S. 513 (2013) (*Horne I*). We rejected the Government's argument and sent the case back to the Court of Appeals so it could address the Hornes' contention on the merits. *Id.*, at 529.

On remand, the Ninth Circuit agreed with the Hornes that the validity of the fine rose or fell with the constitutionality of the reserve requirement. 750 F. 3d 1128, 1137 (2014). The court then considered whether that requirement was a physical appropriation of property, giving rise to a *per se* taking, or a restriction on a raisin grower's use of his property, properly analyzed under the more flexible and forgiving standard for a regulatory taking. The court rejected the Hornes' argument that the reserve requirement was a *per se* taking, reasoning that "the Takings Clause affords less protection to personal than to real property," and concluding

that the Hornes "are not completely divested of their property rights," because growers retain an interest in the proceeds from any sale of reserve raisins by the Raisin Committee. *Id.*, at 1139.

The court instead viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit. See *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987). As in such permit cases, the Court of Appeals explained, the Government here imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market). And just as a landowner was free to avoid the government condition by forgoing a permit, so too the Hornes could avoid the reserve requirement by "planting different crops." 750 F. 3d, at 1143. Under that analysis, the court found that the reserve requirement was a proportional response to the Government's interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment.

We granted certiorari. 574 U. S. 1118 (2015).

II

The petition for certiorari poses three questions, which we answer in turn.

A

The first question presented asks "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' *Arkansas Game & Fish Comm'n v. United States*, [568 U. S. 23, 31] (2012), applies only to real property and not to personal property." The answer is no.

1

There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council*,

Inc. v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (brackets and internal quotation marks omitted). Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 426–435 (1982).

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. It protects "private property" without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings. Clause 28 of that charter forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Cl. 28 (1215), in W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 329 (2d ed. 1914).

The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property. In 1641, for example, Massachusetts adopted its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Massachusetts Body of Liberties ¶8, in R. Perry, Sources of Our Liberties 149 (1978). Virginia allowed the seizure of surplus "live stock, or beef, pork, or bacon" for the military, but only upon

"paying or tendering to the owner the price so estimated by the appraisers." 1777 Va. Acts ch. XII. And South Carolina authorized the seizure of "necessaries" for public use, but provided that "said articles so seized shall be paid for agreeable to the prices such and the like articles sold for on the ninth day of October last." 1779 S. C. Acts § 4.

Given that background, it is not surprising that early Americans bridled at appropriations of their personal property during the Revolutionary War, at the hands of both sides. John Jay, for example, complained to the New York Legislature about military impressment by the Continental Army of "Horses, Teems, and Carriages," and voiced his fear that such action by the "little Officers" of the Quartermasters Department might extend to "Blankets, Shoes, and many other articles." A Hint to the Legislature of the State of New York (1778), in John Jay, The Making of a Revolutionary 461–463 (R. Morris ed. 1975) (emphasis deleted). The legislature took the "hint," passing a law that, among other things, provided for compensation for the impressment of horses and carriages. 1778 N. Y. Laws ch. 29. According to the author of the first treatise on the Constitution, St. George Tucker, the Takings Clause was "probably" adopted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Blackstone's Commentaries, Editor's App. 305–306 (1803).

Nothing in this history suggests that personal property was any less protected against physical appropriation than real property. As this Court summed up in *James* v. *Campbell*, 104 U. S. 356, 358 (1882), a case concerning the alleged appropriation of a patent by the Government:

> "[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use

> without compensation land which has been patented to a private purchaser."

Prior to this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), the Takings Clause was understood to provide protection only against a direct appropriation of property—personal or real. *Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a "regulatory taking"—a restriction on the use of property that went "too far." *Id.*, at 415. And in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978), the Court clarified that the test for how far was "too far" required an "ad hoc" factual inquiry. That inquiry required considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

Four years after *Penn Central*, however, the Court reaffirmed the rule that a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors. In *Loretto*, the Court held that requiring an owner of an apartment building to allow installation of a cable box on her rooftop was a physical taking of real property, for which compensation was required. That was true without regard to the claimed public benefit or the economic impact on the owner. The Court explained that such protection was justified not only by history, but also because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," depriving the owner of "the rights to possess, use and dispose of" the property. 458 U. S., at 435 (internal quotation marks omitted). That reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property.

The Ninth Circuit based its distinction between real and personal property on this Court's discussion in *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992), a case involving extensive limitations on the use of shorefront prop-

erty. 750 F. 3d, at 1139–1141. *Lucas* recognized that while an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless," such an "implied limitation" was not reasonable in the case of land. 505 U. S., at 1027–1028.

Lucas, however, was about regulatory takings, not direct appropriations. Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away. Our cases have stressed the "longstanding distinction" between government acquisitions of property and regulations. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323. The different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike. See 535 U. S., at 323 (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa" (footnote omitted)).

2

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. App. to Pet. for Cert. 179a; Tr. of Oral Arg. 31. The Committee's raisins must be physically segregated from free-tonnage raisins. 7 CFR § 989.66(b)(2). Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. § 989.66(a). The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of"

them, *Loretto*, 458 U. S., at 435 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," *id.*, at 431 (internal quotation marks omitted), as it essentially does. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.*, at 432.

The Government thinks it "strange" and the dissent "baffling" that the Hornes object to the reserve requirement, when they nonetheless concede that "the government may prohibit the sale of raisins without effecting a per se taking." Brief for Respondent 35; *post*, at 388 (SOTOMAYOR, J., dissenting). But that distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal*, 260 U. S., at 416.

B

The second question presented asks "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the

property owner a contingent interest in a portion of the value of the property, set at the government's discretion." The answer is no.

The Government and dissent argue that raisins are fungible goods whose only value is in the revenue from their sale. According to the Government, the raisin marketing order leaves that interest with the raisin growers: After selling reserve raisins and deducting expenses and subsidies for exporters, the Raisin Committee returns any net proceeds to the growers. 7 CFR §§ 989.67(d), 989.82, 989.53(a), 989.66(h). The Government contends that because growers are entitled to these net proceeds, they retain the most important property interest in the reserve raisins, so there is no taking in the first place. The dissent agrees, arguing that this possible future revenue means there has been no taking under *Loretto*. See *post*, at 378–382.

But when there has been a physical appropriation, "we do not ask . . . whether it deprives the owner of all economically valuable use" of the item taken. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323; see *id.*, at 322 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (citation omitted)). For example, in *Loretto*, we held that the installation of a cable box on a small corner of Loretto's rooftop was a *per se* taking, even though she could of course still sell and economically benefit from the property. 458 U. S., at 430, 436. The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.

The dissent points to *Andrus* v. *Allard*, 444 U. S. 51 (1979), noting that the Court found no taking in that case, even though the owners' artifacts could not be sold at all. *Post*,

at 381–382. The dissent suggests that the Hornes should be happy, because they might at least get *something* from what had been their raisins. But *Allard* is a very different case. As the dissent recognizes, the owners in that case retained the rights to possess, donate, and devise their property. In finding no taking, the Court emphasized that the Government did not "compel the surrender of the artifacts, and there [was] no physical invasion or restraint upon them." 444 U. S., at 65–66. Here of course the raisin program requires physical surrender of the raisins and transfer of title, and the growers lose any right to control their disposition.

The Government and dissent again confuse our inquiry concerning *per se* takings with our analysis for regulatory takings. A regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*. That is why, in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we held that a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property. The owner retained the value of the use of the property as a shopping center largely unimpaired, so the regulation did not go "too far." *Id.*, at 83 (quoting *Pennsylvania Coal Co.*, 260 U. S., at 415). But once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation. See *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 747–748 (1997) (SCALIA, J., concurring in part and concurring in judgment). That is not an issue here: The Hornes did not receive any net proceeds from Raisin Committee sales for the years at issue, because they had not set aside any reserve raisins in those years (and, in any event, there were no net proceeds in one of them).

C

The third question presented asks "Whether a governmental mandate to relinquish specific, identifiable property as a

'condition' on permission to engage in commerce effects a per se taking." The answer, at least in this case, is yes.

The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine." Brief for Respondent 32 (brackets and internal quotation marks omitted).

"Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law. In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U. S., at 439, n. 17. As the Court explained, the contrary argument "proves too much":

> "For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices." *Ibid.*

As the Court concluded, property rights "cannot be so easily manipulated." *Ibid.*

The Government and dissent rely heavily on *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). There we held that the Environmental Protection Agency could require companies manufacturing pesticides, fungicides, and rodenticides to disclose health, safety, and environmental information about their products as a condition to receiving a permit to sell

those products. While such information included trade secrets in which pesticide manufacturers had a property interest, those manufacturers were not subjected to a taking because they received a "valuable Government benefit" in exchange—a license to sell dangerous chemicals. *Id.*, at 1007; see *Nollan*, 483 U. S., at 834, n. 2 (discussing *Monsanto*).

The taking here cannot reasonably be characterized as part of a similar voluntary exchange. In one of the years at issue here, the Government insisted that the Hornes turn over 47 percent of their raisin crop, in exchange for the "benefit" of being allowed to sell the remaining 53 percent. The next year, the toll was 30 percent. We have already rejected the idea that *Monsanto* may be extended by regarding basic and familiar uses of property as a "Government benefit" on the same order as a permit to sell hazardous chemicals. See *Nollan*, 483 U. S., at 834, n. 2 (distinguishing *Monsanto* on the ground that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit' "). Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.

Leonard & Leonard v. *Earle*, 279 U. S. 392 (1929), is also readily distinguishable. In that case, the Court upheld a Maryland requirement that oyster packers remit ten percent of the marketable detached oyster shells or their monetary equivalent to the State for the privilege of harvesting the oysters. But the packers did "not deny the power of the

State to declare their business a privilege," and the power of the State to impose a "privilege tax" was "not questioned by counsel." *Id.*, at 396. The oysters, unlike raisins, were "feræ naturæ" that belonged to the State under state law, and "[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire." *Leonard* v. *Earle*, 155 Md. 252, 258, 141 A. 714, 716 (1928). The oyster packers did not simply seek to sell their property; they sought to appropriate the State's. Indeed, the Maryland Court of Appeals saw the issue as a question of "a reasonable and fair compensation" *from* the packers *to* "the state, as owner of the oysters." *Id.*, at 259, 141 A., at 717 (internal quotation marks omitted).

Raisins are not like oysters: they are private property—the fruit of the growers' labor—not "public things subject to the absolute control of the state," *id.*, at 258, 141 A., at 716. Any physical taking of them for public use must be accompanied by just compensation.

III

The Government correctly points out that a taking does not violate the Fifth Amendment unless there is no just compensation, and argues that the Hornes are free to seek compensation for any taking by bringing a damages action under the Tucker Act in the Court of Federal Claims. See 28 U. S. C. § 1491(a)(1); *Monsanto*, 467 U. S., at 1020. But we held in *Horne I* that the Hornes may, in their capacity as handlers, raise a takings-based defense to the fine levied against them. We specifically rejected the contention that the Hornes were required to pay the fine and then seek compensation under the Tucker Act. See 569 U. S., at 527–528 ("We . . . conclude that the [Agricultural Marketing Agreement Act] withdraws Tucker Act jurisdiction over [the Hornes'] takings claim. [The Hornes] (as handlers) have no alternative remedy, and their takings claim was not 'premature' when presented to the Ninth Circuit.").

As noted, the Hornes are both growers and handlers. Their situation is unusual in that, as handlers, they have the full economic interest in the raisins the Government alleges should have been set aside for its account. They own the raisins they grew and are handling for themselves, and they own the raisins they handle for other growers, having paid those growers for all their raisins (not just the free-tonnage amount, as is true with respect to most handlers). See *supra*, at 356; Tr. of Oral Arg. 3–4. The penalty assessed against them as handlers included the dollar equivalent of the raisins they refused to set aside—their raisins. 750 F. 3d, at 1135, n. 6; Brief for Petitioners 15. They may challenge the imposition of that fine, and do not have to pay it first and then resort to the Court of Federal Claims.

Finally, the Government briefly argues that if we conclude that the reserve requirement effects a taking, we should remand for the Court of Appeals to calculate "what compensation would have been due if petitioners had complied with the reserve requirement." Brief for Respondent 55. The Government contends that the calculation must consider what the value of the reserve raisins would have been without the price support program, as well as "other benefits . . . from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards and promotional activities." *Id.*, at 55–56. Indeed, according to the Government, the Hornes would "likely" have a net gain under this theory. *Id.*, at 56.

The best defense may be a good offense, but the Government cites no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking. Instead, our cases have set forth a clear and administrable rule for just compensation: "The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property

at the time of the taking.'" *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934)).

JUSTICE BREYER is concerned that applying this rule in this case will affect provisions concerning whether a condemning authority may deduct special benefits—such as new access to a waterway or highway, or filling in of swampland—from the amount of compensation it seeks to pay a landowner suffering a partial taking. *Post*, at 375 (opinion concurring in part and dissenting in part); see *Bauman* v. *Ross*, 167 U. S. 548 (1897) (laying out of streets and subdivisions in the District of Columbia). He need not be. Cases of that sort can raise complicated questions involving the exercise of the eminent domain power, but they do not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here. Nothing in the cases JUSTICE BREYER labels "*Bauman* and its progeny," *post*, at 374, suggests otherwise, which may be why the Solicitor General does not cite them.*

---

*For example, in *United States* v. *Miller*, 317 U. S. 369, 377 (1943), the Court—in calculating the fair market value of land—discounted an increase in value resulting from speculation "as to what the Government would be compelled to pay as compensation" after the land was earmarked for acquisition. In *United States* v. *Sponenbarger*, 308 U. S. 256, 265 (1939), the Court determined there was no taking in the first place, when the complaint was merely that a Government flood control plan provided insufficient protection for the claimant's land. *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363 (1918), similarly involved a claim "for damages to property not actually taken." So too *Reichelderfer* v. *Quinn*, 287 U. S. 315 (1932). There the Court held that claimants who had paid a special assessment when Rock Creek Park in Washington, D. C., was created—because the Park increased the value of their property—did not thereby have the right to prevent Congress from altering use of part of the Park for a fire station 38 years later. In *Dohany* v. *Rogers*, 281 U. S. 362 (1930), the law authorizing the taking did "not permit the offset of benefits for a railroad," and therefore was "not subject to the objection that it fails to provide adequate compensation . . . and is therefore unconstitutional." *Id.*, at

In any event, this litigation presents no occasion to consider the broader issues discussed by JUSTICE BREYER. The Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: $483,843.53. 750 F. 3d, at 1135, n. 6. The Government cannot now disavow that valuation, see Reply Brief 21–23, and does not suggest that the marketing order affords the Hornes compensation in that amount. There is accordingly no need for a remand; the Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government's effort to take their raisins. This case, in litigation for more than a decade, has gone on long enough.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to offer an additional observation concerning JUSTICE BREYER's argument that we should remand the case. The Takings Clause prohibits the government from taking private property except "for public use," even when it offers "just compensation." U. S. Const., Amdt. 5. That requirement, as originally understood, imposes a meaningful constraint on the power of the state—"the government may take property only if it actually uses or gives the public a legal right to use the property." *Kelo* v. *New London*, 545

367, and n. 1 (quoting *Fitzsimons & Galvin, Inc.* v. *Rogers*, 243 Mich. 649, 665, 220 N. W. 881, 886 (1928)). And in *Norwood* v. *Baker*, 172 U. S. 269 (1898), the issue was whether an assessment to pay for improvements exceeded a village's taxing power. Perhaps farthest afield are the *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 153 (1974), which involved valuation questions arising from the Government reorganization of northeast and midwest railroads. The Court in that case held that the legislation at issue was not "merely an eminent domain statute" but instead was enacted "pursuant to the bankruptcy power." *Id.*, at 151, 153.

U. S. 469, 521 (2005) (THOMAS, J., dissenting). It is far from clear that the Raisin Administrative Committee's conduct meets that standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments. 7 CFR § 989.67(b) (2015). To the extent that the Committee is not taking the raisins "for public use," having the Court of Appeals calculate "just compensation" in this case would be a fruitless exercise.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, concurring in part and dissenting in part.

I agree with Parts I and II of the Court's opinion. However, I cannot agree with the Court's rejection, in Part III, of the Government's final argument. The Government contends that we should remand the case for a determination of whether any compensation would have been due if the Hornes had complied with the California Raisin Marketing Order's reserve requirement. In my view, a remand for such a determination is necessary.

The question of just compensation was not presented in the Hornes' petition for certiorari. It was barely touched on in the briefs. And the courts below did not decide it. At the same time, the case law that I have found indicates that the Government may well be right: The marketing order may afford just compensation for the takings of raisins that it imposes. If that is correct, then the reserve requirement does not violate the Takings Clause.

I

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Clause means what it says: It "does not proscribe the taking of property; it proscribes taking *without just compensation*." *Williamson County Re-*

gional Planning Comm'n v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985) (emphasis added). Under the Clause, a property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken," which is to say that "[h]e must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255 (1934).

On the record before us, the Hornes have not established that the Government, through the raisin reserve program, takes raisins *without just compensation*. When the Government takes as reserve raisins a percentage of the annual crop, the raisin owners retain the remaining, free-tonnage, raisins. The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market. See 7 CFR § 989.55 (2015); 7 U. S. C. § 602(1). And any such enhancement matters. This Court's precedents indicate that, when calculating the just compensation that the Fifth Amendment requires, a court should deduct from the value of the taken (reserve) raisins any enhancement caused by the taking to the value of the remaining (free-tonnage) raisins.

More than a century ago, in *Bauman* v. *Ross*, 167 U. S. 548 (1897), this Court established an exception to the rule that "just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (quoting *Olson*, *supra*, at 255). We considered in *Bauman* how to calculate just compensation when the Government takes only a portion of a parcel of property:

> "[W]hen part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages

> on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." 167 U. S., at 574.

"The Constitution of the United States," the Court stated, "contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use." *Id.*, at 584.

The Court has consistently applied this method for calculating just compensation: It sets off from the value of the portion that was taken the value of any benefits conferred upon the remaining portion of the property. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 151 (1974) ("[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation" (footnote omitted)); *United States* v. *Miller*, 317 U. S. 369, 376 (1943) ("[I]f the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken"); *United States* v. *Sponenbarger*, 308 U. S. 256, 266–267 (1939) ("[I]f governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner"); *Reichelderfer* v. *Quinn*, 287 U. S. 315, 323 (1932) ("Just compensation . . . was awarded if the benefits resulting from the proximity of the improvement [were] set off against the value of the property taken from the same owners"); *Dohany* v. *Rogers*, 281 U. S. 362, 367–368 (1930) (a statute that "permits deduction of benefits derived from the construction of a highway" from the compensation paid to landowners "afford[s] no basis for anticipating that . . . just compensation will be denied"); *Norwood* v. *Baker*, 172 U. S. 269, 277 (1898) ("Except for [state law], the State could have authorized benefits to be deducted

from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use").

The rule applies regardless of whether a taking enhances the value of one property or the value of many properties. That is to say, the Government may "permi[t] consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages." *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 366 (1918). The Federal Constitution does not distinguish between "special" benefits, which specifically affect the property taken, and "general" benefits, which have a broader impact.

Of course, a State may prefer to guarantee a greater payment to property owners, for instance by establishing a standard for compensation that does not account for general benefits (or for any benefits) afforded to a property owner by a taking. See *id.*, at 365 (describing categories of rules applied in different jurisdictions); Schopflocher, Deduction of Benefits in Determining Compensation or Damages in Eminent Domain, 145 A. L. R. 7, 158–294 (1943) (describing particular rules applied in different jurisdictions). Similarly, "Congress . . . has the power to authorize compensation greater than the constitutional minimum." *50 Acres of Land*, *supra*, at 30, n. 14. Thus, Congress, too, may limit the types of benefits to be considered. See, *e. g.*, 33 U. S. C. § 595. But I am unaware of any congressional authorization that would increase beyond the constitutional floor the compensation owed for a taking of the Hornes' raisins.

If we apply *Bauman* and its progeny to the marketing order's reserve requirement, "the benefit [to the free-tonnage raisins] may be set off against the value of the [reserve raisins] taken." *Miller*, *supra*, at 376. The value

of the raisins taken might exceed the value of the benefit conferred. In that case, the reserve requirement effects a taking without just compensation, and the Hornes' decision not to comply with the requirement was justified. On the other hand, the benefit might equal or exceed the value of the raisins taken. In that case, the California Raisin Marketing Order does not effect a taking without just compensation. See *McCoy*, *supra*, at 366 ("In such [a] case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury"); *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 237 (2003) ("[I]f petitioners' net loss was zero, the compensation that is due is also zero"). And even the Hornes agree that if the reserve requirement does not effect a taking without just compensation, then they cannot use the Takings Clause to excuse their failure to comply with the marketing order—or to justify their refusal to pay the fine and penalty imposed based on that failure. See Brief for Petitioners 31 ("The constitutionality of the fine rises or falls on the constitutionality of the Marketing Order's reserve requirement and attendant transfer of reserve raisins" (internal quotation marks omitted)).

II

The majority believes the *Bauman* line of cases most likely does not apply here. It says that those cases do "not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here." *Ante*, at 369. But it is unclear to me what distinguishes this case from those.

It seems unlikely that the majority finds a distinction in the fact that this taking is based on regulatory authority. Cf. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law" (internal quotation marks omitted)). It similarly seems unlikely that the majority intends to distin-

guish between takings of real property and takings of personal property, given its recognition that the Takings Clause "protects 'private property' without any distinction between different types." *Ante,* at 358. It is possible that the majority questions the Government's argument because of its breadth—the Government argues that "it would be appropriate to consider what value all of the raisins would have had *in the absence of the marketing order*," Brief for Respondent 55, and I am unaware of any precedent that allows a court to account for portions of the marketing order that are entirely separate from the reserve requirement. But neither am I aware of any precedent that would distinguish between how the *Bauman* doctrine applies to the reserve requirement itself and how it applies to other types of partial takings.

Ultimately, the majority rejects the Government's request for a remand because it believes that the Government "does not suggest that the marketing order affords the Hornes compensation" in the amount of the fine that the Government assessed. *Ante,* at 370. In my view, however, the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins adjusted to account for the benefits received. And the Government does, indeed, suggest that the marketing order affords just compensation. See Brief for Respondent 56 ("It is likely that when all benefits and alleged losses from the marketing order are calculated, [the Hornes] would have a net *gain* rather than a net loss, given that a central point of the order is to benefit producers"). Further, the Hornes have not demonstrated the contrary. Before granting judgment in favor of the Hornes, a court should address the issue in light of all of the relevant facts and law.

* * *

Given the precedents, the parties should provide full briefing on this question. I would remand the case, permit-

ting the lower courts to consider argument on the question of just compensation.

For these reasons, while joining Parts I and II of the Court's opinion, I respectfully dissent from Part III.

JUSTICE SOTOMAYOR, dissenting.

The Hornes claim, and the Court agrees, that the Raisin Marketing Order, 7 CFR pt. 989 (2015) (hereinafter Order), effects a *per se* taking under our decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). But *Loretto* sets a high bar for such claims: It requires that each and every property right be destroyed by governmental action before that action can be said to have effected a *per se* taking. Because the Order does not deprive the Hornes of all of their property rights, it does not effect a *per se* taking. I respectfully dissent from the Court's contrary holding.

I

Our Takings Clause jurisprudence has generally eschewed "magic formula[s]" and has "recognized few invariable rules." *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). Most takings cases therefore proceed under the fact-specific balancing test set out in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). See *Arkansas Game and Fish Comm'n*, 568 U. S., at 31; *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 538–539 (2005). The Hornes have not made any argument under *Penn Central*. In order to prevail, they therefore must fit their claim into one of the three narrow categories in which we have assessed takings claims more categorically.

In the "special context of land-use exactions," we have held that "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit" constitute takings unless the government demonstrates a nexus and rough proportionality between its demand and the impact of the pro-

posed development. *Lingle*, 544 U. S., at 538, 546; see *Dolan* v. *City of Tigard*, 512 U. S. 374, 386, 391 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 837 (1987). We have also held that a regulation that deprives a property owner of "*all* economically beneficial us[e]" of his or her land is a *per se* taking. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1019 (1992) (emphasis in original). The Hornes have not relied on either of these rules in this Court. See Brief for Petitioners 42, 55.

Finally—and this is the argument the Hornes do rely on—we have held that the government effects a *per se* taking when it requires a property owner to suffer a "permanent physical occupation" of his or her property. *Loretto*, 458 U. S., at 426. In my view, however, *Loretto*—when properly understood—does not encompass the circumstances of this case because it only applies where all property rights have been destroyed by governmental action. Where some property right is retained by the owner, no *per se* taking under *Loretto* has occurred.

This strict rule is apparent from the reasoning in *Loretto* itself. We explained that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Id.*, at 435 (quoting *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945)). A "permanent physical occupation" of property occurs, we said, when governmental action "destroys *each* of these rights." 458 U. S., at 435 (emphasis in original); see *ibid.*, n. 12 (requiring that an owner be "absolutely dispossess[ed]" of rights). When, as we held in *Loretto*, *each* of these rights is destroyed, the government has not simply "take[n] a single 'strand' from the 'bundle' of property rights"; it has "chop[ped] through the bundle" entirely. *Id.*, at 435. In the narrow circumstance in which a property owner has suffered this "most serious form of invasion of [his or her] property interests," a taking can be said to have occurred without any further showing on the property owner's part. *Ibid.*

By contrast, in the mine run of cases where governmental action impacts property rights in ways that do not chop through the bundle entirely, we have declined to apply *per se* rules and have instead opted for the more nuanced *Penn Central* test. See, *e. g.*, *Hodel* v. *Irving*, 481 U. S. 704 (1987) (applying *Penn Central* to assess a requirement that title to land within Indian reservations escheat to the tribe upon the landowner's death); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–83 (1980) (engaging in similar analysis where there was "literally . . . a 'taking' of th[e] right" to exclude); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174–180 (1979) (applying *Penn Central* to find that the Government's imposition of a servitude requiring public access to a pond was a taking); see also *Loretto*, 458 U. S., at 433–434 (distinguishing *PruneYard* and *Kaiser Aetna*). Even governmental action that reduces the value of property or that imposes "a significant restriction . . . on one means of disposing" of property is not a *per se* taking; in fact, it may not even be a taking at all. *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979).

What our jurisprudence thus makes plain is that a claim of a *Loretto* taking is a bold accusation that carries with it a heavy burden. To qualify as a *per se* taking under *Loretto*, the governmental action must be so completely destructive to the property owner's rights—all of them—as to render the ordinary, generally applicable protections of the *Penn Central* framework either a foregone conclusion or unequal to the task. Simply put, the retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking under *Loretto*.

II

A

When evaluating the Order under this rubric, it is important to bear two things in mind. The first is that *Loretto* is not concerned with whether the Order is a good idea now,

whether it was ever a good idea, or whether it intrudes upon some property rights. The Order may well be an outdated, and by some lights downright silly, regulation. It is also no doubt intrusive. But whatever else one can say about the Order, it is not a *per se* taking if it does not result in the destruction of every property right. The second thing to keep in mind is the need for precision about whose property rights are at issue and about what property is at issue. Here, what is at issue are the Hornes' property rights in the raisins they own and that are subject to the reserve requirement. The Order therefore effects a *per se* taking under *Loretto* if and only if each of the Hornes' property rights in the portion of raisins that the Order designated as reserve has been destroyed. If not, then whatever fate the Order may reach under some other takings test, it is not a *per se* taking.

The Hornes, however, retain at least one meaningful property interest in the reserve raisins: the right to receive some money for their disposition. The Order explicitly provides that raisin producers retain the right to "[t]he net proceeds from the disposition of reserve tonnage raisins," 7 CFR § 989.66(h), and ensures that reserve raisins will be sold "at prices and in a manner intended to maxim[ize] producer returns," § 989.67(d)(1). According to the Government, of the 49 crop years for which a reserve pool was operative, producers received equitable distributions of net proceeds from the disposition of reserve raisins in 42. See Letter from Donald B. Verrilli, Jr., Solicitor General, to Scott S. Harris, Clerk of Court (Apr. 29, 2015).

Granted, this equitable distribution may represent less income than what some or all of the reserve raisins could fetch if sold in an unregulated market. In some years, it may even turn out (and has turned out) to represent no net income. But whether and when that occurs turns on market forces for which the Government cannot be blamed and to which all commodities—indeed, all property—are subject. In any event, we have emphasized that "a reduction in the

value of property is not necessarily equated with a taking," *Andrus*, 444 U. S., at 66, that even "a significant restriction . . . imposed on one means of disposing" of property is not necessarily a taking, *id.*, at 65, and that not every " 'injury to property by governmental action' " amounts to a taking, *PruneYard*, 447 U. S., at 82. Indeed, we would not have used the word "destroy" in *Loretto* if we meant "damaged" or even "substantially damaged." I take us at our word: *Loretto*'s strict requirement that all property interests be "destroy[ed]" by governmental action before that action can be called a *per se* taking cannot be satisfied if there remains a property interest that is at most merely damaged. That is the case here; accordingly, no *per se* taking has occurred.

Moreover, when, as here, the property at issue is a fungible commodity for sale, the income that the property may yield is the property owner's most central interest. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1002 (1984) (noting that the "nature" of particular property defines "the extent of the property right therein"). "[A]rticles of commerce," in other words, are "desirable because [they are] convertible into money." *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 396 (1929). The Hornes do not use the raisins that are subject to the reserve requirement—which are, again, the only raisins that have allegedly been unlawfully taken—by eating them, feeding them to farm animals, or the like. They wish to use those reserve raisins by selling them, and they value those raisins only because they are a means of acquiring money. While the Order infringes upon the amount of that potential income, it does not inexorably eliminate it. Unlike the law in *Loretto*, see 458 U. S., at 436, the Order therefore cannot be said to have prevented the Hornes from making *any* use of the relevant property.

The conclusion that the Order does not effect a *per se* taking fits comfortably within our precedents. After all, we have observed that even "[r]egulations that bar trade in certain goods" altogether—for example, a ban on the sale of eagle feathers—may survive takings challenges. *Andrus*,

444 U. S., at 67. To be sure, it was important to our decision in *Andrus* that the regulation at issue did not prohibit the possession, donation, or devise of the property. See *id.*, at 66. But as to those feathers the plaintiffs would have liked to sell, the law said they could not be sold at any price—and therefore categorically could not be converted into money. Here, too, the Hornes may do as they wish with the raisins they are not selling. But as to those raisins that they would like to sell, the Order subjects a subset of them to the reserve requirement, which allows for the conversion of reserve raisins into at least *some* money and which is thus *more* generous than the law in *Andrus*. We held that no taking occurred in *Andrus*, so rejecting the Hornes' claim follows *a fortiori*.

We made this principle even clearer in *Lucas*, when we relied on *Andrus* and said that where, as here, "property's only economically productive use is sale or manufacture for sale," a regulation could even "render [that] property economically *worthless*" without effecting a *per se* taking. *Lucas*, 505 U. S., at 1027–1028 (citing *Andrus*, 444 U. S., at 66–67; emphasis added). The Order does not go nearly that far. It should easily escape our opprobrium, at least where a *per se* takings claim is concerned.

B

The fact that at least one property right is not destroyed by the Order is alone sufficient to hold that this case does not fall within the narrow confines of *Loretto*. But such a holding is also consistent with another line of cases that, when viewed together, teach that the government may require certain property rights to be given up as a condition of entry into a regulated market without effecting a *per se* taking.

First, in *Leonard & Leonard* v. *Earle*, 279 U. S. 392, we considered a state law that required those who wished to engage in the business of oyster packing to deliver to the State 10 percent of the empty oyster shells. We rejected

the argument that this law effected a taking and held that it was "not materially different" from a tax upon the privilege of doing business in the State. *Id.*, at 396. "[A]s the packer lawfully could be required to pay that sum in money," we said, "nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent. of such shells." *Ibid.*[1]

Next, in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, we held that no taking occurred when a provision of the Federal Insecticide, Fungicide, and Rodenticide Act required companies that wished to sell certain pesticides to first submit sensitive data and trade secrets to the Environmental Protection Agency as part of a registration process. Even though the EPA was permitted to publicly disclose some of that submitted data—which would have had the effect of revealing trade secrets, thus substantially diminishing or perhaps even eliminating their value—we reasoned that, like the privilege tax in *Leonard & Leonard*, the disclosure requirement was the price Monsanto had to pay for "'the advantage of living and doing business in a civilized community.'" 467 U. S., at 1007 (quoting *Andrus*, 444 U. S., at 67; some internal quotation marks omitted). We offered nary a suggestion that the law at issue could be considered a *per se* taking, and instead recognized that "a voluntary submission of data by an applicant" in exchange for the ability to participate in a regulated market "can hardly be called a taking." 467 U. S., at 1007.[2]

---

[1] The Court attempts to distinguish *Leonard & Leonard* because it involved wild oysters, not raisins. *Ante*, at 366–367. That is not an inaccurate factual statement, but I do not find in *Leonard & Leonard* any suggestion that its holding turned on this or any other of the facts to which the Court now points. Indeed, the only citation the Court offers for these allegedly crucial facts is the Maryland Court of Appeals' opinion, not ours. See *ante*, at 366–367.

[2] The Court claims that *Monsanto* is distinguishable for three reasons, none of which hold up. First, it seems, the Court believes the degree of the intrusion on property rights is greater here than in *Monsanto*. See *ante*, at 365–366. Maybe, maybe not. But nothing in *Monsanto* sug-

Finally, in *Yee* v. *Escondido*, 503 U. S. 519 (1992), we addressed a mobile-home park rent-control ordinance that set rents at below-market rates. We held the ordinance did not effect a taking under *Loretto*, even when it was considered in conjunction with other state laws regarding eviction that effectively permitted tenants to remain at will, because it only regulated the terms of market participation. See 503 U. S., at 527–529.

Understood together, these cases demonstrate that the Government may condition the ability to offer goods in the market on the giving up of certain property interests without effecting a *per se* taking.[3] The Order is a similar regulation. It has no effect whatsoever on raisins that the Hornes grow for their own use. But insofar as the Hornes wish to sell some raisins in a market regulated by the Government

---

gests this is a relevant question, and the Court points to nothing saying that it is. Second, the Court believes that "[s]elling produce in interstate commerce" is not a government benefit. *Ante*, at 366. Again, that may be true, but the Hornes are not simply selling raisins in interstate commerce. They are selling raisins in a regulated market at a price artificially inflated by Government action in that market. That is the benefit the Hornes receive, and it does not matter that they "would rather not have" received it. *United States* v. *Sperry Corp.*, 493 U. S. 52, 62–63 (1989). Third, the Court points out that raisins "are not dangerous pesticides; they are a healthy snack." *Ante*, at 366. I could not agree more, but nothing in *Monsanto*, or in *Andrus* for that matter, turned on the dangerousness of the commodity at issue.

[3] The Court points out that, in a footnote in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), we suggested that it did not matter for takings purposes whether a property owner could avoid an intrusion on her property rights by using her property differently. See *ante*, at 365 (quoting 458 U. S., at 439, n. 17). But in *Yee* v. *Escondido*, 503 U. S. 519 (1992), we clarified that, where a law does not on its face effect a *per se* taking, the voluntariness of a particular use of property or of entry into a particular market is quite relevant. See *id.*, at 531–532. In other words, only when a law requires the forfeiture of *all* rights in property does it effect a *per se* taking regardless of whether the law could be avoided by a different use of the property. As discussed above, the Order is not such a law.

and at a price supported by governmental intervention, the Order requires that they give up the right to sell a portion of those raisins at that price and instead accept disposal of them at a lower price. Given that we have held that the Government may impose a price on the privilege of engaging in a particular business without effecting a taking—which is all that the Order does—it follows that the Order at the very least does not run afoul of our *per se* takings jurisprudence. Under a different takings test, one might reach a different conclusion. But the Hornes have advanced only this narrow *per se* takings claim, and that claim fails.

III

The Court's contrary conclusion rests upon two fundamental errors. The first is the Court's breezy assertion that a *per se* taking has occurred because the Hornes "lose the entire 'bundle' of property rights in the appropriated raisins . . . with the exception of" the retained interest in the equitable distribution of the proceeds from the disposition of the reserve raisins. *Ante*, at 361–362. But if there is a property right that has not been lost, as the Court concedes there is, then the Order has *not* destroyed each of the Hornes' rights in the reserve raisins and does *not* effect a *per se* taking. The Court protests that the retained interest is not substantial or certain enough. But while I see more value in that interest than the Court does, the bottom line is that *Loretto* does not distinguish among retained property interests that are substantial or certain enough to count and others that are not.[4] Nor is it at all clear how the Court's approach will

[4] The Court relies on *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 322 (2002), for the proposition that "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.'" *Ante*, at 363. But all that means is that a *per se* taking may be said to have occurred with respect to the portion of property that has been taken even if other por-

be administrable. How, after all, are courts, governments, or individuals supposed to know how much a property owner must be left with before this Court will bless the retained interest as sufficiently meaningful and certain?

One virtue of the *Loretto* test was, at least until today, its clarity. Under *Loretto*, a total destruction of all property rights constitutes a *per se* taking; anything less does not. See 458 U. S., at 441 (noting the "very narrow" nature of the *Loretto* framework). Among the most significant doctrinal damage that the Court causes is the blurring of this otherwise bright line and the expansion of this otherwise narrow category. By the Court's lights, perhaps a 95 percent destruction of property rights can be a *per se* taking. Perhaps 90? Perhaps 60, so long as the remaining 40 is viewed by a reviewing court as less than meaningful? And what makes a retained right meaningful enough? One wonders. Indeed, it is not at all clear what test the Court has actually applied. Such confusion would be bad enough in any context, but it is especially pernicious in the area of property rights. Property owners should be assured of where they stand, and the government needs to know how far it can permissibly go without tripping over a categorical rule.

The second overarching error in the Court's opinion arises from its reliance on what it views as the uniquely physical nature of the taking effected by the Order. This, it says, is why many of the cases having to do with so-called regulatory takings are inapposite. See *ante*, at 362–364. It is not the case, however, that Government agents acting pursuant to the Order are storming raisin farms in the dark of night to load raisins onto trucks. But see Tr. of Oral Arg. 30 (re-

---

tions of the property have not been taken. This is of no help to the Hornes, or to the Court, because it in no way diminishes a plaintiff's burden to demonstrate a *per se* taking as to the portion of his or her property that he or she claims has been taken—here, the reserve raisins. As to that specific property, a *per se* taking occurs if and only if the *Loretto* conditions are satisfied.

marks of ROBERTS, C. J.). The Order simply requires the Hornes to set aside a portion of their raisins—a requirement with which the Hornes refused to comply. See 7 CFR § 989.66(b)(2); Tr. of Oral Arg. 31. And it does so to facilitate two classic regulatory goals. One is the regulatory purpose of limiting the quantity of raisins that can be sold on the market. The other is the regulatory purpose of arranging the orderly disposition of those raisins whose sale would otherwise exceed the cap.

The Hornes and the Court both concede that a cap on the quantity of raisins that the Hornes can sell would not be a *per se* taking. See *ante*, at 362; Brief for Petitioners 23, 52. The Court's focus on the physical nature of the intrusion also suggests that merely arranging for the sale of the reserve raisins would not be a *per se* taking. The rub for the Court must therefore be not that the Government is doing these things, but that it is accomplishing them by the altogether understandable requirement that the reserve raisins be physically set aside. I know of no principle, however, providing that if the Government achieves a permissible regulatory end by asking regulated individuals or entities to physically move the property subject to the regulation, it has committed a *per se* taking rather than a potential regulatory taking. After all, in *Monsanto*, the data that the pesticide companies had to turn over to the Government was presumably turned over in some physical form, yet even the Court does not call *Monsanto* a physical takings case. It therefore cannot be that any regulation that involves the slightest physical movement of property is necessarily evaluated as a *per se* taking rather than as a regulatory taking.

The combined effect of these errors is to unsettle an important area of our jurisprudence. Unable to justify its holding under our precedents, the Court resorts to superimposing new limitations on those precedents, stretching the otherwise strict *Loretto* test into an unadministrable one, and deeming regulatory takings jurisprudence irrelevant in some

undefined set of cases involving government regulation of property rights. And it does all of this in service of eliminating a type of reserve requirement that is applicable to just a few commodities in the entire country—and that, in any event, commodity producers could vote to terminate if they wished. See Letter from Solicitor General to Clerk of Court (Apr. 29, 2015); 7 U. S. C. § 608c(16)(B); 7 CFR § 989.91(c). This intervention hardly strikes me as worth the cost, but what makes the Court's twisting of the doctrine even more baffling is that it ultimately instructs the Government that it can permissibly achieve its market control goals by imposing a quota without offering raisin producers a way of reaping any return whatsoever on the raisins they cannot sell. I have trouble understanding why anyone would prefer that.

* * *

Because a straightforward application of our precedents reveals that the Hornes have not suffered a *per se* taking, I would affirm the judgment of the Ninth Circuit. The Court reaches a contrary conclusion only by expanding our *per se* takings doctrine in a manner that is as unwarranted as it is vague. I respectfully dissent.

Syllabus

KINGSLEY *v.* HENDRICKSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14–6368. Argued April 27, 2015—Decided June 22, 2015

While petitioner Kingsley was awaiting trial in county jail, officers forcibly removed him from his cell when he refused to comply with their instructions. Kingsley filed a complaint in Federal District Court claiming, as relevant here, that two of the officers used excessive force against him in violation of the Fourteenth Amendment's Due Process Clause. At the trial's conclusion, the District Court instructed the jury that Kingsley was required to prove, *inter alia*, that the officers "recklessly disregarded [Kingsley's] safety" and "acted with reckless disregard of [his] rights." The jury found in the officers' favor. On appeal, Kingsley argued that the jury instruction did not adhere to the proper standard for judging a pretrial detainee's excessive force claim, namely, objective unreasonableness. The Seventh Circuit disagreed, holding that the law required a subjective inquiry into the officers' state of mind, *i. e.*, whether the officers actually intended to violate, or recklessly disregarded, Kingsley's rights.

Held:

1. Under 42 U. S. C. § 1983, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. Pp. 395–402.

(a) This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time, see *Graham* v. *Connor*, 490 U. S. 386, 396, and must account for the "legitimate interests [stemming from the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security," *Bell* v. *Wolfish*, 441 U. S. 520, 540, 547. Pp. 395–397.

(b) Several considerations lead to this conclusion. An objective standard is consistent with precedent. In *Bell*, for instance, this Court held that a pretrial detainee could prevail on a claim that his due process rights were violated by providing only objective evidence that the challenged governmental action was not rationally related to a legitimate governmental objective or that it was excessive in relation to that purpose. 441 U. S., at 541–543. Cf. *Block* v. *Rutherford*, 468 U. S. 576, 585–586. Experience also suggests that an objective standard is work-

able. It is consistent with the pattern jury instructions used in several Circuits, and many facilities train officers to interact with detainees as if the officers' conduct is subject to objective reasonableness. Finally, the use of an objective standard adequately protects an officer who acts in good faith, *e. g.*, by acknowledging that judging the reasonableness of the force used from the perspective and with the knowledge of the defendant officer is an appropriate part of the analysis. Pp. 397–400.

(c) None of the cases respondents point to provides significant support for a subjective standard. *Whitley* v. *Albers*, 475 U. S. 312, and *Hudson* v. *McMillian*, 503 U. S. 1, lack relevance in this context because they involved claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause, not claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause. And in *County of Sacramento* v. *Lewis*, 523 U. S. 833, a statement indicating the need to show "purpose to cause harm," *id.*, at 854, for due process liability refers not to whether the force intentionally used was excessive, but whether the defendant intended to commit the acts in question, *ibid.*, and n. 13. Finally, in *Johnson* v. *Glick*, 481 F. 2d 1028 (CA2), a malicious-and-sadistic-purpose-to-cause-harm factor was not suggested as a *necessary* condition for liability, but as a factor, among others, that might help show that the use of force was excessive. Pp. 400–402.

2. Applying the proper standard, the jury instruction was erroneous. Taken together, the features of that instruction suggested that the jury should weigh respondents' subjective reasons for using force and subjective views about the excessiveness of that force. Respondents' claim that, irrespective of this Court's holding, any error in the instruction was harmless is left to the Seventh Circuit to resolve on remand. Pp. 402–404.

744 F. 3d 443, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 404. ALITO, J., filed a dissenting opinion, *post*, p. 408.

Wendy M. Ward argued the cause for petitioner. With her on the briefs were *Jeffrey T. Green*, *Jeffrey S. Ward*, and *Sarah O'Rourke Schrup*.

John F. Bash argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorneys*

General Mizer and *Gupta*, *Deputy Solicitor General Gershengorn*, *Barbara L. Herwig*, *Mark L. Gross*, and *Erin Aslan*.

Paul D. Clement argued the cause for respondents. With him on the brief were *Charles H. Bohl*, *Andrew A. Jones*, *Timothy H. Posnanski*, *Mpoli N. Simwanza-Johnson*, *D. Zachary Hudson*, and *William R. Levi*.*

JUSTICE BREYER delivered the opinion of the Court.

In this case, an individual detained in a jail prior to trial brought a claim under Rev. Stat. § 1979, 42 U. S. C. § 1983, against several jail officers, alleging that they used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause. The officers concede that they intended to use the force that they used. But the parties disagree about whether the force used was excessive.

The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers

---

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Catherine M. A. Carroll*, *Steven R. Shapiro*, *David C. Fathi*, and *Laurence J. Dupuis*; for Former Corrections Administrators and Experts by *Jon Loevy*; for the National Association of Criminal Defense Lawyers by *Mitchell F. Dolin* and *Barbara E. Bergman*; and for The Rutherford Institute by *John W. Whitehead* and *Stephen J. Neuberger*.

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Heather Hagan McVeigh* and *Lara Langeneckert*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Matthew P. Denn* of Delaware, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Bill Schuette* of Michigan, *Joseph A. Foster* of New Hampshire, *Kathleen G. Kane* of Pennsylvania, *Alan Wilson* of South Carolina, and *Brad D. Schimel* of Wisconsin; and for the National Association of Counties by *Aaron M. Streett*, *Shane Pennington*, and *Lisa Soronen*.

Gregory C. Champagne, *Maurice E. Bostick*, *Robert P. Faigin*, *Richard M. Weintraub*, *Carrie L. Hill*, and *Robert Spence* filed a brief for the National Sheriffs' Association et al. as *amici curiae*.

were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable. We conclude that the latter standard is the correct one.

I

A

Some but not all of the facts are undisputed: Michael Kingsley, the petitioner, was arrested on a drug charge and detained in a Wisconsin county jail prior to trial. On the evening of May 20, 2010, an officer performing a cell check noticed a piece of paper covering the light fixture above Kingsley's bed. The officer told Kingsley to remove it; Kingsley refused; subsequently other officers told Kingsley to remove the paper; and each time Kingsley refused. The next morning, the jail administrator, Lieutenant Robert Conroy, ordered Kingsley to remove the paper. Kingsley once again refused. Conroy then told Kingsley that officers would remove the paper and that he would be moved to a receiving cell in the interim.

Shortly thereafter, four officers, including respondents Sergeant Stan Hendrickson and Deputy Sheriff Fritz Degner, approached the cell and ordered Kingsley to stand, back up to the door, and keep his hands behind him. When Kingsley refused to comply, the officers handcuffed him, forcibly removed him from the cell, carried him to a receiving cell, and placed him face down on a bunk with his hands handcuffed behind his back.

The parties' views about what happened next differ. The officers testified that Kingsley resisted their efforts to remove his handcuffs. Kingsley testified that he did not resist. All agree that Sergeant Hendrickson placed his knee in Kingsley's back and Kingsley told him in impolite language to get off. Kingsley testified that Hendrickson and Degner then slammed his head into the concrete bunk—an allegation the officers deny.

The parties agree, however, about what happened next: Hendrickson directed Degner to stun Kingsley with a Taser; Degner applied a Taser to Kingsley's back for approximately five seconds; the officers then left the handcuffed Kingsley alone in the receiving cell; and officers returned to the cell 15 minutes later and removed Kingsley's handcuffs.

B

Based on these and related events, Kingsley filed a § 1983 complaint in Federal District Court claiming (among other things) that Hendrickson and Degner used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause. The officers moved for summary judgment, which the District Court denied, stating that "a reasonable jury could conclude that [the officers] acted with malice and intended to harm [Kingsley] when they used force against him." *Kingsley* v. *Josvai*, No. 10–cv–832–bbc (WD Wis., Nov. 16, 2011), App. to Pet. for Cert. 66a–67a. Kingsley's excessive force claim accordingly proceeded to trial. At the conclusion of the trial, the District Court instructed the jury as follows:

> "Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> "(1) Defendants used force on plaintiff;
>
> "(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> "(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and
>
> "(4) Defendants' conduct caused some harm to plaintiff.

> "In deciding whether one or more defendants used 'unreasonable' force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.
>
> "Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:
>
> "• The need to use force;
>
> "• The relationship between the need to use force and the amount of force used;
>
> "• The extent of plaintiff's injury;
>
> "• Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
>
> "• Any efforts made by defendants to limit the amount of force used." App. 277–278 (emphasis added).

The jury found in the officers' favor.

On appeal, Kingsley argued that the correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness. And, the jury instruction, he said, did not hew to that standard. A panel of the Court of Appeals disagreed, with one judge dissenting. The majority held that the law required a "subjective inquiry" into the officer's state of mind. There must be "'an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights.'" 744 F. 3d 443, 451 (CA7 2014) (quoting *Wilson* v. *Williams*, 83 F. 3d 870, 875 (CA7 1996)). The dissent would have used instructions promulgated by the Committee on Pattern Civil Jury Instructions of the Seventh Circuit, which require a pretrial detainee claiming excessive force to show only that the use of force was objectively unreasonable. 744 F. 3d, at 455 (opinion of Hamilton, J.); see Pattern Civ. Jury

Instr. 7.08 (2009). The dissent further stated that the District Court's use of the word "reckless" in the jury instruction added "an unnecessary and confusing element." 744 F. 3d, at 455.

Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard. In light of disagreement among the Circuits, we agreed to do so. Compare, *e. g.*, *Murray* v. *Johnson No. 260*, 367 Fed. Appx. 196, 198 (CA2 2010); *Bozeman* v. *Orum*, 422 F. 3d 1265, 1271 (CA11 2005) (*per curiam*), with *Aldini* v. *Johnson*, 609 F. 3d 858, 865–866 (CA6 2010); *Young* v. *Wolfe*, 478 Fed. Appx. 354, 356 (CA9 2012).

II

A

We consider a legally requisite state of mind. In a case like this one, there are, in a sense, two separate state-of-mind questions. The first concerns the defendant's state of mind with respect to his physical acts—*i. e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was "excessive." Here, as to the first question, there is no dispute. As to the second, whether to interpret the defendant's physical acts in the world as involving force that was "excessive," there is a dispute. We conclude with respect to that question that the relevant standard is objective not subjective. Thus, the defendant's state of mind is not a matter that a plaintiff is required to prove.

Consider the series of physical events that take place in the world—a series of events that might consist, for example, of the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient. No one here denies, and we must assume, that,

as to the series of events that have taken place in the world, the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind. That is because, as we have stated, "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 849 (1998) (emphasis added). See also *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property"). Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—*i. e.*, purposeful or knowing—the pretrial detainee's claim may proceed. In the context of a police pursuit of a suspect the Court noted, though without so holding, that recklessness in some cases might suffice as a standard for imposing liability. See *Lewis*, *supra*, at 849. Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.

We now consider the question before us here—the defendant's state of mind with respect to the proper *interpretation* of the force (a series of events in the world) that the defendant deliberately (not accidentally or negligently) used. In deciding whether the force deliberately used is, constitutionally speaking, "excessive," should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard. In short, we agree with the dissenting appeals court judge, the Seventh Circuit's jury instruction committee, and Kingsley, that a pretrial detainee must show only

that the force purposely or knowingly used against him was objectively unreasonable.

A court (judge or jury) cannot apply this standard mechanically. See *Lewis*, *supra*, at 850. Rather, objective reasonableness turns on the "facts and circumstances of each particular case." *Graham* v. *Connor*, 490 U. S. 386, 396 (1989). A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. See *ibid.* A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S. 520, 540, 547 (1979).

Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. See, *e. g.*, *Graham*, *supra*, at 396. We do not consider this list to be exclusive. We mention these factors only to illustrate the types of objective circumstances potentially relevant to a determination of excessive force.

B

Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one. For one thing, it is consistent with our precedent. We have said that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, *supra*, at

395, n. 10. And in *Bell*, we explained that such "punishment" can consist of actions taken with an "expressed intent to punish." 441 U. S., at 538. But the *Bell* Court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." *Id.*, at 561. The *Bell* Court applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double bunking. In doing so, it did not consider the prison officials' subjective beliefs about the policy. *Id.*, at 541–543. Rather, the Court examined objective evidence, such as the size of the rooms and available amenities, before concluding that the conditions were reasonably related to the legitimate purpose of holding detainees for trial and did not appear excessive in relation to that purpose. *Ibid.*

Bell's focus on "punishment" does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose. Cf. *Block* v. *Rutherford*, 468 U. S. 576, 585–586 (1984) (where there was no suggestion that the purpose of jail policy of denying contact visitation was to punish inmates, the Court need only evaluate whether the policy was "reasonably related to legitimate governmental objectives" and whether it appears excessive in relation to that objective); *Schall* v. *Martin*, 467 U. S. 253, 269–271 (1984) (similar); see also *United States* v. *Salerno*, 481 U. S. 739, 747 (1987) ("[T]he punitive/regulatory distinction *turns on* 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive

in relation to the alternative purpose assigned [to it]' " (quoting *Schall*, *supra*, at 269; emphasis added and some internal quotation marks omitted)). The Court did not suggest in any of these cases, either by its words or its analysis, that its application of *Bell*'s objective standard should involve subjective considerations. Our standard is also consistent with our use of an objective "excessive force" standard where officers apply force to a person who, like Kingsley, has been accused but not convicted of a crime, but who, unlike Kingsley, is free on bail. See *Graham*, *supra*.

For another thing, experience suggests that an objective standard is workable. It is consistent with the pattern jury instructions used in several Circuits. We are also told that many facilities, including the facility at issue here, train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard. See Brief for Petitioner 26; App. 247–248; Brief for Former Corrections Administrators and Experts as *Amici Curiae* 8–18.

Finally, the use of an objective standard adequately protects an officer who acts in good faith. We recognize that "[r]unning a prison is an inordinately difficult undertaking," *Turner* v. *Safley*, 482 U. S. 78, 84–85 (1987), and that "safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face," *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. 318, 326 (2012). Officers facing disturbances "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U. S., at 397. For these reasons, we have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer. We have also explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to

maintain order and institutional security is appropriate. See Part II–A, *supra*. And we have limited liability for excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a "reckless" act as well). *Ibid.* Additionally, an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001); see also Brief for United States as *Amicus Curiae* 27–28. It is unlikely (though theoretically possible) that a plaintiff could overcome these hurdles where an officer acted in good faith.

C

Respondents believe that the relevant legal standard should be subjective, *i. e.*, that the plaintiff must prove that the use of force was not "applied in a good-faith effort to maintain or restore discipline" but, rather, was applied "maliciously and sadistically to cause harm." Brief for Respondents 27. And they refer to several cases that they believe support their position. See *id.*, at 26–31 (citing *Whitley* v. *Albers*, 475 U. S. 312 (1986); *Hudson* v. *McMillian*, 503 U. S. 1 (1992); *Lewis*, 523 U. S. 833; *Johnson* v. *Glick*, 481 F. 2d 1028 (CA2 1973)).

The first two of these cases, however, concern excessive force claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause, not claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause. *Whitley*, *supra*, at 320; *Hudson*, *supra*, at 6–7. The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less "maliciously and sadistically." *Ingraham* v. *Wright*, 430 U. S. 651, 671–

672, n. 40 (1977); *Graham*, *supra*, at 395, n. 10; see also 4 W. Blackstone, Commentaries *300 ("[I]f the offence be not bailable, or the party cannot find bail, he is to be committed to the county [jail] . . . [b]ut . . . only for safe custody, and not for punishment"). Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional. *Whitley* and *Hudson* are relevant here only insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails. And, as explained above, we believe we have done so.

Lewis does not prove respondents' point, either. There, the Court considered a claim that a police officer had violated due process by causing a death during a high-speed automobile chase aimed at apprehending a suspect. We wrote that "[j]ust as a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case, so it ought to be needed for due process liability in a pursuit case." 523 U. S., at 854. Respondents contend that this statement shows that the Court embraced a standard for due process claims that requires a showing of subjective intent. Brief for Respondents 30–31. Other portions of the *Lewis* opinion make clear, however, that this statement referred to the defendant's intent to commit the *acts* in question, not to whether the force intentionally used was "excessive." 523 U. S., at 854, and n. 13. As explained above, the parties here do not dispute that respondents' use of force was intentional. See Part II–A, *supra*.

Nor does *Glick* provide respondents with significant support. In that case Judge Friendly, writing for the Second Circuit, considered an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment's Due Process Clause. Judge Friendly pointed out that the "management by a few guards of large numbers of prisoners" in an institution "may require and justify the occasional use of a degree of intentional force." 481 F. 2d, at 1033. He added

that, in determining whether that intentional use of force "crosse[s]" the "constitutional line," a court should look

> "to such factors as [(1)] the need for the application of force, [(2)] the relationship between the need and the amount of force that was used, [(3)] the extent of injury inflicted, and [(4)] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Ibid.*

This statement does not suggest that the fourth factor (malicious and sadistic purpose to cause harm) is a *necessary* condition for liability. To the contrary, the words "such . . . as" make clear that the four factors provide examples of some considerations, among others, that might help show that the use of force was excessive.

Respondents believe these cases nonetheless help them make a broader point—namely, that a subjective standard "protects against a relative flood of claims," many of them perhaps unfounded, brought by pretrial detainees. Brief for Respondents 38. But we note that the Prison Litigation Reform Act of 1995, 42 U. S. C. § 1997e, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners. Nor is there evidence of a rash of unfounded filings in Circuits that use an objective standard.

We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.

III

We now consider the lawfulness of the jury instruction given in this case in light of our adoption of an objective

standard for pretrial detainees' excessive force claims. See Part II–A, *supra*. That jury instruction defined "excessive force" as "force applied recklessly that is unreasonable in light of the facts and circumstances of the time." App. 277. It required Kingsley to show that the officers "recklessly disregarded [Kingsley's] safety." *Id.*, at 278. And it suggested that Kingsley must show the defendants "acted with reckless disregard of [Kingsley's] rights," while telling the jury that it could consider several objective factors in making this determination. *Ibid.*

Kingsley argues that the jury instruction is faulty because the word "reckless" suggests a need to prove that respondents acted with a certain subjective state of mind with respect to the excessive or nonexcessive nature of the force used, contrary to what we have just held. Reply Brief 20–22. Respondents argue that irrespective of our holding, any error in the instruction was harmless. Brief for Respondents 57–58. And the Solicitor General suggests that, because the instructions defined "recklessness" with reference to objective factors, those instructions effectively embody our objective standard and did not confuse the jury. Brief for United States as *Amicus Curiae* 28–32.

We agree with Kingsley that the instructions were erroneous. "[R]eckles[s] disregar[d] [of Kingsley's] safety" was listed as an additional requirement, beyond the need to find that "[respondents'] use of force was unreasonable in light of the facts and circumstances at the time." App. 278. See also *ibid.* (Kingsley had to show respondents "used unreasonable force *and* acted with reckless disregard of [Kingsley's] rights" (emphasis added)). And in determining whether respondents "acted with reckless disregard of [Kingsley's] rights," the jury was instructed to "consider . . . [w]hether [respondents] reasonably *believed* there was a threat to the safety of staff or prisoners." *Ibid.* (emphasis added). Together, these features suggested the jury should weigh respondents' subjective reasons for using force and subjective

views about the excessiveness of the force. As we have just held, that was error. But because the question whether that error was harmless may depend in part on the detailed specifics of this case, we leave that question for the Court of Appeals to resolve in the first instance.

The judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Constitution contains no freestanding prohibition of excessive force. There are, however, four constitutional provisions that we have said forbid the use of excessive force in certain circumstances. The Fourth Amendment prohibits it when it makes a search or seizure "unreasonable." The Eighth Amendment prohibits it when it constitutes "cruel and unusual" punishment. The Fifth and Fourteenth Amendments prohibit it (or, for that matter, any use of force) when it is used to "deprive" someone of "life, liberty, or property, without due process of law."

This is a Fourteenth Amendment case. The Fifth Amendment applies only to federal actors; Kingsley forfeited any argument under the Fourth Amendment by failing to raise it below; and he acknowledges that the Eighth Amendment standard is inapplicable, Brief for Petitioner 27, n. 8. The only question before us is whether a pretrial detainee's due-process rights are violated when "the force purposely or knowingly used against him [is] objectively unreasonable." *Ante*, at 397. In my view, the answer is no. Our cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of "objectively unreasonable" force, without more, is not the intentional infliction of punishment.

In *Bell* v. *Wolfish*, 441 U. S. 520 (1979), we held that the Due Process Clause forbids holding pretrial detainees in conditions that "amount to punishment." *Id.*, at 535. Conditions amount to punishment, we explained, when they are "imposed for the purpose of punishment." *Id.*, at 538. Acting with the intent to punish means taking a " 'deliberate act intended to chastise or deter.' " *Wilson* v. *Seiter*, 501 U. S. 294, 300 (1991) (quoting *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985)); see also *Bell*, *supra*, at 537–538. The Court in *Bell* recognized that intent to punish need not be "expressed," 441 U. S., at 538, but may be established with circumstantial evidence. More specifically, if the condition of confinement being challenged "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment." *Id.*, at 539. We endorsed the same inference when we applied *Bell*'s intent-to-punish test in challenges brought by pretrial detainees against jailhouse security policies, *id.*, at 560–562; *Block* v. *Rutherford*, 468 U. S. 576, 583–584 (1984), and statutes permitting pretrial detention, *Schall* v. *Martin*, 467 U. S. 253, 255, 269 (1984); *United States* v. *Salerno*, 481 U. S. 739, 741, 746–747 (1987).

In light of these cases, I agree with the Court that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989) (citing *Bell*, *supra*, at 535–539). I disagree, however, that any intentional application of force that is objectively unreasonable in degree is a use of excessive force that "amount[s] to punishment." *Bell*, 441 U. S., at 535. The Court reaches that conclusion by misreading *Bell* as forbidding States to take *any* harmful action against pretrial detainees that is not "reasonably related to a legitimate goal." *Id.*, at 539.

Bell endorsed this "reasonable relation" inference in the context of a challenge *to conditions of a confinement*—spe-

cifically, challenges to the State's policy of housing two people in each cell, *id.*, at 528, and various security policies, *id.*, at 548–549, 553, 555, 558, 560–562. The conditions in which pretrial detainees are held, and the security policies to which they are subject, are the result of considered deliberation by the authority imposing the detention. If those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent. And the same logic supports finding a punitive intent in statutes authorizing detention that lacks any reasonable relationship to a valid government interest. *Schall*, *supra*, at 269; *Salerno*, *supra*, at 746–747.

It is *illogical*, however, automatically to infer punitive intent from the fact that a prison guard used more force against a pretrial detainee than was necessary. That could easily have been the result of a misjudgment about the degree of force required to maintain order or protect other inmates, rather than the product of an intent to punish the detainee for his charged crime (or for any other behavior). An officer's decision regarding how much force to use is made "in haste, under pressure, and frequently without the luxury of a second chance," *Hudson* v. *McMillian*, 503 U. S. 1, 6 (1992) (internal quotation marks omitted), not after the considered thought that precedes detention-policy determinations like those at issue in *Bell*, *Block*, *Schall*, and *Salerno*. That an officer used more force than necessary might be *evidence* that he acted with intent to punish, but it is no more than that.

In sum: *Bell* makes intent to punish the focus of its due-process analysis. Objective reasonableness of the force used is nothing more than a heuristic for identifying this intent. That heuristic makes good sense for considered decisions by the detaining authority, but is much weaker in the context of excessive-force claims. Kingsley does not argue that respondents actually intended to punish him, and his reliance on *Bell* to infer such an intent is misplaced.

Kingsley claims that "the protections of due process . . . extend beyond the narrow context of 'punishment.'" Brief for Petitioner 15. Unquestionably. A State would plainly violate the Due Process Clause if it extended a detainee's confinement because it believed him mentally ill (not as "punishment"), without giving him the constitutionally guaranteed processes that must precede the deprivation of liberty. But Kingsley does not claim deprivation of liberty in that normal sense of that word—the right to walk about free. He claims that the Due Process Clause confers, on pretrial detainees, a substantive "liberty" interest that consists of freedom from objectively unreasonable force. Kingsley seeks relief, in other words, under the doctrine of "substantive due process," through which we have occasionally recognized "liberty" interests other than freedom from incarceration or detention, that "cannot be limited at all, except by provisions that are 'narrowly tailored to serve a compelling state interest.'" *Kerry* v. *Din*, *ante*, at 92 (plurality opinion) (quoting *Reno* v. *Flores*, 507 U. S. 292, 301–302 (1993)).

Even if one believed that the right to process can confer the right to substance in particular cases, Kingsley's interest is not one of the "fundamental liberty interests" that substantive due process protects. We have said that that doctrine protects only those liberty interests that, carefully described, are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997) (citations and internal quotation marks omitted). Carefully described, the liberty interest Kingsley asserts is the right of pretrial detainees to be free from the application of force that is more than is objectively required to further some legitimate, nonpunitive, governmental interest. He does not argue (nor could he) that this asserted interest could pass the test announced in *Glucksberg*.

I conclude by emphasizing that our Constitution is not the only source of American law. There is an immense body of state statutory and common law under which individuals abused by state officials can seek relief. Kingsley himself, in addition to suing respondents for excessive force under 42 U. S. C. § 1983, brought a state-law claim for assault and battery. 744 F. 3d 443, 446, n. 6 (CA7 2014). The Due Process Clause is not "a font of tort law to be superimposed upon" that state system. *Daniels* v. *Williams*, 474 U. S. 327, 332 (1986) (quoting *Paul* v. *Davis*, 424 U. S. 693, 701 (1976)). Today's majority overlooks this in its tender-hearted desire to tortify the Fourteenth Amendment.

JUSTICE ALITO, dissenting.

I would dismiss this case as improvidently granted. Before deciding what a pretrial detainee must show in order to prevail on a due process excessive force claim, we should decide whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee. We have not yet decided that question. See *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989). If a pretrial detainee can bring such a claim, we need not and should not rely on substantive due process. See *Albright* v. *Oliver*, 510 U. S. 266, 273 (1994) (plurality opinion); *Graham*, 490 U. S., at 395. It is settled that the test for an unreasonable seizure under the Fourth Amendment is objective, see *id.*, at 397, so if a pretrial detainee can bring such a claim, it apparently would be indistinguishable from the substantive due process claim that the Court discusses.

I would not decide the due process issue presented in this case until the availability of a Fourth Amendment claim is settled, and I would therefore dismiss this case as improvidently granted.

Syllabus

CITY OF LOS ANGELES, CALIFORNIA *v.* PATEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–1175. Argued March 3, 2015—Decided June 22, 2015

Petitioner, the city of Los Angeles (City), requires hotel operators to record and keep specific information about their guests on the premises for a 90-day period. Los Angeles Municipal Code § 41.49. These records "shall be made available to any officer of the Los Angeles Police Department for inspection . . . at a time and in a manner that minimizes any interference with the operation of the business," § 41.49(3)(a), and a hotel operator's failure to make the records available is a criminal misdemeanor, § 11.00(m). Respondents, a group of motel operators and a lodging association, brought a facial challenge to § 41.49(3)(a) on Fourth Amendment grounds. The District Court entered judgment for the City, finding that respondents lacked a reasonable expectation of privacy in their records. The Ninth Circuit subsequently reversed, determining that inspections under § 41.49(3)(a) are Fourth Amendment searches and that such searches are unreasonable under the Fourth Amendment because hotel owners are subjected to punishment for failure to turn over their records without first being afforded the opportunity for precompliance review.

Held:

1. Facial challenges under the Fourth Amendment are not categorically barred or especially disfavored. Pp. 415–419.

(a) Facial challenges to statutes—as opposed to challenges to particular applications of statutes—have been permitted to proceed under a diverse array of constitutional provisions. See, *e. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (First Amendment); *District of Columbia* v. *Heller*, 554 U. S. 570 (Second Amendment). The Fourth Amendment is no exception. *Sibron* v. *New York*, 392 U. S. 40, distinguished. This Court has entertained facial challenges to statutes authorizing warrantless searches, declaring them, on several occasions, facially invalid, see, *e. g.*, *Chandler* v. *Miller*, 520 U. S. 305, 308–309. Pp. 415–417.

(b) Petitioner contends that facial challenges to statutes authorizing warrantless searches must fail because they will never be unconstitutional in all applications, but this Court's precedents demonstrate that such challenges can be brought, and can succeed. Under the proper facial-challenge analysis, only applications of a statute in which the statute actually authorizes or prohibits conduct are considered. See, *e. g.*,

Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U. S. 833. When addressing a facial challenge to a statute authorizing warrantless searches, the proper focus is on searches that the law actually authorizes and not those that could proceed irrespective of whether they are authorized by the statute, *e. g.*, where exigent circumstances, a warrant, or consent to search exists. Pp. 417–419.

2. Section 41.49(3)(a) is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review. Pp. 419–428.

(a) "'[S]earches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few . . . exceptions.'" *Arizona* v. *Gant*, 556 U. S. 332, 338. One exception is for administrative searches. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534. To be constitutional, the subject of an administrative search must, among other things, be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. See *See* v. *Seattle*, 387 U. S. 541, 545. Assuming the administrative search exception otherwise applies here, § 41.49 is facially invalid because it fails to afford hotel operators any opportunity for precompliance review. To be clear, a hotel owner must only be afforded an opportunity for precompliance review; actual review need occur only when a hotel operator objects to turning over the records. This opportunity can be provided without imposing onerous burdens on law enforcement. For instance, officers in the field can issue administrative subpoenas without probable cause that a regulation is being infringed. This narrow holding does not call into question those parts of § 41.49 requiring hotel operators to keep records nor does it prevent police from obtaining access to those records, where a hotel operator consents to the search, where the officer has a proper administrative warrant, or where some other exception to the warrant requirement applies. Pp. 419–423.

(b) Petitioner's argument that the ordinance is facially valid under the more relaxed standard for closely regulated industries is rejected. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313. This Court has only recognized four such industries, and nothing inherent in the operation of hotels poses a comparable clear and significant risk to the public welfare. Additionally, because the majority of regulations applicable to hotels apply to many businesses, to classify hotels as closely regulated would permit what has always been a narrow exception to swallow the rule. But even if hotels were closely regulated, § 41.49 would still contravene the Fourth Amendment, as it fails to satisfy the additional criteria that must be met for searches of closely regulated industries to be reasonable. See *New York* v. *Burger*, 482 U. S. 691, 702–703. Pp. 424–428.

Syllabus

738 F. 3d 1058, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 428. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 441.

E. Joshua Rosenkranz argued the cause for petitioner. With him on the briefs were *Robert M. Loeb*, *Gregory P. Orland*, *Rachel Wainer Apter*, *Orin S. Kerr*, *Michael N. Feuer*, and *James P. Clark*.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Leslie R. Caldwell*, *Zachary D. Tripp*, and *John M. Peilletieri*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Kevin K. Russell*, *Tejinder Singh*, and *Frank A. Weiser*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Gerald A. Engler*, Chief Assistant Attorney General, *Julie L. Garland*, Senior Assistant Attorney General, *Janill L. Richards*, Principal Deputy Solicitor General, *A. Natasha Cortina*, Supervising Deputy Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Tom Horne* of Arizona, *Russell A. Suzuki* of Hawaii, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan, *Kathleen G. Kane* of Pennsylvania, and *Alan Wilson* of South Carolina; for the California State Sheriffs' Association et al. by *Martin J. Mayer*, *James R. Touchstone*, and *Krista MacNevin Jee*; for the County of Los Angeles et al. by *Timothy T. Coates*; for Drug Free America Foundation, Inc., et al. by *Orly Degani*; for the Manhattan Institute for Policy Research by *Nicholas Quinn Rosenkranz*; and for the National League of Cities et al. by *Thomas R. McCarthy*, *William S. Consovoy*, *J. Michael Connolly*, and *Lisa Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the Asian American Hotel Owners Association by *Onkar N. Sharma* and *William H. Owens*; for the Chamber of Commerce of the United States of America by *Jessica Ring Amunson*, *Jessie K. Liu*, *Lindsay C. Harrison*, *Kate Comerford Todd*, and *Warren Postman*; for the Cato Institute by *Jim Harper* and

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels "[e]very operator of a hotel to keep a record" containing specified information concerning guests and to make this record "available to any officer of the Los Angeles Police Department for inspection" on demand. Los Angeles Municipal Code §§ 41.49(2), (3)(a), (4) (2015). The questions presented are whether facial challenges to statutes can be brought under the Fourth Amendment and, if so, whether this provision of the Los Angeles Municipal Code is facially invalid. We hold facial challenges can be brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for precompliance review.

I

A

Los Angeles Municipal Code (LAMC) § 41.49 requires hotel operators to record information about their guests, including: the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property; the

---

Ilya Shapiro; for the Electronic Frontier Foundation by *Lee Tien*, *Hanni Fakhoury*, and *Jennifer Lynch*; for Google Inc. by *Eric D. Miller* and *Albert Gidari, Jr.*; for Gun Owners of America, Inc., et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, and *Jeremiah L. Morgan*; and for The Rutherford Institute by *John W. Whitehead* and *Amand Agneshwar*.

Briefs of *amici curiae* were filed for the Institute for Justice by *Anthony B. Sanders*, *William H. Mellor*, *Dana Berliner*, and *Mahesha P. Subbaraman*; for Love146 by *Amanda R. Parker* and *Louis K. Fisher*; and for Adam Lamparello et al. by *James J. Berles* and *Mr. Lamparello*, *pro se*.

guest's date and time of arrival and scheduled departure date; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment. § 41.49(2). Guests without reservations, those who pay for their rooms with cash, and any guests who rent a room for less than 12 hours must present photographic identification at the time of check-in, and hotel operators are required to record the number and expiration date of that document. § 41.49(4). For those guests who check in using an electronic kiosk, the hotel's records must also contain the guest's credit card information. § 41.49(2)(b). This information can be maintained in either electronic or paper form, but it must be "kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. § 41.49(3)(a).

Section 41.49(3)(a)—the only provision at issue here—states, in pertinent part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. § 11.00(m) (general provision applicable to entire LAMC).

B

In 2003, respondents, a group of motel operators along with a lodging association, sued the city of Los Angeles (City or petitioner) in three consolidated cases challenging the constitutionality of § 41.49(3)(a). They sought declaratory and injunctive relief. The parties "agree[d] that the sole issue in the . . . action [would be] a facial constitutional challenge" to § 41.49(3)(a) under the Fourth Amendment. App. 195. They further stipulated that respondents have been sub-

jected to mandatory record inspections under the ordinance without consent or a warrant. *Id.*, at 194–195.

Following a bench trial, the District Court entered judgment in favor of the City, holding that respondents' facial challenge failed because they lacked a reasonable expectation of privacy in the records subject to inspection. A divided panel of the Ninth Circuit affirmed on the same grounds. 686 F. 3d 1085 (2012). On rehearing en banc, however, the Court of Appeals reversed. 738 F. 3d 1058, 1065 (2013).

The en banc court first determined that a police officer's nonconsensual inspection of hotel records under § 41.49 is a Fourth Amendment "search" because "[t]he business records covered by § 41.49 are the hotel's private property" and the hotel therefore "has the right to exclude others from prying into the[ir] contents." *Id.*, at 1061. Next, the court assessed "whether the searches authorized by § 41.49 are reasonable." *Id.*, at 1063. Relying on *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408 (1984), and *See* v. *Seattle*, 387 U. S. 541 (1967), the court held that § 41.49 is facially unconstitutional "as it authorizes inspections" of hotel records "without affording an opportunity to 'obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.'" 738 F. 3d, at 1065 (quoting *See*, 387 U. S., at 545).

Two dissenting opinions were filed. The first dissent argued that facial relief should rarely be available for Fourth Amendment challenges, and was inappropriate here because the ordinance would be constitutional in those circumstances where police officers demand access to hotel records with a warrant in hand or exigent circumstances justify the search. 738 F. 3d, at 1065–1070 (opinion of Tallman, J.). The second dissent conceded that inspections under § 41.49 constitute Fourth Amendment searches, but faulted the majority for assessing the reasonableness of these searches without accounting for the weakness of the hotel operators' privacy in-

terest in the content of their guest registries. *Id.*, at 1070–1074 (opinion of Clifton, J.).

We granted certiorari, 574 U. S. 958 (2014), and now affirm.

II

We first clarify that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored.

A

A facial challenge is an attack on a statute itself as opposed to a particular application. While such challenges are "the most difficult . . . to mount successfully," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), the Court has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution. Cf. Fallon, Fact and Fiction About Facial Challenges, 99 Cal. L. Rev. 915, 918 (2011) (pointing to several Terms in which "the Court adjudicated more facial challenges on the merits than it did as-applied challenges"). Instead, the Court has allowed such challenges to proceed under a diverse array of constitutional provisions. See, *e. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011) (First Amendment); *District of Columbia* v. *Heller*, 554 U. S. 570 (2008) (Second Amendment); *Chicago* v. *Morales*, 527 U. S. 41 (1999) (Due Process Clause of the Fourteenth Amendment); *Kraft Gen. Foods, Inc.* v. *Iowa Dept. of Revenue and Finance*, 505 U. S. 71 (1992) (Foreign Commerce Clause).

Fourth Amendment challenges to statutes authorizing warrantless searches are no exception. Any claim to the contrary reflects a misunderstanding of our decision in *Sibron* v. *New York*, 392 U. S. 40 (1968). In *Sibron*, two criminal defendants challenged the constitutionality of a statute authorizing police to, among other things, "'stop any person abroad in a public place whom [they] reasonably suspec[t] is committing, has committed or is about to commit a felony." *Id.*, at 43 (quoting then N. Y. Code Crim. Proc. § 180–a). The

Court held that the search of one of the defendants under the statute violated the Fourth Amendment, 392 U. S., at 59, 62, but refused to opine more broadly on the statute's validity, stating that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case," *id.*, at 59.

This statement from *Sibron*—which on its face might suggest an intent to foreclose all facial challenges to statutes authorizing warrantless searches—must be understood in the broader context of that case. In the same section of the opinion, the Court emphasized that the "operative categories" of the New York law at issue were "susceptible of a wide variety of interpretations," *id.*, at 60, and that "[the law] was passed too recently for the State's highest court to have ruled upon many of the questions involving potential intersections with federal constitutional guarantees," *id.*, at 60, n. 20. *Sibron* thus stands for the simple proposition that claims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes: Where a statute consists of "extraordinarily elastic categories," it may be "impossible to tell" whether and to what extent it deviates from the requirements of the Fourth Amendment. *Id.*, at 59, 61, n. 20.

This reading of *Sibron* is confirmed by subsequent precedents. Since *Sibron*, the Court has entertained facial challenges under the Fourth Amendment to statutes authorizing warrantless searches. See, *e. g.*, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 648 (1995) ("We granted certiorari to decide whether" petitioner's student athlete drug testing policy "violates the Fourth and Fourteenth Amendments to the United States Constitution"); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 633, n. 10 (1989) ("[R]espondents have challenged the administrative scheme on its face. We deal therefore with whether the [drug] tests contemplated by the regulation can *ever* be conducted"); cf. *Illi-*

nois v. *Krull*, 480 U. S. 340, 354 (1987) ("[A] person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation"). Perhaps more importantly, the Court has on numerous occasions declared statutes facially invalid under the Fourth Amendment. For instance, in *Chandler* v. *Miller*, 520 U. S. 305, 308–309 (1997), the Court struck down a Georgia statute requiring candidates for certain state offices to take and pass a drug test, concluding that this "requirement . . . [did] not fit within the closely guarded category of constitutionally permissible suspicionless searches." Similar examples abound. See, *e. g.*, *Ferguson* v. *Charleston*, 532 U. S. 67, 86 (2001) (holding that a hospital policy authorizing "nonconsensual, warrantless, and suspicionless searches" contravened the Fourth Amendment); *Payton* v. *New York*, 445 U. S. 573, 574, 576 (1980) (holding that a New York statute "authoriz[ing] police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest" was "not consistent with the Fourth Amendment"); *Torres* v. *Puerto Rico*, 442 U. S. 465, 466, 471 (1979) (holding that a Puerto Rico statute authorizing "police to search the luggage of any person arriving in Puerto Rico from the United States" was unconstitutional because it failed to require either probable cause or a warrant).

B

Petitioner principally contends that facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in all applications. Cf. *Salerno*, 481 U. S., at 745 (to obtain facial relief the party seeking it "must establish that no set of circumstances exists under which the [statute] would be valid"). In particular, the City points to situations where police are responding to an emergency, where the subject of the search consents to the intrusion, and where police are acting under

a court-ordered warrant. See Brief for Petitioner 19–20. While petitioner frames this argument as an objection to respondents' challenge in this case, its logic would preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches. For this reason alone, the City's argument must fail: The Court's precedents demonstrate not only that facial challenges to statutes authorizing warrantless searches can be brought, but also that they can succeed. See Part II–A, *supra*.

Moreover, the City's argument misunderstands how courts analyze facial challenges. Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a "law is unconstitutional in all of its applications." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449 (2008). But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. For instance, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court struck down a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: The "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.*, at 894.

Similarly, when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the

search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.[1]

III

Turning to the merits of the particular claim before us, we hold that § 41.49(3)(a) is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review.

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It further provides that "no Warrants shall issue, but upon probable cause." Based on this constitutional text, the Court has repeatedly held that "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Arizona* v. *Gant*, 556 U. S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967)). This rule "applies

[1] Relatedly, the United States claims that a statute authorizing warrantless searches may still have independent force if it imposes a penalty for failing to cooperate in a search conducted under a warrant or in an exigency. See Brief for United States as *Amicus Curiae* 19. This argument gets things backwards. An otherwise facially unconstitutional statute cannot be saved from invalidation based solely on the existence of a penalty provision that applies when searches are not actually authorized by the statute. This argument is especially unconvincing where, as here, an independent obstruction of justice statute imposes a penalty for "willfully, resist[ing], delay[ing], or obstruct[ing] any public officer . . . in the discharge or attempt to discharge any duty of his or her office of employment." Cal. Penal Code Ann. § 148(a)(1) (West 2014).

to commercial premises as well as to homes." *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978).

Search regimes where no warrant is ever required may be reasonable where "'special needs . . . make the warrant and probable-cause requirement impracticable,'" *Skinner*, 489 U. S., at 619 (quoting *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987); some internal quotation marks omitted), and where the "primary purpose" of the searches is "[d]istinguishable from the general interest in crime control," *Indianapolis* v. *Edmond*, 531 U. S. 32, 44 (2000). Here, we assume that the searches authorized by § 41.49 serve a "special need" other than conducting criminal investigations: They ensure compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels' premises.[2] The Court has referred to this kind of search as an "administrative searc[h]." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534 (1967). Thus, we consider whether § 41.49 falls within the administrative search exception to the warrant requirement.

The Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. See *See*, 387 U. S., at 545; *Lone Steer*, 464 U. S., at 415 (noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court"). And, we see no reason why this minimal requirement is inapplicable here. While the

---

[2] Respondents contend that § 41.49's principal purpose instead is to facilitate criminal investigation. Brief for Respondents 44–47. Because we find that the searches authorized by § 41.49 are unconstitutional even if they serve the City's asserted purpose, we decline to address this argument.

Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that § 41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid.

A hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot. The Court has held that business owners cannot reasonably be put to this kind of choice. *Camara*, 387 U. S., at 533 (holding that "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty"). Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests. Even if a hotel has been searched 10 times a day, every day, for three months, without any violation being found, the operator can only refuse to comply with an officer's demand to turn over the registry at his or her own peril.

To be clear, we hold only that a hotel owner must be afforded an *opportunity* to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces penalties for failing to comply. Actual review need only occur in those rare instances where a hotel operator objects to turning over the registry. Moreover, this opportunity can be provided without imposing onerous burdens on those charged with an administrative scheme's enforcement. For instance, respondents accept that the searches authorized by § 41.49(3)(a) would be constitutional if they were performed pursuant to an administrative subpoena. Tr. of Oral Arg. 36–37. These subpoenas, which are typically a simple form, can be issued by the individual seeking the record—here, officers in the field—without probable cause that a regulation is being infringed. See *See*, 387 U. S., at 544 ("[T]he demand to inspect may be issued by the agency"). Issuing a

subpoena will usually be the full extent of an officer's burden because "the great majority of businessmen can be expected in normal course to consent to inspection without warrant." *Barlow's, Inc.*, 436 U. S., at 316. Indeed, the City has cited no evidence suggesting that without an ordinance authorizing on-demand searches, hotel operators would regularly refuse to cooperate with the police.

In those instances, however, where a subpoenaed hotel operator believes that an attempted search is motivated by illicit purposes, respondents suggest it would be sufficient if he or she could move to quash the subpoena before any search takes place. Tr. of Oral Arg. 38–39. A neutral decisionmaker, including an administrative law judge, would then review the subpoenaed party's objections before deciding whether the subpoena is enforceable. Given the limited grounds on which a motion to quash can be granted, such challenges will likely be rare. And, in the even rarer event that an officer reasonably suspects that a hotel operator may tamper with the registry while the motion to quash is pending, he or she can guard the registry until the required hearing can occur, which ought not take long. *Riley* v. *California*, 573 U. S. 373, 388 (2014) (police may seize and hold a cell phone "to prevent destruction of evidence while seeking a warrant"); *Illinois* v. *McArthur*, 531 U. S. 326, 334 (2001) (citing cases upholding the constitutionality of "temporary restraints where [they are] needed to preserve evidence until police could obtain a warrant"). Cf. *Missouri* v. *McNeely*, 569 U. S. 141, 154, and n. 4 (2013) (noting that many States have procedures in place for considering warrant applications telephonically).[3]

Procedures along these lines are ubiquitous. A 2002 report by the Department of Justice "identified approximately

---

[3] JUSTICE SCALIA professes to be baffled at the idea that we could suggest that, in certain circumstances, police officers may seize something that they cannot immediately search. *Post*, at 437 (dissenting opinion). But that is what this Court's cases have explicitly endorsed, including *Riley* just last Term.

335 existing administrative subpoena authorities held by various [federal] executive branch entities." Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 3, online at http://www.justice.gov/archive/olp/rpt_to_congress.htm (all Internet materials as visited June 19, 2015, and available in Clerk of Court's case file). Their prevalence confirms what common sense alone would otherwise lead us to conclude: In most contexts, business owners can be afforded at least an opportunity to contest an administrative search's propriety without unduly compromising the government's ability to achieve its regulatory aims.

Of course administrative subpoenas are only one way in which an opportunity for precompliance review can be made available. But whatever the precise form, the availability of precompliance review alters the dynamic between the officer and the hotel to be searched, and reduces the risk that officers will use these administrative searches as a pretext to harass business owners.

Finally, we underscore the narrow nature of our holding. Respondents have not challenged and nothing in our opinion calls into question those parts of § 41.49 that require hotel operators to maintain guest registries containing certain information. And, even absent legislative action to create a procedure along the lines discussed above, see *supra*, at 422, police will not be prevented from obtaining access to these documents. As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant—including one that was issued *ex parte*—or if some other exception to the warrant requirement applies, including exigent circumstances.[4]

---

[4] In suggesting that our holding today will somehow impede law enforcement from achieving its important aims, JUSTICE SCALIA relies on instances where hotels were used as "prisons for migrants smuggled across the border and held for ransom" or as "rendezvous sites where child sex workers meet their clients on threat of violence from their pro-

B

Rather than arguing that § 41.49(3)(a) is constitutional under the general administrative search doctrine, the City and JUSTICE SCALIA contend that hotels are "closely regulated," and that the ordinance is facially valid under the more relaxed standard that applies to searches of this category of businesses. Brief for Petitioner 28–47; *post*, at 432. They are wrong on both counts.

Over the past 45 years, the Court has identified only four industries that "have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise," *Barlow's, Inc.*, 436 U. S., at 313. Simply listing these industries refutes petitioner's argument that hotels should be counted among them. Unlike liquor sales, *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), firearms dealing, *United States* v. *Biswell*, 406 U. S. 311, 311–312 (1972), mining, *Donovan* v. *Dewey*, 452 U. S. 594 (1981), or running an automobile junkyard, *New York* v. *Burger*, 482 U. S. 691 (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare. See, *e. g.*, *id.*, at 709 ("Automobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts"); *Dewey*, 452 U. S., at 602 (describing the mining industry as "among the most hazardous in the country").[5]

Moreover, "[t]he clear import of our cases is that the closely regulated industry . . . is the exception." *Barlow's, Inc.*, 436 U. S., at 313. To classify hotels as pervasively regulated would permit what has always been a narrow excep-

---

curers." See *post*, at 429. It is hard to imagine circumstances more exigent than these.

[5] JUSTICE SCALIA's effort to depict hotels as raising a comparable degree of risk rings hollow. See *post*, at 428–429, 441. Hotels—like practically all commercial premises or services—can be put to use for nefarious ends. But unlike the industries that the Court has found to be closely regulated, hotels are not intrinsically dangerous.

tion to swallow the rule. The City wisely refrains from arguing that § 41.49 itself renders hotels closely regulated. Nor do any of the other regulations on which petitioner and JUSTICE SCALIA rely—regulations requiring hotels to, *inter alia*, maintain a license, collect taxes, conspicuously post their rates, and meet certain sanitary standards—establish a comprehensive scheme of regulation that distinguishes hotels from numerous other businesses. See Brief for Petitioner 33–34 (citing regulations); *post*, at 433–434 (same). All businesses in Los Angeles need a license to operate. LAMC §§ 21.03(a), 21.09(a). While some regulations apply to a smaller set of businesses, see, *e. g.*, Cal. Code Regs., tit. 25, § 40 (2015) (requiring linens to be changed between rental guests), online at http://www.oal.ca.gov/ccr.htm, these can hardly be said to have created a "'comprehensive'" scheme that puts hotel owners on notice that their "'property will be subject to periodic inspections undertaken for specific purposes,'" *Burger*, 482 U. S., at 705, n. 16 (quoting *Dewey*, 452 U. S., at 600). Instead, they are more akin to the widely applicable minimum wage and maximum hour rules that the Court rejected as a basis for deeming "the entirety of American interstate commerce" to be closely regulated in *Barlow's, Inc.* 436 U. S., at 314. If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify. See Brief for Google Inc. as *Amicus Curiae* 16–17; Brief for the Chamber of Commerce of United States of America as *Amicus Curiae* 12–13.

Petitioner attempts to recast this hodgepodge of regulations as a comprehensive scheme by referring to a "centuries-old tradition" of warrantless searches of hotels. Brief for Petitioner 34–36. History is relevant when determining whether an industry is closely regulated. See, *e. g.*, *Burger*, 482 U. S., at 707. The historical record here, however, is not as clear as petitioner suggests. The City and JUSTICE SCALIA principally point to evidence that hotels were treated

as public accommodations. Brief for Petitioner 34–36; *post*, at 432–433, and n. 1. For instance, the Commonwealth of Massachusetts required innkeepers to "'furnish[ ] . . . suitable provisions and lodging, for the refreshment and entertainment of strangers and travellers, pasturing and stable room, hay and provender . . . for their horses and cattle.'" Brief for Petitioner 35 (quoting An Act For The Due Regulation Of Licensed Houses (1786), reprinted in Acts and Laws of the Commonwealth of Massachusetts 209 (1893)). But laws obligating inns to provide suitable lodging to all paying guests are not the same as laws subjecting inns to warrantless searches. Petitioner also asserts that "[f]or a long time, [hotel] owners left their registers open to widespread inspection." Brief for Petitioner 51. Setting aside that modern hotel registries contain sensitive information, such as driver's licenses and credit card numbers for which there is no historic analog, the fact that some hotels chose to make registries accessible to the public has little bearing on whether government authorities could have viewed these documents on demand without a hotel's consent.

Even if we were to find that hotels are pervasively regulated, § 41.49 would need to satisfy three additional criteria to be reasonable under the Fourth Amendment: (1) "[T]here must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary' to further [the] regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Burger*, 482 U. S., at 702–703 (internal quotation marks omitted). We assume petitioner's interest in ensuring that hotels maintain accurate and complete registries might fulfill the first of these requirements, but conclude that § 41.49 fails the second and third prongs of this test.

The City claims that affording hotel operators any opportunity for precompliance review would fatally undermine the scheme's efficacy by giving operators a chance to falsify their records. Brief for Petitioner 41–42. The Court has previously rejected this exact argument, which could be made regarding any recordkeeping requirement. See *Barlow's, Inc.*, 436 U. S., at 320 ("[It is not] apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the [Labor] Secretary to seek an *ex parte* warrant to reappear at the premises without further notice to the establishment being inspected"); cf. *Lone Steer*, 464 U. S., at 411, 415 (affirming use of administrative subpoena which provided an opportunity for precompliance review as a means for obtaining "payroll and sales records"). We see no reason to accept it here.

As explained above, nothing in our decision today precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant or, where an officer reasonably suspects the registry would be altered, from guarding the registry pending a hearing on a motion to quash. See *Barlow's, Inc.*, 436 U. S., at 319–321; *Riley*, 573 U. S., at 388. JUSTICE SCALIA's claim that these procedures will prove unworkable given the large number of hotels in Los Angeles is a red herring. See *post*, at 438. While there are approximately 2,000 hotels in Los Angeles, *ibid.*, there is no basis to believe that resort to such measures will be needed to conduct spot checks in the vast majority of them. See *supra*, at 421–422.

Section 41.49 is also constitutionally deficient under the "certainty and regularity" prong of the closely regulated industries test because it fails sufficiently to constrain police officers' discretion as to which hotels to search and under what circumstances. While the Court has upheld inspection schemes of closely regulated industries that called for searches at least four times a year, *Dewey*, 452 U. S., at 604,

or on a "regular basis," *Burger*, 482 U. S., at 711, § 41.49 imposes no comparable standard.

* * *

For the foregoing reasons, we agree with the Ninth Circuit that § 41.49(3)(a) is facially invalid insofar as it fails to provide any opportunity for precompliance review before a hotel must give its guest registry to the police for inspection. Accordingly, the judgment of the Ninth Circuit is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The city of Los Angeles, like many jurisdictions across the country, has a law that requires motels, hotels, and other places of overnight accommodation (hereinafter motels) to keep a register containing specified information about their guests. Los Angeles Municipal Code (LAMC) § 41.49(2) (2015). The purpose of this recordkeeping requirement is to deter criminal conduct, on the theory that criminals will be unwilling to carry on illicit activities in motel rooms if they must provide identifying information at check-in. Because this deterrent effect will only be accomplished if motels actually do require guests to provide the required information, the ordinance also authorizes police to conduct random spot checks of motels' guest registers to ensure that they are properly maintained. § 41.49(3). The ordinance limits these spot checks to the four corners of the register, and does not authorize police to enter any nonpublic area of the motel. To the extent possible, police must conduct these spot checks at times that will minimize any disruption to a motel's business.

The parties do not dispute the governmental interests at stake. Motels not only provide housing to vulnerable transient populations, they are also a particularly attractive site

for criminal activity ranging from drug dealing and prostitution to human trafficking. Offering privacy and anonymity on the cheap, they have been employed as prisons for migrants smuggled across the border and held for ransom, see Sanchez, Immigrant Smugglers Become More Ruthless, Washington Post, June 28, 2004, p. A3; Wagner, Human Smuggling, Arizona Republic, July 23, 2006, p. A1, and rendezvous sites where child sex workers meet their clients on threat of violence from their procurers.

Nevertheless, the Court today concludes that Los Angeles's ordinance is "unreasonable" inasmuch as it permits police to flip through a guest register to ensure it is being filled out without first providing an opportunity for the motel operator to seek judicial review. Because I believe that such a limited inspection of a guest register is eminently reasonable under the circumstances presented, I dissent.

I

I assume that respondents may bring a facial challenge to the City's ordinance under the Fourth Amendment. Even so, their claim must fail because, as discussed *infra*, the law is constitutional in most, if not all, of its applications. See *United States* v. *Salerno*, 481 U. S. 739, 751 (1987). But because the Court discusses the propriety of a facial challenge at some length, I offer a few thoughts.

Article III limits our jurisdiction to "Cases" and "Controversies." Accordingly, "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013). To be sure, the *reasoning* of a decision may suggest that there is no permissible application of a particular statute, *Chicago* v. *Morales*, 527 U. S. 41, 77 (1999) (SCALIA, J., dissenting), and under the doctrine of *stare decisis*, this reasoning—to the extent that it is necessary to the holding—will be binding in all future cases. But

in this sense, the facial invalidation of a statute is a logical consequence of the Court's opinion, not the immediate effect of its judgment. Although we have at times described our holdings as invalidating a law, it is always the application of a law, rather than the law itself, that is before us.

The upshot is that the effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it. If a plaintiff elects not to present any case-specific facts in support of a claim that a law is unconstitutional—as is the case here—he will limit the grounds on which a Court may find for him to highly abstract rules that would have broad application in future cases. The decision to do this might be a poor strategic move, especially in a Fourth Amendment case, where the reasonableness of a search is a highly factbound question and general, abstract rules are hard to come by. Cf. *Sibron* v. *New York*, 392 U. S. 40, 59 (1968). But even had the plaintiffs in this case presented voluminous facts in a self-styled as-applied challenge, nothing would force this Court to rely upon those facts rather than the broader principle that the Court has chosen to rely upon. I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is.

II

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Grammatically, the two clauses of the Amendment seem to be independent—and directed at entirely different actors. The former tells the executive what it must do when it conducts a search, and the latter tells the judiciary what it must do when it issues a

search warrant. But in an effort to guide courts in applying the Search-and-Seizure Clause's indeterminate reasonableness standard, and to maintain coherence in our case law, we have used the Warrant Clause as a guidepost for assessing the reasonableness of a search, and have erected a framework of presumptions applicable to broad categories of searches conducted by executive officials. Our case law has repeatedly recognized, however, that these are mere presumptions, and the only constitutional *requirement* is that a search be reasonable.

When, for example, a search is conducted to enforce an administrative regime rather than to investigate criminal wrongdoing, we have been willing to modify the probable-cause standard so that a warrant may issue absent individualized suspicion of wrongdoing. Thus, our cases say a warrant may issue to inspect a structure for fire-code violations on the basis of such factors as the passage of time, the nature of the building, and the condition of the neighborhood. *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 538–539 (1967). As we recognized in that case, "reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.*, at 539. And precisely "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' " even the presumption that the search of a home without a warrant is unreasonable "is subject to certain exceptions." *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006).

One exception to normal warrant requirements applies to searches of closely regulated businesses. "[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation," and so a warrantless search to enforce those regulations is not unreasonable. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313 (1978). Recognizing that warrantless searches of closely regulated businesses may nevertheless

become unreasonable if arbitrarily conducted, we have required laws authorizing such searches to satisfy three criteria: (1) There must be a "'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) "'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'" *New York* v. *Burger*, 482 U. S. 691, 702–703 (1987).

Los Angeles's ordinance easily meets these standards.

A

In determining whether a business is closely regulated, this Court has looked to factors including the duration of the regulatory tradition, *id.*, at 705–707, *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72, 75–77 (1970), *Donovan* v. *Dewey*, 452 U. S. 594, 606 (1981); the comprehensiveness of the regulatory regime, *Burger*, *supra*, at 704–705, *Dewey*, *supra*, at 606; and the imposition of similar regulations by other jurisdictions, *Burger*, *supra*, at 705. These factors are not talismans, but shed light on the expectation of privacy the owner of a business may reasonably have, which in turn affects the reasonableness of a warrantless search. See *Barlow's*, *supra*, at 313.

Reflecting the unique public role of motels and their commercial forebears, governments have long subjected these businesses to unique public duties, and have established inspection regimes to ensure compliance. As Blackstone observed, "Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behavior." 4 W. Blackstone, Commentaries on the Laws of England 168 (1765). Justice Story similarly recognized "[t]he soundness

of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder." J. Story, Commentaries on the Law of Bailments § 464, pp. 487–488 (5th ed. 1851). Accordingly, in addition to the obligation to receive any paying guest, "innkeepers are bound to take, not merely ordinary care, but uncommon care, of the goods, money, and baggage of their guests," *id.*, § 470, at 495, as travellers "are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers," *id.*, § 471, at 498.

These obligations were not merely aspirational. At the time of the founding, searches—indeed, warrantless searches—of inns and similar places of public accommodation were commonplace. For example, although Massachusetts was perhaps the State most protective against government searches, "the state code of 1788 still allowed tithingmen to search public houses of entertainment on every Sabbath without any sort of warrant." W. Cuddihy, Fourth Amendment: Origins and Original Meaning 602–1791, p. 743 (2009).[1]

As this evidence demonstrates, the regulatory tradition governing motels is not only longstanding, but comprehensive. And the tradition continues in Los Angeles. The City imposes an occupancy tax upon transients who stay in motels, LAMC § 21.7.3, and makes the motel owner responsible for collecting it, § 21.7.5. It authorizes city officials "to enter [a motel], free of charge, during business hours" in order to "inspect and examine" them to determine whether these tax provisions have been complied with. §§ 21.7.9, 21.15. It requires all motels to obtain a "Transient Occu-

[1] As Beale helpfully confirms, "[f]rom the earliest times the fundamental characteristic of an inn has been its public nature. It is a public house, a house of public entertainment, or, as it is legally phrased, a common inn." J. Beale, The Law of Innkeepers and Hotels § 11, p. 10 (1906).

pancy Registration Certificate," which must be displayed on the premises. § 21.7.6. State law requires motels to "post in a conspicuous place . . . a statement of rate or range of rates by the day for lodging," and forbids any charges in excess of those posted rates. Cal. Civ. Code Ann. § 1863 (West 2010). Hotels must change bed linens between guests, Cal. Code Regs., tit. 25, § 40 (2015), and they must offer guests the option not to have towels and linens laundered daily, LAMC § 121.08. "Multiuse drinking utensils" may be placed in guest rooms only if they are "thoroughly washed and sanitized after each use" and "placed in protective bags." Cal. Code Regs., tit. 17, § 30852. And state authorities, like their municipal counterparts, "may at reasonable times enter and inspect any hotels, motels, or other public places" to ensure compliance. § 30858.

The regulatory regime at issue here is thus substantially *more* comprehensive than the regulations governing junkyards in *Burger*, where licensing, inventory-recording, and permit-posting requirements were found sufficient to qualify the industry as closely regulated. 482 U. S., at 704–705. The Court's suggestion that these regulations are not sufficiently targeted to motels, and are "akin to . . . minimum wage and maximum hour rules," *ante*, at 425, is simply false. The regulations we have described above reach into the "minutest detail[s]" of motel operations, *Barlow's*, *supra*, at 314, and those who enter that business today (like those who have entered it over the centuries) do so with an expectation that they will be subjected to especially vigilant governmental oversight.

Finally, this ordinance is not an outlier. The City has pointed us to more than 100 similar register-inspection laws in cities and counties across the country, Brief for Petitioner 36, and n. 3, and that is far from exhaustive. In all, municipalities in at least 41 States have laws similar to Los Angeles's, Brief for National League of Cities et al. as *Amici Curiae* 16–17, and at least 8 States have their own laws au-

thorizing register inspections, Brief for California et al. as *Amici Curiae* 12–13.

This copious evidence is surely enough to establish that "[w]hen a [motel operator] chooses to engage in this pervasively regulated business . . . he does so with the knowledge that his business records . . . will be subject to effective inspection." *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). And *that* is the relevant constitutional test—not whether this regulatory superstructure is "the same as laws subjecting inns to warrantless searches," or whether, as an historical matter, government authorities not only required these documents to be kept but permitted them to be viewed on demand without a motel's consent. *Ante*, at 426.

The Court's observation that "[o]ver the past 45 years, the Court has identified only four industries" as closely regulated, *ante*, at 424, is neither here nor there. Since we first concluded in *Colonnade Catering* that warrantless searches of closely regulated businesses are reasonable, we have only identified *one* industry as *not* closely regulated, see *Barlow's*, 436 U. S., at 313–314. The Court's statistic thus tells us more about how this Court exercises its discretionary review than it does about the number of industries that qualify as closely regulated. At the same time, lower courts, which do not have the luxury of picking the cases they hear, have identified many more businesses as closely regulated under the test we have announced: pharmacies, *United States* v. *Gonsalves*, 435 F. 3d 64, 67 (CA1 2006); massage parlors, *Pollard* v. *Cockrell*, 578 F. 2d 1002, 1014 (CA5 1978); commercial-fishing operations, *United States* v. *Raub*, 637 F. 2d 1205, 1208–1209 (CA9 1980); day-care facilities, *Rush* v. *Obledo*, 756 F. 2d 713, 720–721 (CA9 1985); nursing homes, *People* v. *Firstenberg*, 92 Cal. App. 3d 570, 578–580, 155 Cal. Rptr. 80, 84–86 (1979); jewelers, *People* v. *Pashigian*, 150 Mich. App. 97, 100–101, 388 N. W. 2d 259, 261–262 (1986) (*per curiam*); barbershops, *Stogner* v. *Kentucky*, 638 F. Supp. 1, 3 (WD Ky. 1985); and yes, even rabbit dealers, *Lesser* v. *Espy*, 34 F. 3d

1301, 1306–1307 (CA7 1994). Like automobile junkyards and catering companies that serve alcohol, many of these businesses are far from "intrinsically dangerous," cf. *ante*, at 424, n. 5. This should come as no surprise. The reason closely regulated industries may be searched without a warrant has nothing to do with the risk of harm they pose; rather, it has to do with the expectations of those who enter such a line of work. See *Barlow's*, *supra*, at 313.

B

The City's ordinance easily satisfies the remaining *Burger* requirements: It furthers a substantial governmental interest, it is necessary to achieving that interest, and it provides an adequate substitute for a search warrant.

Neither respondents nor the Court question the substantial interest of the City in deterring criminal activity. See Brief for Respondents 34–41; *ante*, at 420. The private pain and public costs imposed by drug dealing, prostitution, and human trafficking are beyond contention, and motels provide an obvious haven for those who trade in human misery.

Warrantless inspections are also necessary to advance this interest. Although the Court acknowledges that law enforcement can enter a motel room without a warrant when exigent circumstances exist, see *ante*, at 423, n. 4, the whole reason criminals use motel rooms in the first place is that they offer privacy and secrecy, so that police will never come to discover these exigencies. The recordkeeping requirement, which all parties admit is permissible, therefore operates by *deterring* crime. Criminals, who depend on the anonymity that motels offer, will balk when confronted with a motel's demand that they produce identification. And a motel's evasion of the recordkeeping requirement fosters crime. In San Diego, for example, motel owners were indicted for collaborating with members of the Crips street gang in the prostitution of underage girls; the motel owners "set aside rooms apart from the rest of their legitimate customers

where girls and women were housed, charged the gang members/pimps a higher rate for the rooms where 'dates' or 'tricks' took place, and warned the gang members of inquiries by law enforcement." Office of the Attorney General, Cal. Dept. of Justice, The State of Human Trafficking in California 25 (2012). The warrantless inspection requirement provides a necessary incentive for motels to maintain their registers thoroughly and accurately: They never know when law enforcement might drop by to inspect.

Respondents and the Court acknowledge that *inspections* are necessary to achieve the purposes of the recordkeeping regime, but insist that *warrantless* inspections are not. They have to acknowledge, however, that the motel operators who conspire with drug dealers and procurers may demand precompliance judicial review simply as a pretext to buy time for making fraudulent entries in their guest registers. The Court therefore must resort to arguing that warrantless inspections are not "necessary" because other alternatives exist.

The Court suggests that police could obtain an administrative subpoena to search a guest register and, if a motel moves to quash, the police could "guar[d] the registry pending a hearing" on the motion. *Ante*, at 427. This proposal is equal parts 1984 and Alice in Wonderland. It protects motels from government inspection of their registers by authorizing government agents to seize the registers[2] (if "guarding" entails forbidding the register to be moved) or to upset guests by a prolonged police presence at the motel. The Court also notes that police can obtain an *ex parte* warrant before conducting a register inspection. *Ibid.* Presumably such warrants could issue without probable cause of wrongdoing by a particular motel, see *Camara*, 387 U. S., at

[2] We are not at all "baffled at the idea that . . . police officers may seize something that they cannot immediately search." *Ante*, at 422, n. 3. We are baffled at the idea that anyone would think a seizure of required records less intrusive than a visual inspection.

535–536; otherwise, this would be no alternative at all. Even so, under this regime police would have to obtain an *ex parte* warrant before *every* inspection. That is because law enforcement would have no way of knowing ahead of time which motels would refuse consent to a search upon request; and if they wait to obtain a warrant until consent is refused, motels will have the opportunity to falsify their guest registers while the police jump through the procedural hoops required to obtain a warrant. It is quite plausible that the costs of this always-get-a-warrant "alternative" would be prohibitive for a police force in one of America's largest cities, juggling numerous law-enforcement priorities, and confronting more than 2,000 motels within its jurisdiction. E. Wallace, K. Pollock, B. Horth, S. Carty, & N. Elyas, Los Angeles Tourism: A Domestic and International Analysis 7 (May 2014), online at http://www.lachamber.com/clientuploads/Global_Programs/WTW/2014/LATourism_LMU_May2014.pdf (as visited June 19, 2015, and available in Clerk of Court's case file). To be sure, the fact that obtaining a warrant might be costly will not by itself render a warrantless search reasonable under the Fourth Amendment; but it can render a warrantless search *necessary* in the context of an administrative-search regime governing closely regulated businesses.

But all that discussion is in any case irrelevant. The administrative search need only be reasonable. It is not the burden of Los Angeles to show that there are no less restrictive means of achieving the City's purposes. Sequestration or *ex parte* warrants were *possible* alternatives to the warrantless-search regimes approved by this Court in *Colonnade Catering*, *Biswell*, *Dewey*, and *Burger*. By importing a least-restrictive-means test into *Burger*'s Fourth Amendment framework, today's opinion implicitly overrules that entire line of cases.

Finally, the City's ordinance provides an adequate substitute for a warrant. Warrants "advise the owner of the scope

and objects of the search, beyond which limits the inspector is not expected to proceed." *Barlow's*, 436 U. S., at 323. Ultimately, they aim to protect against "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Ibid.*

Los Angeles's ordinance provides that the guest register must be kept in the guest reception or guest check-in area, or in an adjacent office, and that it "be made available to any officer of the Los Angeles Police Department for inspection. Whenever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." LAMC § 41.49(3). Nothing in the ordinance authorizes law enforcement to enter a nonpublic part of the motel. Compare this to the statute upheld in *Colonnade Catering*, which provided that "'[t]he Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects,'" 397 U. S., at 73, n. 2 (quoting 26 U. S. C. § 7606(a) (1964 ed.)); or the one in *Biswell*, which stated that "'[t]he Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . , and (2) any firearms or ammunition kept or stored,'" 406 U. S., at 312, n. 1 (quoting 18 U. S. C. § 923(g) (1970 ed.)); or the one in *Dewey*, which granted federal mine inspectors "'a right of entry to, upon, or through any coal or other mine,'" 452 U. S., at 596 (quoting 30 U. S. C. § 813(a) (1976 ed., Supp. III)); or the one in *Burger*, which compelled junkyard operators to "'produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises,'" 482 U. S., at 694, n. 1 (quoting N. Y. Veh. &

Traf. Law § 415–a5 (McKinney 1986)). The Los Angeles ordinance—which limits warrantless police searches to the pages of a guest register in a public part of a motel—circumscribes police discretion in much more exacting terms than the laws we have approved in our earlier cases.

The Court claims that Los Angeles's ordinance confers too much discretion because it does not adequately limit the *frequency* of searches. Without a trace of irony, the Court tries to distinguish Los Angeles's law from the laws upheld in *Dewey* and *Burger* by pointing out that the latter regimes required inspections at least four times a year and on a "'regular basis,'" respectively. *Ante*, at 427–428. But the warrantless police searches of a business "10 times a day, every day, for three months" that the Court envisions under Los Angeles's regime, *ante*, at 421, are entirely consistent with the regimes in *Dewey* and *Burger*; 10 times a day, every day, is "at least four times a year," and on a (much too) "'regular basis.'" *Ante*, at 427–428.

That is not to say that the Court's hypothetical searches are necessarily constitutional. It is only to say that Los Angeles's ordinance presents no greater risk that such a hypothetical will materialize than the laws we have already upheld. As in our earlier cases, we should leave it to lower courts to consider on a case-by-case basis whether warrantless searches have been conducted in an unreasonably intrusive or harassing manner.

III

The Court reaches its wrongheaded conclusion not simply by misapplying our precedent, but by mistaking our precedent for the Fourth Amendment itself. Rather than bother with the text of that Amendment, the Court relies exclusively on our administrative-search cases, *Camara*, *See* v. *Seattle*, 387 U. S. 541 (1967), and *Barlow's*. But the Constitution predates 1967, and it remains the supreme law of the land today. Although the categorical framework our jurisprudence has erected in this area may provide us guidance,

it is guidance to answer the constitutional question at issue: whether the challenged search is *reasonable*.

An administrative, warrantless-search ordinance that narrowly limits the scope of searches to a single business record, that does not authorize entry upon premises not open to the public, and that is supported by the need to prevent fabrication of guest registers, is, to say the least, far afield from the laws at issue in the cases the Court relies upon. The Court concludes that such minor intrusions, permissible when the police are trying to tamp down the market in stolen auto parts, are "unreasonable" when police are instead attempting to stamp out the market in child sex slaves.

Because I believe that the limited warrantless searches authorized by Los Angeles's ordinance are reasonable under the circumstances, I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

After today, the city of Los Angeles can never, under any circumstances, enforce its 116-year-old requirement that hotels make their registers available to police officers. That is because the Court holds that § 41.49(3)(a) of the Los Angeles Municipal Code (2015) is *facially* unconstitutional. Before entering a judgment with such serious safety and federalism implications, the Court must conclude that every application of this law is unconstitutional—*i. e.*, that "'no set of circumstances exists under which the [law] would be valid.'" *Ante*, at 417 (quoting *United States* v. *Salerno*, 481 U. S. 739, 745 (1987)). I have doubts about the Court's approach to administrative searches and closely regulated industries. *Ante*, at 419–428. But even if the Court were 100% correct, it still should uphold § 41.49(3)(a) because many other applications of this law are constitutional. Here are five examples.

Example One. The police have probable cause to believe that a register contains evidence of a crime. They go to a judge and get a search warrant. The hotel operator, how-

ever, refuses to surrender the register, but instead stashes it away. Officers could tear the hotel apart looking for it. Or they could simply order the operator to produce it. The Fourth Amendment does not create a right to defy a warrant. Hence § 41.49(3)(a) could be constitutionally applied in this scenario. Indeed, the Court concedes that it is proper to apply a California obstruction of justice law in such a case. See *ante*, at 419, n. 1; Brief for Respondents 49. How could applying a city law with a similar effect be different? No one thinks that overlapping laws are unconstitutional. See, *e. g.*, *Yates* v. *United States*, 574 U. S. 528, 562 (2015) (KAGAN, J. dissenting) ("Overlap—even significant overlap—abounds in criminal law") (collecting citations). And a specific law gives more notice than a general law.

In any event, the Los Angeles ordinance is arguably broader in at least one important respect than the California obstruction of justice statute on which the Court relies. *Ante*, at 419, n. 1. The state law applies when a person "willfully resists, delays, or obstructs any public officer . . . in the discharge or attempt to discharge any duty of his or her office." Cal. Penal Code Ann. § 148(a)(1) (West 2014). In the example set out above, suppose that the hotel operator, instead of hiding the register, simply refused to tell the police where it is located. The Court cites no California case holding that such a refusal would be unlawful, and the city of Los Angeles submits that under California law, "[o]bstruction statutes prohibit a hotel owner from *obstructing* a search, but they do not require affirmative assistance." Reply Brief 5. The Los Angeles ordinance, by contrast, unequivocally requires a hotel operator to make the register available on request.

Example Two. A murderer has kidnapped a woman with the intent to rape and kill her and there is reason to believe he is holed up in a certain motel. The Fourth Amendment's reasonableness standard accounts for exigent circumstances. See, *e. g.*, *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006).

When the police arrive, the motel operator folds her arms and says the register is locked in a safe. Invoking § 41.49(3)(a), the police order the operator to turn over the register. She refuses. The Fourth Amendment does not protect her from arrest.

Example Three. A neighborhood of "pay by the hour" motels is a notorious gathering spot for child-sex traffickers. Police officers drive through the neighborhood late one night and see unusual amounts of activity at a particular motel. The officers stop and ask the motel operator for the names of those who paid with cash to rent rooms for less than three hours. The operator refuses to provide the information. Requesting to see the register—and arresting the operator for failing to provide it—would be reasonable under the "totality of the circumstances." *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996). In fact, the Court has upheld a similar reporting duty against a Fourth Amendment challenge where the scope of information required was also targeted and the public's interest in crime prevention was no less serious. See *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 39, n. 15, 66–67 (1974) (having "no difficulty" upholding a requirement that banks must provide reports about transactions involving more than $10,000, including the name, address, occupation, and social security number of the customer involved, along with a summary of the transaction, the amount of money at issue, and the type of identification presented).

Example Four. A motel is operated by a dishonest employee. He has been charging more for rooms than he records, all the while pocketing the difference. The owner finds out and eagerly consents to a police inspection of the register. But when officers arrive and ask to see the register, the operator hides it. The Fourth Amendment does not allow the operator's refusal to defeat the owner's consent. See, *e. g.*, *Mancusi* v. *DeForte*, 392 U. S. 364, 369–370 (1968). Accordingly, it would not violate the Fourth Amendment to arrest the operator for failing to make the register "available

to any officer of the Los Angeles Police Department for inspection." § 41.49(3)(a).

Example Five. A "mom and pop" motel always keeps its old-fashioned guest register open on the front desk. Anyone who wants to can walk up and leaf through it. (Such motels are not as common as they used to be, but Los Angeles is a big place.) The motel has no reasonable expectation of privacy in the register, and no one doubts that police officers—like anyone else—can enter into the lobby. See, *e. g.*, *Florida* v. *Jardines*, 569 U. S. 1, 8 (2013); *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 413 (1984). But when an officer starts looking at the register, as others do, the motel operator at the desk snatches it away and will not give it back. Arresting that person would not violate the Fourth Amendment.

These are just five examples. There are many more. The Court rushes past examples like these by suggesting that § 41.49(3)(a) does no "work" in such scenarios. *Ante*, at 419. That is not true. Under threat of legal sanction, this law orders hotel operators to do things they do not want to do. To be sure, there may be circumstances in which § 41.49(3)(a)'s command conflicts with the Fourth Amendment, and in those circumstances the Fourth Amendment is supreme. See U. S. Const., Art. VI, cl. 2. But no different from any other local law, the remedy for such circumstances should be an as-applied injunction *limited to the conflict with the Fourth Amendment*. Such an injunction would protect a hotel from being "searched 10 times a day, every day, for three months, without any violation being found." *Ante*, at 421. But unlike facial invalidation, an as-applied injunction does not produce collateral damage. Section 41.49(3)(a) should be enforceable in those many cases in which the Fourth Amendment is not violated.

There are serious arguments that the Fourth Amendment's application to warrantless searches and seizures is inherently inconsistent with facial challenges. See *Sibron* v.

New York, 392 U. S. 40, 59, 62 (1968) (explaining that because of the Fourth Amendment's reasonableness requirement, "[t]he constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case"); Brief for Manhattan Institute for Policy Research as *Amicus Curiae* 33 ("A constitutional claim under the first clause of the Fourth Amendment is never a 'facial' challenge, because it is always and inherently a challenge to executive action"). But assuming such facial challenges ever make sense conceptually, this particular one fails under basic principles of facial invalidation. The Court's contrary holding is befuddling. I respectfully dissent.

Syllabus

KIMBLE ET AL. *v.* MARVEL ENTERTAINMENT, LLC, SUCCESSOR TO MARVEL ENTERPRISES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–720. Argued March 31, 2015—Decided June 22, 2015

Respondent Marvel Entertainment's corporate predecessor agreed to purchase petitioner Stephen Kimble's patent for a Spider-Man toy in exchange for a lump sum plus a 3% royalty on future sales. The agreement set no end date for royalties. As the patent neared the end of its statutory 20-year term, Marvel discovered *Brulotte* v. *Thys Co.*, 379 U. S. 29, in which this Court held that a patentee cannot continue to receive royalties for sales made after his patent expires. Marvel then sought a declaratory judgment in federal district court confirming that it could stop paying Kimble royalties. The district court granted relief, and the Ninth Circuit affirmed. Kimble now asks this Court to overrule *Brulotte*.

Held: *Stare decisis* requires this Court to adhere to *Brulotte*. Pp. 451–465.

(a) A patent typically expires 20 years from its application date. 35 U. S. C. § 154(a)(2). At that point, the unrestricted right to make or use the article passes to the public. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230. This Court has carefully guarded the significance of that expiration date, declining to enforce laws and contracts that restrict free public access to formerly patented, as well as unpatentable, inventions. See, *e. g.*, *id.*, at 230–233; *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249, 255–256.

Brulotte applied that principle to a patent licensing agreement that provided for the payment of royalties accruing after the patent's expiration. 379 U. S., at 30. The Court held that the post-patent royalty provision was "unlawful *per se*," *id.*, at 30, 32, because it continued "the patent monopoly beyond the [patent] period," *id.*, at 33, and, in so doing, conflicted with patent law's policy of establishing a "post-expiration . . . public domain," *ibid.*

The *Brulotte* rule may prevent some parties from entering into deals they desire, but parties can often find ways to achieve similar outcomes. For example, *Brulotte* leaves parties free to defer payments for pre-expiration use of a patent, tie royalties to non-patent rights, or make non-royalty-based business arrangements. Contending that such alternatives are not enough, Kimble asks this Court to abandon *Brulotte*'s

bright-line rule in favor of a case-by-case approach based on antitrust law's "rule of reason." Pp. 451–455.

(b) The doctrine of *stare decisis* provides that today's Court should stand by yesterday's decisions. Application of that doctrine, though "not an inexorable command," is the "preferred course." *Payne* v. *Tennessee*, 501 U. S. 808, 828, 827. Overruling a case always requires "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266. Where, as here, the precedent interprets a statute, *stare decisis* carries enhanced force, since critics are free to take their objections to Congress. See, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173. Congress, moreover, has spurned multiple opportunities to reverse *Brulotte*, see *Watson* v. *United States*, 552 U. S. 74, 82–83, and has even rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the standard Kimble urges. In addition, *Brulotte* implicates property and contract law, two contexts in which considerations favoring *stare decisis* are "at their acme," *Payne*, 501 U. S., at 828, because parties are especially likely to rely on such precedents when ordering their affairs.

Given those good reasons for adhering to *stare decisis* in this case, this Court would need a very strong justification for overruling *Brulotte*. But traditional justifications for abandoning *stare decisis* do not help Kimble here. First, *Brulotte*'s doctrinal underpinnings have not eroded over time. The patent statute at issue in *Brulotte* is essentially unchanged. And the precedent on which the *Brulotte* Court primarily relied, like other decisions enforcing a patent's cut-off date, remains good law. Indeed, *Brulotte*'s close relation to a whole web of precedents means that overruling it could threaten others. Second, nothing about *Brulotte* has proved unworkable. See *Patterson*, 491 U. S., at 173. To the contrary, the decision itself is simple to apply—particularly as compared to Kimble's proposed alternative, which can produce high litigation costs and unpredictable results. Pp. 455–460.

(c) Neither of the justifications Kimble offers gives cause to overrule *Brulotte*. Pp. 460–465.

(1) Kimble first argues that *Brulotte* hinged on an economic error—*i. e.*, an assumption that post-expiration royalties are always anticompetitive. This Court sees no error in Kimble's economic analysis. But even assuming Kimble is right that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. The patent laws are not like the Sherman Act, which gives courts exceptional authority to shape the law and reconsider precedent based on better economic analysis. Moreover, Kimble's argument is based not on evolving economic

Syllabus

theory but rather on a claim that the *Brulotte* Court simply made the wrong call. That claim fails to clear *stare decisis*'s high bar. In any event, *Brulotte* did not even turn on the notion that post-patent royalties harm competition. Instead, the *Brulotte* Court simply applied the categorical principle that all patent-related benefits must end when the patent term expires. Kimble's real complaint may go to the merits of that principle as a policy matter. But Congress, not this Court, gets to make patent policy. Pp. 460–463.

(2) Kimble also argues that *Brulotte* suppresses technological innovation and harms the national economy by preventing parties from reaching agreements to commercialize patents. This Court cannot tell whether that is true. *Brulotte* leaves parties free to enter alternative arrangements that may suffice to accomplish parties' payment deferral and risk-spreading goals. And neither Kimble nor his *amici* offer any empirical evidence connecting *Brulotte* to decreased innovation. In any event, claims about a statutory precedent's consequences for innovation are "more appropriately addressed to Congress." *Halliburton*, 573 U. S., at 277. Pp. 463–465.

727 F. 3d 856, affirmed.

KAGAN, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 465.

Roman Melnik argued the cause for petitioners. With him on the briefs were *Kenneth Weatherwax*, *Flavio M. Rose*, and *Antonio R. Durando*.

Thomas G. Saunders argued the cause for respondent. With him on the brief were *Seth P. Waxman*, *Matthew Guanieri*, and *Paul R. Q. Wolfson*.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Mizer*, *Curtis E. Gannon*, *Mark R. Freeman*, and *Katherine Twomey Allen*.*

---

*Briefs of *amici curiae* urging reversal were filed for Biotime, Inc., by *Robert H. Stier, Jr.*; for the Center for Intellectual Property Research of the Indiana University Maurer School of Law et al. by *Mark D. Janis*; for the Intellectual Property Owners Association by *Robert P. Taylor*, *Philip*

JUSTICE KAGAN delivered the opinion of the Court.

In *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), this Court held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis*, we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as "a spider person" by shooting webs—really, pressurized foam string—"from the palm of [the] hand." U. S. Patent No. 5,072,856, Abstract (filed May 25, 1990).[1] Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider-Man, among other comic-book characters. Seeking to sell or license his patent, Kim-

---

S. Johnson, and *Kevin H. Rhoads*; for the Memorial Sloan Kettering Cancer Center et al. by *Harvey M. Stone* and *Richard H. Dolan*; for the New York Intellectual Property Law Association by *Jeffrey I. D. Lewis*, *Scott B. Howard*, *Anthony Lo Cicero*, *Charles R. Macedo*, and *David F. Ryan*; and for the University of Massachusetts Biologic Laboratories by *Donald R. Ware*.

Briefs of *amici curiae* urging affirmance were filed for Nautilus, Inc., by *David Lieberworth*; for Public Knowledge by *Charles Duan*; for the Washington Legal Foundation by *Richard A. Samp*; and for the William Mitchell College of Law Intellectual Property Institute by *R. Carl Moy*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Paul M. Smith*, *Joshua M. Segal*, and *Sharon A. Israel*; for the Association of the Bar of the City of New York by *Fiona Schaeffer* and *Aaron L. Pereira*; for the Intellectual Property Law Association of Chicago by *David L. Applegate*, *Charles W. Shifley*, and *Donald W. Rupert*; for the Licensing Executives Society (U. S. A. and Canada), Inc., by *Brian P. O'Shaughnessy* and *Brian S. Seal*; and for Robin Feldman et al. by *Ms. Feldman*, *pro se*.

[1] Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we refer only to Kimble.

ble met with the president of Marvel's corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the "Web Blaster"—a toy that, like Kimble's patented invention, enables would-be action heroes to mimic Spider-Man through the use of a polyester glove and a canister of foam.

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble's patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel's future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider-Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte*, the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent's expiration. See 379 U. S., at 32. So the decision's effect was to sunset the settlement's royalty clause.[2] On making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble's patent term. The court approved that relief, holding that *Brulotte* made "the royalty provision . . . unenforceable after the expiration of the Kimble patent." 692 F. Supp. 2d 1156, 1161 (Ariz. 2010). The Court of Appeals for the Ninth Circuit affirmed, though making clear that it

[2] In *Brulotte*, the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See 379 U. S., at 29–30. By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way.

was none too happy about doing so. "[T]he *Brulotte* rule," the court complained, "is counterintuitive and its rationale is arguably unconvincing." 727 F. 3d 856, 857 (2013).

We granted certiorari, 574 U. S. 1058 (2014), to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*.[3] For reasons of *stare decisis*, we demur.

II

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See 35 U. S. C. § 154(a)(1). But a patent typically expires 20 years from the day the application for it was filed. See § 154(a)(2). And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230 (1964).

This Court has carefully guarded that cut-off date, just as it has the patent laws' subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have

---

[3] See, *e. g.*, *Scheiber* v. *Dolby Labs., Inc.*, 293 F. 3d 1014, 1017–1018 (CA7 2002) (Posner, J.) (*Brulotte* has been "severely, and as it seems to us, with all due respect, justly criticized . . . . However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); Ayres & Klemperer, Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies, 97 Mich. L. Rev. 985, 1027 (1999) ("Our analysis . . . suggests that *Brulotte* should be overruled").

struck down state statutes with that consequence. See, *e. g.*, *id.*, at 230–233; *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 152, 167–168 (1989); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234, 237–238 (1964). By virtue of federal law, we reasoned, "an article on which the patent has expired," like an unpatentable article, "is in the public domain and may be made and sold by whoever chooses to do so." *Sears*, 376 U. S., at 231. In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249 (1945), for example, we determined that a manufacturer could not agree to refrain from challenging a patent's validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, "would deprive . . . the consuming public of the advantage to be derived" from free exploitation of the discovery. *Id.*, at 256. And to permit such a result, whether or not authorized "by express contract," would impermissibly undermine the patent laws. *Id.*, at 255–256; see also, *e. g.*, *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400–401 (1947) (ruling that *Scott Paper* applies to licensees); *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 668–675 (1969) (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent's validity).

Brulotte was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents' expiration dates. The Court (by an 8-1 vote) held the agreement unenforceable—"unlawful *per se*"—to the extent it provided for the payment of royalties "accru[ing] after the last of the patents incorporated into the machines had expired." 379 U. S., at 30, 32. To arrive at that conclusion, the Court began with the statutory provision setting the length of a patent term. See *id.*, at 30 (quoting the then-current version of § 154). Emphasizing that a

patented invention "become[s] public property once [that term] expires," the Court then quoted from *Scott Paper*: Any attempt to limit a licensee's post-expiration use of the invention, "whatever the legal device employed, runs counter to the policy and purpose of the patent laws." 379 U. S., at 31 (quoting 326 U. S., at 256). In the *Brulotte* Court's view, contracts to pay royalties for such use continue "the patent monopoly beyond the [patent] period," even though only as to the licensee affected. 379 U. S., at 33. And in so doing, those agreements conflict with patent law's policy of establishing a "post-expiration . . . public domain" in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month or year covered, to a product's commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term's end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e. g.*, 3 R. Milgrim & E. Bensen, Milgrim on Licensing § 18.05, p. 18–9 (2013). As to either goal, *Brulotte* may pose an obstacle.

Yet parties can often find ways around *Brulotte*, enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are

royalties for using an invention after it has moved into the public domain. See 379 U. S., at 31; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 136 (1969). A licensee could agree, for example, to pay the licensor a sum equal to 10% of sales during the 20-year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte*, royalties may run until the latest-running patent covered in the parties' agreement expires. See 379 U. S., at 30. Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e. g.*, 3 Milgrim on Licensing § 18.07, at 18–16 to 18–17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in favor of "flexible, case-by-case analysis" of post-expiration royalty clauses "under the rule of reason." Brief for Petitioners 45. Used in antitrust law, the rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997). Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be

able to curtail competition. See Brief for Petitioners 47–48; *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U. S. 28, 44 (2006) ("[A] patent does not necessarily confer market power"). Resolving that issue, Kimble notes, entails "a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like." Brief for Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust §3.2e, p. 3–12.1 (2d ed., Supp. 2014) (Hovenkamp)).

III

Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). Application of that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991). It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well

what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014).

What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). That is true, contrary to the dissent's view, see *post*, at 471 (opinion of ALITO, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e. g.*, *Bilski* v. *Kappos*, 561 U. S. 593, 601–602 (2010). Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton*, 573 U. S., at 274. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees. *Brulotte* has governed licensing agreements for more than half a century. See *Watson* v. *United States*, 552 U. S. 74, 82–83 (2007) (stating that "long congressional acquiescence," there totaling just 14 years, "enhance[s] even the usual precedential force we accord to our interpretations of statutes" (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision (35 U. S. C. § 154) on which *Brulotte* rested. See, *e. g.*, Uruguay Round Agreements Act, § 532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, § 201, 102 Stat. 4676

(limiting patent-misuse claims). *Brulotte* survived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e. g.*, S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of "illegal extension of the patent right by reason of his or her licensing practices . . . unless such practices . . . violate the antitrust laws"); S. 438, 100th Cong., 2d Sess., § 201(3) (1988) (same). Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at the intersection of two areas of law: property (patents) and contracts (licensing agreements). And we have often recognized that in just those contexts—"cases involving property and contract rights"—considerations favoring *stare decisis* are "at their acme." *E. g.*, *Payne*, 501 U. S., at 828; *Khan*, 522 U. S., at 20. That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32–33; see 1 D. Epstein, Eckstrom's Licensing in Foreign and Domestic Operations § 3.13, p. 3–13, and n. 2 (2014) (noting that it is not "necessary to specify the term . . . of the license" when a decision like *Brulotte* limits it "by law"). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no "meaningful number of [such] license agreements . . . actually exist." Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel and Kimble). But even uncertainty on this score cuts in Marvel's direction. So long as we see a reason-

able possibility that parties have structured their business transactions in light of *Brulotte*, we have one more reason to let it stand.

As against this superpowered form of *stare decisis*, we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte*'s statutory and doctrinal underpinnings have not eroded over time. When we reverse our statutory interpretations, we most often point to subsequent legal developments—"either the growth of judicial doctrine or further action taken by Congress"—that have removed the basis for a decision. *Patterson*, 491 U. S., at 173 (calling this "the primary reason" for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: Section 154 now, as then, draws a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention after its patent's expiration. See *supra*, at 451–452. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court's other decisions refusing to enforce either state laws or private contracts constraining individuals' free use of formerly patented (or unpatentable) discoveries. See *supra*, at 451–452. *Brulotte*, then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Cf., *e. g.*, *Alleyne* v. *United States*, 570 U. S. 99, 119–121 (2013) (SOTOMAYOR, J., concurring). To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law.[4]

[4] The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i. e.*, contracts conditioning a licensee's right to use a patent on the purchase of an unpatented prod-

And second, nothing about *Brulotte* has proved unworkable. See, *e. g.*, *Patterson*, 491 U. S., at 173 (identifying unworkability as another "traditional justification" for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte*'s ease of use appears in still sharper relief when compared to Kimble's proposed alternative. Recall that he wants courts to employ antitrust law's rule of reason to identify and invalidate those post-expiration royalty clauses with anticompetitive consequences. See *supra*, at 454–455. But whatever its merits may be for deciding antitrust claims, that "elaborate inquiry" produces notoriously high litigation costs and unpredictable results. *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 343 (1982). For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most

---

uct. See Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (adding the market power requirement in the patent-misuse context); *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U. S. 28, 41–43 (2006) (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte*'s legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and "conclud[ing]" that post-patent royalties are "unlawful *per se*." 379 U. S., at 32. And even if that analogy played some real role in *Brulotte*, the development of tying law would not undercut the decision—rather the opposite. Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra*, at 457 (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte*, and so further supports adhering to *stare decisis*.

usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that *Brulotte* suppresses technological innovation and so harms the nation's economy. (The dissent offers versions of those same arguments. See *post*, at 465–468.) We consider the two claims in turn, but our answers to both are much the same: Kimble's reasoning may give Congress cause to upset *Brulotte*, but does not warrant this Court's doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty "arrangements are invariably anticompetitive." Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id.*, at 36–40. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra*, at 453. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent's own users. See Brief for Petitioners 38. And after the patent's expiration, Kimble continues, further benefits follow: Absent high barriers to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12–13, 23), the licensee's continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38–39. In light of those realities, Kimble

concludes, "the *Brulotte per se* rule makes little sense." *Id.*, at 11.

We do not join issue with Kimble's economics—only with what follows from it. A broad scholarly consensus supports Kimble's view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.*, at 13–18 (citing numerous treatises and articles critiquing *Brulotte*). Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55–56 (citing, *e. g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007); *Illinois Tool Works*, 547 U. S. 28). But to agree with Kimble's conclusion, we must resolve two questions in his favor. First, even assuming Kimble accurately characterizes *Brulotte*'s basis, does the decision's economic mistake suffice to overcome *stare decisis*? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e. g.*, *Khan*, 522 U. S., at 20–21. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 731–732 (1988). We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. See *Leegin*, 551 U. S., at 899–900. Moreover, because the question in those cases was

whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. See *Business Electronics Corp.*, 485 U. S., at 731. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms." *Halliburton*, 573 U. S., at 271.

But *Brulotte* is a patent rather than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See *supra*, at 456. And as we have shown, that doctrine does not ordinarily bend to "wrong on the merits"-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See *supra*, at 455–456. Nor does Kimble offer any reason to think his own "the Court erred" claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Cf., *e. g.*, *Halliburton*, 573 U. S., at 270–274 (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36–40. That claim, even if itself dead-right, fails to clear *stare decisis*'s high bar.

And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra*, the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the "restraint

of trade" standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice's likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms expire. See *Brulotte*, 379 U. S., at 30–32; *supra*, at 452–453. Or more specifically put, the Court held, as it had in *Scott Paper*, that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle. See *Brulotte*, 379 U. S., at 31–32 (a licensee's obligation to pay post-patent royalties conflicts with the "free market visualized for the post-expiration period" and so "runs counter to the policy and purpose of the patent laws" (quoting *Scott Paper*, 326 U. S., at 256)). That patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly "regardless of a demonstrable effect on competition." 1 Hovenkamp § 3.2d, at 3–10.

Kimble's real complaint may go to the merits of such a patent policy—what he terms its "formalis[m]," its "rigid[ity]," and its detachment from "economic reality." Brief for Petitioners 27–28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law's insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte*, he

contends, "discourages technological innovation and does significant damage to the American economy." Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See *supra*, at 453. If the parties' ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some "breakthrough technologies will never see the light of day." *Id.*, at 33.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral and risk-spreading alike. See *supra*, at 453–454. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any "significant real-world economic harm." Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has "serious and harmful consequences" for innovation are (to repeat this opinion's refrain) "more appropriately addressed to Congress." *Halliburton*,

573 U. S., at 277. That branch, far more than this one, has the capacity to assess Kimble's charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, considering concerns of just the kind Kimble raises. See *supra*, at 456–457. In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

V

What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee & S. Ditko, Amazing Fantasy No. 15: Spider-Man! p. 11 (1962) ("[I]n this world, with great power there must also come—great responsibility"). Finding many reasons for staying the *stare decisis* course and no "special justification" for departing from it, we decline Kimble's invitation to overrule *Brulotte*.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), held that parties cannot enter into a patent licensing agreement that provides for royalty payments to continue after the term of the patent expires. That decision was not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act. It was based instead on an

economic theory—and one that has been debunked. The decision interferes with the ability of parties to negotiate licensing agreements that reflect the true value of a patent, and it disrupts contractual expectations. *Stare decisis* does not require us to retain this baseless and damaging precedent.

I

A

The Patent Act provides that a patent grants certain exclusive rights to the patentee and "his heirs or assigns" for a term of 20 years. 35 U. S. C. §§ 154(a)(1) and (2). The Act says nothing whatsoever about post-expiration royalties. In *Brulotte*, however, the Court held that such royalties are *per se* unlawful. The Court made little pretense of finding support for this holding in the language of the Act. Instead, the Court reasoned that allowing post-expiration royalties would subject "the free market visualized for the post-expiration period . . . to monopoly influences that have no proper place there." 379 U. S., at 32–33. Invoking antitrust concepts, the decision suggested that such arrangements are "an effort to enlarge the monopoly of the patent by t[y]ing the sale or use of the patented article to the purchase or use of unpatented ones." *Id.*, at 33.

Whatever the merits of this economic argument, it does not represent a serious attempt to interpret the Patent Act. A licensing agreement that provides for the payment of royalties after a patent's term expires does not enlarge the patentee's monopoly or extend the term of the patent. It simply gives the licensor a contractual right. Thus, nothing in the text of the Act even arguably forbids licensing agreements that provide for post-expiration royalties.

Brulotte was thus a bald act of policymaking. It was not simply a case of incorrect statutory interpretation. It was not really statutory interpretation at all.

B

Not only was *Brulotte* based on policymaking, it was based on a policy that is difficult to defend. Indeed, in the intervening 50 years, its reasoning has been soundly refuted. See, *e. g.*, 10 P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶1782c.3, pp. 554–556 (3d ed. 2011); See & Caprio, The Trouble with *Brulotte*: The Patent Royalty Term and Patent Monopoly Extension, 1990 Utah L. Rev. 813, 846–851; *Scheiber* v. *Dolby Labs., Inc.*, 293 F. 3d 1014, 1017 (CA7 2002); Brief for Petitioners 23–25, and n. 11 (collecting sources); *ante*, at 451, n. 3.

Brulotte misperceived the purpose and effect of post-expiration royalties. The decision rested on the view that post-expiration royalties extend the patent term by means of an anticompetitive tying arrangement. As the Court understood such an arrangement, the patent holder leverages its monopoly power during the patent term to require payments after the term ends, when the invention would otherwise be available for free public use. But agreements to pay licensing fees after a patent expires do not "enlarge the monopoly of the patent." 379 U. S., at 33. Instead, "[o]nce the patent term expires, the power to exclude is gone," and all that is left "is a problem about optimal contract design." Easterbrook, Contract and Copyright, 42 Hous. L. Rev. 953, 955 (2005).

The economics are simple: Extending a royalty term allows the parties to spread the licensing fees over a longer period of time, which naturally has the effect of reducing the fees during the patent term. See *ante*, at 453. Restricting royalty payments to the patent term, as *Brulotte* requires, compresses payment into a shorter period of higher fees. The Patent Act does not prefer one approach over the other.

There are, however, good reasons why parties sometimes prefer post-expiration royalties over upfront fees, and why

such arrangements have procompetitive effects. Patent holders and licensees are often unsure whether a patented idea will yield significant economic value, and it often takes years to monetize an innovation. In those circumstances, deferred royalty agreements are economically efficient. They encourage innovators, like universities, hospitals, and other institutions, to invest in research that might not yield marketable products until decades down the line. See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 8–12. And they allow producers to hedge their bets and develop more products by spreading licensing fees over longer periods. See *ibid.* By prohibiting these arrangements, *Brulotte* erects an obstacle to efficient patent use. In patent law and other areas, we have abandoned *per se* rules with similarly disruptive effects. See, *e. g.*, *Illinois Tool Works Inc.* v. *Independent Ink*, *Inc.*, 547 U. S. 28 (2006); *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007).

The majority downplays this harm by insisting that "parties can often find ways around *Brulotte*." *Ante*, at 453. But the need to avoid *Brulotte* is an economic inefficiency in itself. Parties are not always aware of the prohibition—as this case amply demonstrates. And the suggested alternatives do not provide the same benefits as post-expiration royalty agreements. For instance, although an agreement to amortize payments for sales during the patent term would "bring down early outlays," the Court admits that such an agreement might not reflect the parties' risk preferences. *Ante*, at 454. Moreover, such an arrangement would not necessarily yield the same amount of total royalties, particularly for an invention or a medical breakthrough that takes decades to develop into a marketable product. The sort of agreements that *Brulotte* prohibits would allow licensees to spread their costs, while *also* allowing patent holders to capitalize on slow-developing inventions.

C

On top of that, *Brulotte* most often functions to upset the parties' expectations.

This case illustrates the point. No one disputes that, when "negotiating the settlement, neither side was aware of *Brulotte*." *Ante*, at 450. Without knowledge of our *per se* rule, the parties agreed that Marvel would pay 3% in royalties on all of its future sales involving the Web Blaster and similar products. If the parties had been aware of *Brulotte*, they might have agreed to higher payments during the patent term. Instead, both sides expected the royalty payments to continue until Marvel stopped selling toys that fit the terms of the agreement. But that is not what happened. When Marvel discovered *Brulotte*, it used that decision to nullify a key part of the agreement. The parties' contractual expectations were shattered, and petitioners' rights were extinguished.

The Court's suggestion that some parties have come to rely on *Brulotte* is fanciful. The Court believes that there is a "reasonable possibility that parties have structured their business transactions in light of *Brulotte*." *Ante*, at 457–458. Its only support for this conclusion is Marvel's self-serving and unsupported assertion that some contracts might not specify an end date for royalties because the parties expect *Brulotte* to supply the default rule. To its credit, the Court stops short of endorsing this unlikely prediction, saying only that "uncertainty on this score cuts in Marvel's direction." *Ante*, at 457.

But there is no real uncertainty. "[W]e do not know" if Marvel's assertion is correct because Marvel has provided no evidence to support it. *Ibid.* And there are reasons to believe that, if parties actually relied on *Brulotte* to supply a default rule, courts would enforce the contracts as the parties expected. See, *e. g.*, 27 R. Lord, Williston on Contracts § 70:124 (4th ed. 2003). What we know for sure, however, is

that *Brulotte* has upended the parties' expectations here and in many other cases. See, *e. g.*, *Scheiber*, 293 F. 3d, at 1016; *Boggild* v. *Kenner Products*, 853 F. 2d 465, 466–467 (CA6 1988); *Pitney Bowes, Inc.* v. *Mestre*, 701 F. 2d 1365, 1367, 1373 (CA11 1983). These confirmed problems with retaining *Brulotte* clearly outweigh Marvel's hypothetical fears.

II

In the end, *Brulotte*'s only virtue is that we decided it. But that does not render it invincible. *Stare decisis* is important to the rule of law, but so are correct judicial decisions. Adherence to prior decisions "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991)). But *stare decisis* is not an "inexorable command." *Id.*, at 828; *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 238 (1924) (Brandeis, J., dissenting). "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . , and experience has pointed up the precedent's shortcomings." *Pearson*, *supra*, at 233.

Our traditional approach to *stare decisis* does not require us to retain *Brulotte*'s *per se* rule. *Brulotte*'s holding had no basis in the law. Its reasoning has been thoroughly disproved. It poses economic barriers that stifle innovation. And it unsettles contractual expectations.

It is not decisive that Congress could have altered *Brulotte*'s rule. In general, we are especially reluctant to overturn decisions interpreting statutes because those decisions can be undone by Congress. See, *e. g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). The Court calls this a "superpowered form of *stare decisis*"

that renders statutory interpretation decisions nearly impervious to challenge. *Ante*, at 458. I think this goes a bit too far.

As an initial matter, we do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting "the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 69–70 (1946). On the contrary, we have recognized that it is appropriate for us to correct rules of this sort. See, *e. g.*, *Leegin*, *supra*, at 899–900; *State Oil Co.* v. *Khan*, 522 U. S. 3, 20–21 (1997).

The Court says that it might agree if *Brulotte* were an antitrust precedent because *stare decisis* has "less-than-usual force in cases involving the Sherman Act." *Ante*, at 461. But this distinction is unwarranted. We have been more willing to reexamine antitrust precedents because they have attributes of common-law decisions. I see no reason why the same approach should not apply where the precedent at issue, while purporting to apply a statute, is actually based on policy concerns. Indeed, we should be even more willing to reconsider such a precedent because the role implicitly assigned to the federal courts under the Sherman Act has no parallel in Patent Act cases.

Even taking the Court on its own terms, *Brulotte* was an antitrust decision masquerading as a patent case. The Court was principally concerned with patentees improperly leveraging their monopoly power. See 379 U. S., at 32–33. And it expressly characterized post-expiration royalties as anticompetitive tying arrangements. See *id.*, at 33. It makes no sense to afford greater *stare decisis* protection to *Brulotte*'s thinly veiled antitrust reasoning than to our Sherman Act decisions.

The Court also places too much weight on Congress' failure to overturn *Brulotte*. We have long cautioned that "[i]t

is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard*, *supra*, at 69. Even where Congress has considered, but not adopted, legislation that would abrogate a judicial ruling, it cannot be inferred that Congress' failure to act shows that it approves the ruling. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). "'[S]everal equally tenable inferences may be drawn from such inaction.'" *Ibid.* (quoting *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990)).

Passing legislation is no easy task. A federal statute must withstand the "finely wrought" procedure of bicameralism and presentment. *INS* v. *Chadha*, 462 U. S. 919, 951 (1983); *Clinton* v. *City of New York*, 524 U. S. 417, 440 (1998); see U. S. Const., Art. I, § 7. Within that onerous process, there are additional practical hurdles. A law must be taken up for discussion and not passed over in favor of more pressing matters, and Senate rules require 60 votes to end debate on most legislation. And even if the House and Senate agree on a general policy, the details of the measure usually must be hammered out in a conference committee and repassed by both Houses.

* * *

A proper understanding of our doctrine of *stare decisis* does not prevent us from reexamining *Brulotte*. Even the Court does not defend the decision on the merits. I would reconsider and overrule our obvious mistake. For these reasons, I respectfully dissent.

Syllabus

KING ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14–114. Argued March 4, 2015—Decided June 25, 2015

The Patient Protection and Affordable Care Act grew out of a long history of failed health insurance reform. In the 1990s, several States sought to expand access to coverage by imposing a pair of insurance market regulations—a "guaranteed issue" requirement, which bars insurers from denying coverage to any person because of his health, and a "community rating" requirement, which bars insurers from charging a person higher premiums for the same reason. The reforms achieved the goal of expanding access to coverage, but they also encouraged people to wait until they got sick to buy insurance. The result was an economic "death spiral": premiums rose, the number of people buying insurance declined, and insurers left the market entirely. In 2006, however, Massachusetts discovered a way to make the guaranteed issue and community rating requirements work—by requiring individuals to buy insurance and by providing tax credits to certain individuals to make insurance more affordable. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—enabled Massachusetts to drastically reduce its uninsured rate.

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. 42 U. S. C. §§ 300gg, 300gg–1. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the Internal Revenue Service, unless the cost of buying insurance would exceed eight percent of that individual's income. 26 U. S. C. § 5000A. And third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B.

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish "such Exchange" if the State does not. 42 U. S. C. §§ 18031, 18041. Relatedly, the Act provides that tax credits "shall be allowed" for any "applicable taxpayer," 26 U. S. C.

§ 36B(a), but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under [42 U. S. C. § 18031]," §§ 36B(b)–(c). An IRS regulation interprets that language as making tax credits available on "an Exchange," 26 CFR § 1.36B–2, "regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR § 155.20.

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. § 18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of petitioners' income, exempting them from the Act's coverage requirement. As a result of the IRS Rule, however, petitioners *would* receive tax credits. That would make the cost of buying insurance *less* than eight percent of their income, which would subject them to the Act's coverage requirement.

Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. The Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit viewed the Act as ambiguous, and deferred to the IRS's interpretation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held: Section 36B's tax credits are available to individuals in States that have a Federal Exchange. Pp. 484–498.

(a) When analyzing an agency's interpretation of a statute, this Court often applies the two-step framework announced in *Chevron*, 467 U. S. 837. But *Chevron* does not provide the appropriate framework here. The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance"; had Congress wished to assign that question to an agency, it surely would have done so expressly. And it is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.

It is instead the Court's task to determine the correct reading of Section 36B. If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words "in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133. Pp. 484–486.

Syllabus

(b) When read in context, the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it could also refer to *all* Exchanges—both State and Federal—for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 to establish an Exchange, the Act tells the Secretary of Health and Human Services to establish "such Exchange." § 18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not. Several other provisions in the Act—*e. g.*, Section 18031(i)(3)(B)'s requirement that all Exchanges create outreach programs to "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B"—would make little sense if tax credits were not available on Federal Exchanges.

The argument that the phrase "established by the State" would be superfluous if Congress meant to extend tax credits to both State and Federal Exchanges is unpersuasive. This Court's "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536. And rigorous application of that canon does not seem a particularly useful guide to a fair construction of the Affordable Care Act, which contains more than a few examples of inartful drafting. The Court nevertheless must do its best, "bearing in mind the 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320. Pp. 486–492.

(c) Given that the text is ambiguous, the Court must look to the broader structure of the Act to determine whether one of Section 36B's "permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371.

Here, the statutory scheme compels the Court to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. Under petitioners' reading, the Act would not work in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way, because so

many individuals would be exempt from the requirement without the tax credits. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange. The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. It is implausible that Congress meant the Act to operate in this manner. Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation, but those requirements only work when combined with the coverage requirement and tax credits. It thus stands to reason that Congress meant for those provisions to apply in every State as well. Pp. 492–496.

(d) The structure of Section 36B itself also suggests that tax credits are not limited to State Exchanges. Together, Section 36B(a), which allows tax credits for any "applicable taxpayer," and Section 36B(c)(1), which defines that term as someone with a household income between 100 percent and 400 percent of the federal poverty line, appear to make anyone in the specified income range eligible for a tax credit. According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit, but the *amount* of that tax credit would always be zero because of two provisions buried deep within the Tax Code. That argument fails because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468. Pp. 496–497.

(e) Petitioners' plain-meaning arguments are strong, but the Act's context and structure compel the conclusion that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid. Pp. 497–498.

759 F. 3d 358, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 498.

Michael A. Carvin argued the cause and filed briefs for petitioners.

Solicitor General Verrilli argued the cause for respondents. With him on the brief were *Acting Assistant At-*

torney General Branda, *Deputy Solicitors General Gershengorn* and *Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *Brian H. Fletcher*, *Mark B. Stern*, *Alisa P. Klein*, *Christopher J. Meade*, *M. Patricia Smith*, and *William B. Schultz.**

---

*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Heather Hagin McVeigh* and *Lara Langeneckert*, Deputy Attorneys General, and *Andrew M. McNeil*; for the State of Oklahoma et al. by *E. Scott Pruitt*, Attorney General of Oklahoma, and *Patrick R. Wyrick*, Solicitor General, and by the Attorneys General of their respective States as follows: *Luther Strange* of Alabama, *Sam Olens* of Georgia, *Jon Bruning* of Nebraska, *Alan Wilson* of South Carolina, and *Patrick Morrisey* of West Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Cece Noland-Heil*, and *Laura B. Hernandez*; for the American Civil Rights Union by *Peter J. Ferrara*; for the Cato Institute by *Ilya Shapiro*; for Consumers' Research by *Ronald A. Cass*; for the Galen Institute et al. by *C. Boyden Gray* and *Adam J. White*; for Judicial Watch, Inc., by *Michael Bekesha*; for the Landmark Legal Foundation by *Richard P. Hutchinson*; for the Missouri Liberty Project et al. by *D. John Sauer* and *Erin Morrow Hawley*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Research Institute et al. by *Bert W. Rein*, *William S. Consovoy*, *Thomas R. McCarthy*, and *J. Michael Connolly*; for Sen. John Cornyn et al. by *Charles J. Cooper*, *David H. Thompson*, *Howard C. Nielson, Jr.*, *Peter A. Patterson*, *Michael E. Rosman*, and *Carrie Severino*; for Texas Black Americans for Life et al. by *Lawrence J. Joyce*; for Virginia Delegate Mark Berg et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, and *John S. Miles*; for the Washington Legal Foundation et al. by *Cory L. Andrews*; for Jonathan H. Adler et al. by *Bradley A. Benbrook*, *Eric Grant*, and *Stephen M. Duvernay*; for Joseph R. Evanns by *Egon Mittlemann*; and for Jeremy Rabkin by *Thomas M. Christina*.

Briefs of *amici curiae* urging affirmance were filed for the State of Virginia et al. by *Mark R. Herring*, Attorney General of Virginia, *Stuart A. Rappael*, Solicitor General, *Cynthia Bailey*, Deputy Attorney General, *Trevor S. Cox*, Deputy Solicitor General, *Kim Piner*, Senior Assistant Attorney General, and *Carly L. Rush*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage

---

Kentucky, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healy* of Massachusetts, *Jim Hood* of Mississippi, *Joseph A. Foster* of New Hampshire, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *William Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for AARP by *Stuart R. Cohen*; for the American Academy of Pediatrics et al. by *Walter Dellinger* and *Kara M. Kapke*; for the American Cancer Society et al. by *Mary P. Rouvelas* and *Brian G. Eberle*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, and *James B. Coppess*; for the American Hospital Association et al. by *Neal Kumar Katyal*, *Dominic F. Perella*, *Sean Marotta*, and *Frank Trinity*; for the American Thoracic Society by *Michael T. Kirkpatrick*; for America's Health Insurance Plans by *Andrew J. Pincus*, *Brian D. Netter*, *Joseph Miller*, and *Julie Simon Miller*; for the Asian & Pacific Islander American Health Forum et al. by *Jonathan M. Cohen*, *Mark A. Packman*, *Priscilla Huang*, *Meredith Higashi*, *Doreena P. Wong*, and *Janelle R. Hu*; for Bipartisan Economic Scholars by *Matthew S. Hellman*; for the Catholic Health Association of the United States et al. by *Christopher J. Wright* and *Lisa J. Gilden*; for Families USA by *Robert N. Weiner*; for the Harvard Law School Center for Health Law and Policy Innovation et al. by *Mark C. Fleming*; for HCA Inc. by *Robert A. Long, Jr.*, *Christian J. Pistilli*, *David M. Zionts*, and *Paige M. Jennings*; for Health Care Policy History Scholars by *Benjamin J. Horwich*; for the Jewish Alliance for Law & Social Action (JALSA) et al. by *Andrew M. Fischer*; for the Lambda Legal Defense & Education Fund, Inc., et al., by *Kirsten V. Mayer*, *Nicole P. Cate*, *Gregory R. Nevins*, *Douglas Hallward-Driemeier*, and *Nicholas C. Perros*; for Members of Congress et al. by *Douglas T. Kendall*, *Elizabeth B. Wydra*, *Simon Lazarus*, and *Brianne J. Gorod*; for the National Alliance of State Health CO-OPs by *Woody N. Peterson* and *Peter W. Morgan*; for the National Association of Community Health Centers et al. by *Deanne E. Maynard*, *Brian R. Matsui*, and *Marc A. Herron*; for the National Education Association by *Alice O'Brien*, *Jason Walta*, and *Lisa Powell*; for the National Women's Law Center et al. by *Catherine E. Stetson*, *Jaclyn L. DiLauro*, *Marcia D. Greenberger*, *Gretchen Borchelt*, and *Emily J. Martin*; for Public Health Deans, Chairs, and Faculty et

in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

This case is about whether the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange. Specifically, the question presented is whether the Act's tax credits are available in States that have a Federal Exchange.

I

A

The Patient Protection and Affordable Care Act, 124 Stat. 119, grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market reg-

---

al. by *H. Guy Collier* and *Ankur J. Goel*; for the Small Business Majority Foundation, Inc., et al. by *Pratik A. Shah*, *Hyland Hunt*, *Z. W. Julius Chen*, and *John B. Capehart*; for Trinity Health by *J. Mark Waxman*; for Maurice F. Baggiano by *Mr. Baggiano*, *pro se*; for David Boyle by *Mr. Boyle*, *pro se*; for William N. Eskridge, Jr., et al. by *Lawrence S. Robbins* and *Daniel N. Lerman*; for Thomas W. Merrill by *James A. Feldman* and *Gillian E. Metzger*; and for Marilyn Ralat-Albernas et al. by *Judith A. Scott*, *Nicole G. Berner*, *Claire Prestel*, and *Walter Kamiat*.

Briefs of *amici curiae* were filed for Administrative & Constitutional Law Professors by *Robert A. Destro*; for the Citizens' Council for Health Freedom et al. by *David P. Felsher*; and for Former Government Officials by *Boris Bershteyn* and *Sally Katzen*.

ulations—a "guaranteed issue" requirement, which barred insurers from denying coverage to any person because of his health, and a "community rating" requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.

The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as "adverse selection"—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.

This led to an economic "death spiral." As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.

This cycle happened repeatedly during the 1990s. For example, in 1993, the State of Washington reformed its individual insurance market by adopting the guaranteed issue and community rating requirements. Over the next three years, premiums rose by 78 percent and the number of people enrolled fell by 25 percent. By 1999, 17 of the State's 19 private insurers had left the market, and the remaining two had announced their intention to do so. Brief for America's Health Insurance Plans as *Amicus Curiae* 10–11.

For another example, also in 1993, New York adopted the guaranteed issue and community rating requirements. Over the next few years, some major insurers in the individ-

ual market raised premiums by roughly 40 percent. By 1996, these reforms had "effectively eliminated the commercial individual indemnity market in New York with the largest individual health insurer exiting the market." L. Wachenheim & H. Leida, The Impact of Guaranteed Issue and Community Rating Reforms on States' Individual Insurance Markets 38 (2012).

In 1996, Massachusetts adopted the guaranteed issue and community rating requirements and experienced similar results. But in 2006, Massachusetts added two more reforms: The Commonwealth required individuals to buy insurance or pay a penalty, and it gave tax credits to certain individuals to ensure that they could afford the insurance they were required to buy. Brief for Bipartisan Economic Scholars as *Amici Curiae* 24–25. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—reduced the uninsured rate in Massachusetts to 2.6 percent, by far the lowest in the Nation. Hearing on Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform before the Senate Committee on Health, Education, Labor, and Pensions, 111th Cong., 1st Sess., 9 (2009).

B

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. The Act provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U. S. C. §300gg–1(a). The Act also bars insurers from charging higher premiums on the basis of a person's health. §300gg.

Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS.

26 U. S. C. § 5000A. Congress recognized that, without an incentive, "many individuals would wait to purchase health insurance until they needed care." 42 U. S. C. § 18091(2)(I). So Congress adopted a coverage requirement to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Ibid.* In Congress's view, that coverage requirement was "essential to creating effective health insurance markets." *Ibid.* Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on health insurance. 26 U. S. C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii).

Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B. Individuals who meet the Act's requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual's insurer. 42 U. S. C. §§ 18081, 18082.

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. § 18091(2)(I). And the coverage requirement would not work without the tax credits. The reason is that, without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement. Given the relationship between these three reforms, the Act provided that they should take effect on the same day—January 1, 2014. See Affordable Care Act, § 1253, redesignated § 1255, 124 Stat. 162, 895; §§ 1401(e), 1501(d), *id.*, at 220, 249.

C

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. 42 U. S. C. § 18031(b)(1).

An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." *Ibid.* Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State." § 18041(c)(1).

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." 26 U. S. C. § 36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U. S. C. § 18031]." 26 U. S. C. §§ 36B(b)–(c) (emphasis added).

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. 77 Fed. Reg. 30378 (2012). As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through "an Exchange," 26 CFR § 1.36B–2 (2013), which is defined as "an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR § 155.20 (2014). At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.

D

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. § 18031]," so they should not receive any tax credits. That would make the cost of buying insurance more

than eight percent of their income, which would exempt them from the Act's coverage requirement. 26 U. S. C. § 5000A(e)(1).

Under the IRS Rule, however, Virginia's Exchange *would* qualify as "an Exchange established by the State under [42 U. S. C. § 18031]," so petitioners would receive tax credits. That would make the cost of buying insurance *less* than eight percent of petitioners' income, which would subject them to the Act's coverage requirement. The IRS Rule therefore requires petitioners to either buy health insurance they do not want, or make a payment to the IRS.

Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. *King* v. *Sebelius*, 997 F. Supp. 2d 415 (ED Va. 2014). The Court of Appeals for the Fourth Circuit affirmed. 759 F. 3d 358 (2014). The Fourth Circuit viewed the Act as "ambiguous and subject to at least two different interpretations." *Id.*, at 372. The court therefore deferred to the IRS's interpretation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). 759 F. 3d, at 376.

The same day that the Fourth Circuit issued its decision, the Court of Appeals for the District of Columbia Circuit vacated the IRS Rule in a different case, holding that the Act "unambiguously restricts" the tax credits to State Exchanges. *Halbig* v. *Burwell*, 758 F. 3d 390, 394 (2014). We granted certiorari in the present case. 574 U. S. 988 (2014).

II

The Affordable Care Act addresses tax credits in what is now Section 36B of the Internal Revenue Code. That section provides: "In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle . . . an amount equal to the premium assistance credit amount." 26 U. S. C. § 36B(a). Section 36B then defines

the term "premium assistance credit amount" as "the sum of the *premium assistance amounts* determined under paragraph (2) with respect to all *coverage months* of the taxpayer occurring during the taxable year." § 36B(b)(1) (emphasis added). Section 36B goes on to define the two italicized terms—"premium assistance amount" and "coverage month"—in part by referring to an insurance plan that is enrolled in through "an Exchange established by the State under [42 U. S. C. § 18031]." 26 U. S. C. §§ 36B(b)(2)(A), (c)(2)(A)(i).

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not "an Exchange established by the State under [42 U. S. C. § 18031]," and that the IRS Rule therefore contradicts Section 36B. Brief for Petitioners 18–20. The Government responds that the IRS Rule is lawful because the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" should be read to include Federal Exchanges. Brief for Respondents 20–25.

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U. S. 837. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. *Id.*, at 842–843. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Ibid.*

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Fed-

eral Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 160). It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. See *Gonzales* v. *Oregon*, 546 U. S. 243, 266–267 (2006). This is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010). But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U. S., at 132. So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.*, at 133 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 290 (2010) (internal quotation marks omitted).

A

We begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through "an Exchange established by the State under [42 U. S. C. § 18031]." In other words, three things must be true: First, the individual must enroll in an insurance plan through "an Exchange." Second, that Exchange must be "established by the State." And third, that Exchange must be established "under [42 U. S. C. § 18031]." We address each requirement in turn.

First, all parties agree that a Federal Exchange qualifies as "an Exchange" for purposes of Section 36B. See Brief for Petitioners 22; Brief for Respondents 22. Section 18031 provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." § 18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether they want to establish an Exchange. § 18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall . . . establish and operate *such Exchange* within the State." § 18041(c)(1) (emphasis added).

By using the phrase "such Exchange," Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. Although State and Federal Exchanges are established by different sovereigns, Sections 18031 and 18041 do not suggest that they differ in any meaningful way. A Federal Exchange therefore counts as "an Exchange" under Section 36B.

Second, we must determine whether a Federal Exchange is "established by the State" for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U. S. C. § 18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. *Brown & Williamson*, 529 U. S., at 133 (internal quotation marks omitted).

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U. S. C. § 18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." § 18032(f)(1)(A). And that's a problem: If we give the phrase "the State that established the Exchange" its most natural meaning, there would be *no* "qualified individuals" on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. As we just mentioned, the Act requires all Exchanges to "make available qualified health plans to qualified individuals"—something an Exchange could not do if there were no such individuals. § 18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider "the interests of qualified individuals . . . in the State or States in which such Exchange operates"—again, something the Exchange could not do if qualified individuals did not exist. § 18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, *e. g.*, § 18031(b)(2) (allowing a State to create "one Exchange . . . for providing . . . services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).[1]

These provisions suggest that the Act may not always use the phrase "established by the State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

---

[1] The dissent argues that one would "naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals." *Post*, at 508 (opinion of SCALIA, J.). But the fact that the dissent's interpretation would make so many parts of the Act "inapplicable" to Federal Exchanges is precisely what creates the problem. It would be odd indeed for Congress to write such detailed instructions about customers on a State Exchange, while having nothing to say about those on a Federal Exchange.

Third, we must determine whether a Federal Exchange is established "under [42 U. S. C. § 18031]." This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to "establish and operate such Exchange." But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." § 300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to "establish and operate such 'American Health Benefit Exchange established under section 18031.' " That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. See *Halbig*, 758 F. 3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031).

This interpretation of "under [42 U. S. C. § 18031]" fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word "Exchange," the definitional provision requires that we substitute the phrase "Exchange established under section 18031." If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. Finally, the Act repeatedly uses the phrase "established under [42 U. S. C. § 18031]" in situations where it would make no sense to distinguish between State and Federal Exchanges. See, *e. g.*, 26 U. S. C. § 125(f)(3)(A) (2012 ed., Supp. I) ("The term 'qualified benefit' shall not include any qualified health plan . . . offered through an Exchange established under [42 U. S. C. § 18031]"); 26 U. S. C. § 6055(b)(1)(B)(iii)(I) (2012 ed.) (requiring insurers to report

whether each insurance plan they provided "is a qualified health plan offered through an Exchange established under [42 U. S. C. § 18031]"). A Federal Exchange may therefore be considered one established "under [42 U. S. C. § 18031]."

The upshot of all this is that the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish "such Exchange." § 18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.[2]

The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. For example, the Act requires all Exchanges to create outreach

---

[2] The dissent argues that the phrase "such Exchange" does not suggest that State and Federal Exchanges "are in all respects equivalent." *Post*, at 505. In support, it quotes the Constitution's Elections Clause, which makes the state legislature primarily responsible for prescribing election regulations, but allows Congress to "make or alter such Regulations." Art. I, § 4, cl. 1. No one would say that state and federal election regulations are in all respects equivalent, the dissent contends, so we should not say that State and Federal Exchanges are. But the Elections Clause does not precisely define what an election regulation must look like, so Congress can prescribe regulations that differ from what the State would prescribe. The Affordable Care Act *does* precisely define what an Exchange must look like, however, so a Federal Exchange cannot differ from a State Exchange.

programs that must "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B." § 18031(i)(3)(B). The Act also requires all Exchanges to "establish and make available by electronic means a calculator to determine the actual cost of coverage after the application of any premium tax credit under section 36B." § 18031(d)(4)(G). And the Act requires all Exchanges to report to the Treasury Secretary information about each health plan they sell, including the "aggregate amount of any advance payment of such credit," "[a]ny information . . . necessary to determine eligibility for, and the amount of, such credit," and any "[i]nformation necessary to determine whether a taxpayer has received excess advance payments." 26 U. S. C. § 36B(f)(3). If tax credits were not available on Federal Exchanges, these provisions would make little sense.

Petitioners and the dissent respond that the words "established by the State" would be unnecessary if Congress meant to extend tax credits to both State and Federal Exchanges. Brief for Petitioners 20; *post*, at 502. But "our preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004); see also *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 385 (2013) ("The canon against surplusage is not an absolute rule"). And specifically with respect to this Act, rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Con-

gress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. *Id.*, at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. Cf. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545 (1947) (describing a cartoon "in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ").

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group*, 573 U. S., at 320 (internal quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.

B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs.* v.

Dublino, 413 U. S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").[3]

As discussed above, Congress based the Affordable Care Act on three major reforms: first, the guaranteed issue and community rating requirements; second, a requirement that individuals maintain health insurance coverage or make a payment to the IRS; and third, the tax credits for individuals with household incomes between 100 percent and 400 percent of the federal poverty line. In a State that establishes its own Exchange, these three reforms work together to expand insurance coverage. The guaranteed issue and community rating requirements ensure that anyone can buy insurance; the coverage requirement creates an incentive for people to do so before they get sick; and the tax credits—it is hoped—make insurance more affordable. Together, those reforms "minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U. S. C. § 18091(2)(I).

Under petitioners' reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way. As explained earlier, the coverage requirement applies only when the cost of buying health insurance (minus the amount of the tax credits) is less than eight percent

[3] The dissent notes that several other provisions in the Act use the phrase "established by the State," and argues that our holding applies to each of those provisions. *Post*, at 502. But "the presumption of consistent usage readily yields to context," and a statutory term may mean different things in different places. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320 (2014) (internal quotation marks omitted). That is particularly true when, as here, "the Act is far from a *chef d'oeuvre* of legislative draftsmanship." *Ibid.* Because the other provisions cited by the dissent are not at issue here, we do not address them.

of an individual's income. 26 U. S. C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii). So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. In 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt. HHS, A. Burke, A. Misra, & S. Sheingold, Premium Affordability, Competition, and Choice in the Health Insurance Marketplace 5 (2014); Brief for Bipartisan Economic Scholars as *Amici Curiae* 19–20. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. E. Saltzman & C. Eibner, The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces (2015). Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. L. Blumberg, M. Buettgens, & J. Holahan, The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums (2015). And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U. S. C. § 18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. Brief for Bipartisan Economic Scholars as *Amici Curiae* 11–12.

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 702 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) ("Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all."). Congress

made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.[4]

Petitioners respond that Congress was not worried about the effects of withholding tax credits from States with Federal Exchanges because "Congress evidently believed it was offering states a deal they would not refuse." Brief for Petitioners 36. Congress may have been wrong about the States' willingness to establish their own Exchanges, petitioners continue, but that does not allow this Court to rewrite the Act to fix that problem. That is particularly true, petitioners conclude, because the States likely *would* have created their own Exchanges in the absence of the IRS Rule, which eliminated any incentive that the States had to do so. *Id.*, at 36–38.

---

[4] The dissent argues that our analysis "show[s] only that the statutory scheme contains a flaw," one "that appeared as well in other parts of the Act." *Post*, at 511. For support, the dissent notes that the guaranteed issue and community rating requirements might apply in the federal territories, even though the coverage requirement does not. *Post*, at 511–512. The confusion arises from the fact that the guaranteed issue and community rating requirements were added as amendments to the Public Health Service Act, which contains a definition of the word "State" that includes the territories, 42 U. S. C. § 201(f), while the later-enacted Affordable Care Act contains a definition of the word "State" that excludes the territories, § 18024(d). The predicate for the dissent's point is therefore uncertain at best.

The dissent also notes that a different part of the Act "established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies." *Post*, at 511. True enough. But the fact that Congress was willing to accept the risk of adverse selection in a comparatively minor program does not show that Congress was willing to do so in the general health insurance program—the very heart of the Act. Moreover, Congress said expressly that it wanted to avoid adverse selection in the *health* insurance markets. § 18091(2)(I).

Section 18041 refutes the argument that Congress believed it was offering the States a deal they would not refuse. That section provides that, if a State elects not to establish an Exchange, the Secretary "shall . . . establish and operate such Exchange within the State." 42 U. S. C. § 18041(c)(1)(A). The whole point of that provision is to create a federal fallback in case a State chooses not to establish its own Exchange. Contrary to petitioners' argument, Congress did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal.

C

Finally, the structure of Section 36B itself suggests that tax credits are not limited to State Exchanges. Section 36B(a) initially provides that tax credits "shall be allowed" for any "applicable taxpayer." Section 36B(c)(1) then defines an "applicable taxpayer" as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, these two provisions appear to make anyone in the specified income range eligible to receive a tax credit.

According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit—but the *amount* of that tax credit would always be zero. And that is because—diving several layers down into the Tax Code—Section 36B says that the amount of the tax credits shall be "an amount equal to the premium assistance credit amount," § 36B(a); and then says that the term "premium assistance credit amount" means "the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year," § 36B(b)(1); and then says that the term "premium assistance amount" is tied to the amount of the monthly premium for insurance purchased on "an Exchange established by the State under [42 U. S. C. § 18031]," § 36B(b)(2); and then says that the term "coverage

month" means any month in which the taxpayer has insurance through "an Exchange established by the State under [42 U. S. C. § 18031]," § 36B(c)(2)(A)(i).

We have held that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). But in petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of "applicable taxpayer" or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.[5]

D

Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 343 (1994). In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and at-

[5] The dissent cites several provisions that "make[ ] taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero." *Post*, at 508 (citing 26 U. S. C. §§ 24, 32, 35, 36). None of those provisions, however, is crucial to the viability of a comprehensive program like the Affordable Care Act. No one suggests, for example, that the first-time-homebuyer tax credit, § 36, is essential to the viability of federal housing regulation.

tempted interpretation of legislation becomes legislation itself." *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939). For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

* * *

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Court holds that when the Patient Protection and Affordable Care Act says "Exchange established by the State" it means "Exchange established by the State or the Federal Government." That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

I

The Patient Protection and Affordable Care Act makes major reforms to the American health-insurance market. It provides, among other things, that every State "shall . . . establish an American Health Benefit Exchange"—a marketplace where people can shop for health-insurance plans. 42 U. S. C. § 18031(b)(1). And it provides that if a State does not comply with this instruction, the Secretary of Health and Human Services must "establish and operate such Exchange within the State." § 18041(c)(1).

A separate part of the Act—housed in § 36B of the Internal Revenue Code—grants "premium tax credits" to subsidize certain purchases of health insurance made on Exchanges. The tax credit consists of "premium assistance amounts" for "coverage months." 26 U. S. C. § 36B(b)(1). An individual has a coverage month only when he is covered by an insurance plan "that was enrolled in through an Exchange established by the State under [§ 18031]." § 36B(c)(2)(A). And the law ties the size of the premium assistance amount to the premiums for health plans which cover the individual "and which were enrolled in through an Exchange established by the State under [§ 18031]." § 36B(b)(2)(A). The premium assistance amount further depends on the cost of certain other insurance plans "offered through the same Exchange." § 36B(b)(3)(B)(i).

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under § 36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who

buy health insurance through such an Exchange get no money under § 36B.

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

The Court interprets § 36B to award tax credits on both federal and state Exchanges. It accepts that the "most natural sense" of the phrase "Exchange established by the State" is an Exchange established by a State. *Ante*, at 488. (Understatement, thy name is an opinion on the Affordable Care Act!) Yet the opinion continues, with no semblance of shame, that "it is also possible that the phrase refers to *all* Exchanges—both State and Federal." *Ante*, at 490. (Impossible possibility, thy name is an opinion on the Affordable Care Act!) The Court claims that "the context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." *Ante*, at 497.

I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Con-

text always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in "their natural and ordinary signification." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12 (1878). Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today's interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that "Exchange established by the State" means "Exchange established by the State *or the Federal Government*"? Little short of an express statutory definition could justify adopting this singular reading. Yet the only pertinent definition here provides that "State" means "each of the 50 States and the District of Columbia." 42 U. S. C. § 18024(d). Because the Secretary is neither one of the 50 States nor the District of Columbia, that definition positively contradicts the eccentric theory that an Exchange established by the Secretary has been established by the State.

Far from offering the overwhelming evidence of meaning needed to justify the Court's interpretation, other contextual clues undermine it at every turn. To begin with, other parts of the Act sharply distinguish between the establishment of an Exchange by a State and the establishment of an Exchange by the Federal Government. The States' authority to set up Exchanges comes from one provision, § 18031(b); the Secretary's authority comes from an entirely different provision, § 18041(c). Funding for States to establish Exchanges comes from one part of the law, § 18031(a); funding for the Secretary to establish Exchanges comes from an entirely different part of the law, § 18121. States generally run state-created Exchanges; the Secretary generally runs federally created Exchanges. § 18041(b)–(c). And the Sec-

retary's authority to set up an Exchange in a State depends upon the State's "*[f]ailure* to establish [an] Exchange." § 18041(c) (emphasis added). Provisions such as these destroy any pretense that a federal Exchange is in some sense also established by a State.

Reading the rest of the Act also confirms that, as relevant here, there are *only* two ways to set up an Exchange in a State: establishment by a State and establishment by the Secretary. §§ 18031(b), 18041(c). So saying that an Exchange established by the Federal Government is "established by the State" goes beyond giving words bizarre meanings; it leaves the limiting phrase "by the State" with no operative effect at all. That is a stark violation of the elementary principle that requires an interpreter "to give effect, if possible, to every clause and word of a statute." *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883). In weighing this argument, it is well to remember the difference between giving a term a meaning that duplicates another part of the law, and giving a term no meaning at all. Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void). Lawmakers do not, however, tend to use terms that "have no operation at all." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803). So while the rule against treating a term as a redundancy is far from categorical, the rule against treating it as a nullity is as close to absolute as interpretive principles get. The Court's reading does not merely give "by the State" a duplicative effect; it causes the phrase to have no effect whatever.

Making matters worse, the reader of the whole Act will come across a number of provisions beyond § 36B that refer to the establishment of Exchanges by States. Adopting the Court's interpretation means nullifying the term "by the State" not just once, but again and again throughout the Act. Consider for the moment only those parts of the Act that

mention an "Exchange established by the State" in connection with tax credits:

- The formula for calculating the amount of the tax credit, as already explained, twice mentions "an Exchange established by the State." 26 U. S. C. § 36B(b)(2)(A), (c)(2)(A)(i).
- The Act directs States to screen children for eligibility for "[tax credits] under section 36B" and for "any other assistance or subsidies available for coverage obtained through" an "Exchange established by the State." 42 U. S. C. § 1396w–3(b)(1)(B)–(C).
- The Act requires "an Exchange established by the State" to use a "secure electronic interface" to determine eligibility for (among other things) tax credits. § 1396w–3(b)(1)(D).
- The Act authorizes "an Exchange established by the State" to make arrangements under which other state agencies "determine whether a State resident is eligible for [tax credits] under section 36B." § 1396w–3(b)(2).
- The Act directs States to operate Web sites that allow anyone "who is eligible to receive [tax credits] under section 36B" to compare insurance plans offered through "an Exchange established by the State." § 1396w–3(b)(4).
- One of the Act's provisions addresses the enrollment of certain children in health plans "offered through an Exchange established by the State" and then discusses the eligibility of these children for tax credits. § 1397ee(d)(3)(B).

It is bad enough for a court to cross out "by the State" once. But seven times?

Congress did not, by the way, repeat "Exchange established by the State under [§ 18031]" by rote throughout the Act. Quite the contrary, clause after clause of the law uses a more general term such as "Exchange" or "Exchange es-

tablished under [§ 18031]." See, *e. g.*, 42 U. S. C. §§ 18031(k), 18033; 26 U. S. C. § 6055. It is common sense that any speaker who says "Exchange" some of the time, but "Exchange established by the State" the rest of the time, probably means something by the contrast.

Equating establishment "by the State" with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any "Exchange established by the State" uses a "secure electronic interface" to determine an individual's eligibility for various benefits (including tax credits). 42 U. S. C. § 1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by "an Exchange established by the State." § 18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides "Assistance to States to establish American Health Benefit Exchanges" and directs the Secretary to renew this funding "if the State . . . is making progress . . . toward . . . establishing an Exchange." § 18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only "for purposes of the tax credits." *Ante*, at 490. (Contrivance, thy name is an opinion on the Affordable Care Act!)

It is probably piling on to add that the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so. The Act includes a clause providing that "[a] *territory* that . . . establishes . . . an Exchange . . . shall be treated as a State" for certain purposes. § 18043(a) (emphasis added). Tellingly, it does not include a comparable clause providing that

the *Secretary* shall be treated as a State for purposes of § 36B when *she* establishes an Exchange.

Faced with overwhelming confirmation that "Exchange established by the State" means what it looks like it means, the Court comes up with argument after feeble argument to support its contrary interpretation. None of its tries comes close to establishing the implausible conclusion that Congress used "by the State" to mean "by the State or not by the State."

The Court emphasizes that if a State does not set up an Exchange, the Secretary must establish "such Exchange." § 18041(c). It claims that the word "such" implies that federal and state Exchanges are "the same." *Ante*, at 490. To see the error in this reasoning, one need only consider a parallel provision from our Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter *such Regulations*." Art. I, § 4, cl. 1 (emphasis added). Just as the Affordable Care Act directs States to establish Exchanges while allowing the Secretary to establish "such Exchange" as a fallback, the Elections Clause directs state legislatures to prescribe election regulations while allowing Congress to make "such Regulations" as a fallback. Would anybody refer to an election regulation made by Congress as a "regulation prescribed by the state legislature"? Would anybody say that a federal election law and a state election law are in all respects equivalent? Of course not. The word "such" does not help the Court one whit. The Court's argument also overlooks the rudimentary principle that a specific provision governs a general one. Even if it were true that the term "such Exchange" in § 18041(c) implies that federal and state Exchanges are the same in general, the term "established by the State" in § 36B makes plain that they differ when it comes to tax credits in particular.

The Court's next bit of interpretive jiggery-pokery involves other parts of the Act that purportedly presuppose the availability of tax credits on both federal and state Exchanges. *Ante*, at 490–491. It is curious that the Court is willing to subordinate the express words of the section that grants tax credits to the mere implications of other provisions with only tangential connections to tax credits. One would think that interpretation would work the other way around. In any event, each of the provisions mentioned by the Court is perfectly consistent with limiting tax credits to state Exchanges. One of them says that the minimum functions of an Exchange include (alongside several tasks that have nothing to do with tax credits) setting up an electronic calculator that shows "the actual cost of coverage after the application of any premium tax credit." 42 U. S. C. § 18031(d)(4)(G). What stops a federal Exchange's electronic calculator from telling a customer that his tax credit is zero? Another provision requires an Exchange's outreach program to educate the public about health plans, to facilitate enrollment, and to "distribute fair and impartial information" about enrollment and "the availability of premium tax credits." § 18031(i)(3)(B). What stops a federal Exchange's outreach program from fairly and impartially telling customers that no tax credits are available? A third provision requires an Exchange to report information about each insurance plan sold—including level of coverage, premium, name of the insured, and "amount of any advance payment" of the tax credit. 26 U. S. C. § 36B(f)(3). What stops a federal Exchange's report from confirming that no tax credits have been paid out?

The Court persists that these provisions "would make little sense" if no tax credits were available on federal Exchanges. *Ante*, at 491. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provi-

sions all lined up perfectly with each other. This Court "does not revise legislation . . . just because the text as written creates an apparent anomaly." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 794 (2014). At any rate, the provisions cited by the Court are not particularly unusual. Each requires an Exchange to perform a standardized series of tasks, some aspects of which relate in some way to tax credits. It is entirely natural for slight mismatches to occur when, as here, lawmakers draft "a single statutory provision" to cover "different kinds" of situations. *Robers* v. *United States*, 572 U. S. 639, 643 (2014). Lawmakers need not, and often do not, "write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed." *Id.*, at 643–644.

Roaming even farther afield from § 36B, the Court turns to the Act's provisions about "qualified individuals." *Ante,* at 488. Qualified individuals receive favored treatment on Exchanges, although customers who are not qualified individuals may also shop there. See *Halbig* v. *Burwell*, 758 F. 3d 390, 404–405 (CADC 2014). The Court claims that the Act must equate federal and state establishment of Exchanges when it defines a qualified individual as someone who (among other things) lives in the "State that established the Exchange," 42 U. S. C. § 18032(f)(1)(A). Otherwise, the Court says, there would be no qualified individuals on federal Exchanges, contradicting (for example) the provision requiring every Exchange to take the " 'interests of qualified individuals' " into account when selecting health plans. *Ante,* at 488 (quoting § 18031(e)(1)(b)). Pure applesauce. Imagine that a university sends around a bulletin reminding every professor to take the "interests of graduate students" into account when setting office hours, but that some professors teach only undergraduates. Would anybody reason that the bulletin implicitly presupposes that every professor has "graduate students," so that "graduate students" must really mean "graduate or undergraduate students"? Surely not.

Just as one naturally reads instructions about graduate students to be inapplicable to the extent a particular professor has no such students, so too would one naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals. There is no need to rewrite the term "State that established the Exchange" in the definition of "qualified individual," much less a need to rewrite the separate term "Exchange established by the State" in a separate part of the Act.

Least convincing of all, however, is the Court's attempt to uncover support for its interpretation in "the structure of Section 36B itself." *Ante*, at 496. The Court finds it strange that Congress limited the tax credit to state Exchanges in the formula for calculating the *amount* of the credit, rather than in the provision defining the range of taxpayers *eligible* for the credit. Had the Court bothered to look at the rest of the Tax Code, it would have seen that the structure it finds strange is in fact quite common. Consider, for example, the many provisions that initially make taxpayers of all incomes eligible for a tax credit, only to provide later that the amount of the credit is zero if the taxpayer's income exceeds a specified threshold. See, *e. g.*, 26 U. S. C. § 24 (child tax credit); § 32 (earned-income tax credit); § 36 (first-time-homebuyer tax credit). Or consider, for an even closer parallel, a neighboring provision that initially makes taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero if the taxpayer's State does not satisfy certain requirements. See § 35 (health-insurance-costs tax credit). One begins to get the sense that the Court's insistence on reading things in context applies to "established by the State," but to nothing else.

For what it is worth, lawmakers usually draft tax-credit provisions the way they do—*i. e.*, the way they drafted § 36B—because the mechanics of the credit require it. Many Americans move to new States in the middle of the year. Mentioning state Exchanges in the definition of "coverage

month"—rather than (as the Court proposes) in the provisions concerning taxpayers' eligibility for the credit—accounts for taxpayers who live in a State with a state Exchange for a part of the year, but a State with a federal Exchange for the rest of the year. In addition, § 36B awards a credit with respect to insurance plans "which cover the taxpayer, *the taxpayer's spouse, or any dependent . . . of the taxpayer* and which were enrolled in through an Exchange established by the State." § 36B(b)(2)(A) (emphasis added). If Congress had mentioned state Exchanges in the provisions discussing taxpayers' eligibility for the credit, a taxpayer who buys insurance from a federal Exchange would get no money, even if he has a spouse or dependent who buys insurance from a state Exchange—say a child attending college in a different State. It thus makes perfect sense for "Exchange established by the State" to appear where it does, rather than where the Court suggests. Even if that were not so, of course, its location would not make it any less clear.

The Court has not come close to presenting the compelling contextual case necessary to justify departing from the ordinary meaning of the terms of the law. Quite the contrary, context only underscores the outlandishness of the Court's interpretation. Reading the Act as a whole leaves no doubt about the matter: "Exchange established by the State" means what it looks like it means.

III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. As relevant here, the Act makes three major reforms. The guaranteed-issue and community-rating requirements prohibit insurers from considering a customer's health when deciding whether to sell insurance and how much to charge, 42 U. S. C. §§ 300gg, 300gg–1; its famous individual mandate requires everyone to maintain insurance coverage or to pay what the Act calls a "penalty," 26 U. S. C. § 5000A(b)(1), and what we

have nonetheless called a tax, see *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 570 (2012); and its tax credits help make insurance more affordable. The Court reasons that Congress intended these three reforms to "work together to expand insurance coverage"; and because the first two apply in every State, so must the third. *Ante*, at 493.

This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner* v. *Solis*, 568 U. S. 41, 56, n. 4 (2012). Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that § 36B is unclear? To mention just the highlights, the Court's interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say "Exchange" and those that say "Exchange established by the State," gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous.

Having gone wrong in consulting statutory purpose at all, the Court goes wrong again in analyzing it. The purposes of a law must be "collected chiefly from its words," not "from extrinsic circumstances." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202 (1819) (Marshall, C. J.). Only by concentrating on the law's terms can a judge hope to uncover the

scheme *of the statute*, rather than some other scheme that the judge thinks desirable. Like it or not, the express terms of the Affordable Care Act make only two of the three reforms mentioned by the Court applicable in States that do not establish Exchanges. It is perfectly possible for them to operate independently of tax credits. The guaranteed-issue and community-rating requirements continue to ensure that insurance companies treat all customers the same no matter their health, and the individual mandate continues to encourage people to maintain coverage, lest they be "taxed."

The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements "would destabilize the individual insurance market." *Ante*, at 492. If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says. Moreover, it is a flaw that appeared as well in other parts of the Act. A different title established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies. §§ 8001–8002, 124 Stat. 828–847 (2010). This program never came into effect "only because Congress, in response to actuarial analyses predicting that the [program] would be fiscally unsustainable, repealed the provision in 2013." *Halbig*, 758 F. 3d, at 410. How could the Court say that Congress would never dream of combining guaranteed-issue and community-rating requirements with a narrow individual mandate, when it combined those requirements with *no* individual mandate in the context of long-term-care insurance?

Similarly, the Department of Health and Human Services originally interpreted the Act to impose guaranteed-issue and community-rating requirements in the Federal Territories, even though the Act plainly does not make the individual mandate applicable there. *Ibid.*; see 26 U. S. C.

§ 5000A(f)(4); 42 U. S. C. § 201(f). "This combination, predictably, [threw] individual insurance markets in the territories into turmoil." *Halbig, supra,* at 410. Responding to complaints from the Territories, the Department at first insisted that it had "no statutory authority" to address the problem and suggested that the Territories "seek legislative relief from Congress" instead. Letter from G. Cohen, Director of the Center for Consumer Information and Insurance Oversight, to S. Igisomar, Secretary of Commerce of the Commonwealth of Northern Mariana Islands (July 12, 2013). The Department changed its mind a year later, after what it described as "a careful review of [the] situation and the relevant statutory language." Letter from M. Tavenner, Administrator of the Centers for Medicare and Medicaid Services, to G. Francis, Insurance Commissioner of the Virgin Islands (July 16, 2014). How could the Court pronounce it "implausible" for Congress to have tolerated instability in insurance markets in States with federal Exchanges, *ante,* at 17, when even the Government maintained until recently that Congress did exactly that in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands?

Compounding its errors, the Court forgets that it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element. Most relevant here, the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges: Each State gets the first opportunity to set up its Exchange, 42 U. S. C. § 18031(b); States that take up the opportunity receive federal funding for "activities . . . related to establishing" an Exchange, § 18031(a)(3); and the Secretary may establish an Exchange in a State only as a fallback, § 18041(c). But setting up and running an Exchange involve significant burdens—meeting strict deadlines, § 18041(b), implementing

requirements related to the offering of insurance plans, § 18031(d)(4), setting up outreach programs, § 18031(i), and ensuring that the Exchange is self-sustaining by 2015, § 18031(d)(5)(A). A State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange. (Now that the Internal Revenue Service has interpreted § 36B to authorize tax credits everywhere, by the way, 34 States have failed to set up their own Exchanges. *Ante*, at 483.) So even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. *This* is what justifies going out of our way to read "established by the State" to mean "established by the State or not established by the State"?

Worst of all for the repute of today's decision, the Court's reasoning is largely self-defeating. The Court predicts that making tax credits unavailable in States that do not set up their own Exchanges would cause disastrous economic consequences there. If that is so, however, wouldn't one expect States to react by setting up their own Exchanges? And wouldn't that outcome satisfy two of the Act's goals rather than just one: enabling the Act's reforms to work *and* promoting state involvement in the Act's implementation? The Court protests that the very existence of a federal fallback shows that Congress expected that some States might fail to set up their own Exchanges. *Ante*, at 496. So it does. It does not show, however, that Congress expected the number of recalcitrant States to be particularly large. The more accurate the Court's dire economic predictions, the smaller that number is likely to be. That reality destroys the Court's pretense that applying the law as written would imperil "the viability of the entire Affordable Care Act." *Ante*, at 497. All in all, the Court's arguments about the law's purpose and design are no more convincing than its arguments about context.

IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante*, at 491. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *Lamie* v. *United States Trustee*, 540 U. S. 526, 542 (2004) (internal quotation marks omitted). Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act "creates three separate Section 1563s." *Ante*, at 491. But the Court does not pretend that there is any such indication of a drafting error on the face of § 36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges*, 4 Wheat., at 203. But § 36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

Let us not forget that the term "Exchange established by the State" appears twice in § 36B and five more times in other parts of the Act that mention tax credits. What are the odds, do you think, that the same slip of the pen occurred in seven separate places? No provision of the Act—none at all—contradicts the limitation of tax credits to state Exchanges. And as I have already explained, uses of the term "Exchange established by the State" beyond the context of tax credits look anything but accidental. *Supra*, at 503–504. If there was a mistake here, context suggests it was a substan-

tive mistake in designing this part of the law, not a technical mistake in transcribing it.

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, § 1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989).

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress "meant [it] to operate." *Ante*, at 494. First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, *supra*, at 542. In the meantime, this Court "has no roving license . . . to disregard clear language

simply on the view that . . . Congress 'must have intended' something broader." *Bay Mills*, 572 U. S., at 794.

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." *Ante,* at 492. It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act's implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court. If Congress wants to accommodate both goals, it could make tax credits available everywhere while offering new incentives for States to set up their own Exchanges. And if Congress thinks that the present design of the Act works well enough, it could do nothing. Congress could also do something else altogether, entirely abandoning the structure of the Affordable Care Act. The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.

Just ponder the significance of the Court's decision to take matters into its own hands. The Court's revision of the law authorizes the Internal Revenue Service to spend tens of

billions of dollars every year in tax credits on federal Exchanges. It affects the price of insurance for millions of Americans. It diminishes the participation of the States in the implementation of the Act. It vastly expands the reach of the Act's individual mandate, whose scope depends in part on the availability of credits. What a parody today's decision makes of Hamilton's assurances to the people of New York: "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over . . . the purse; no direction . . . of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

* * *

Today's opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is not a novelty. In *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual "shall" maintain insurance or else pay a "penalty." 26 U. S. C. § 5000A. This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. 567 U. S., at 547–575 (principal opinion). The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing *all* Medicaid funding. 42 U. S. C. § 1396c. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the *incremental* funds associated with the Medicaid expansion. 567 U. S., at 575–588 (principal opinion). Having transformed two major parts of the law, the Court today has turned its attention to a third. The Act

that Congress passed makes tax credits available only on an "Exchange established by the State." This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

Syllabus

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS ET AL. *v.* INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–1371. Argued January 21, 2015—Decided June 25, 2015

The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§ 804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie showing of disparate impact. After assuming the Department's proffered nondiscriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of "race, color, religion, or national origin." In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

Held: Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 530–547.

(a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both § 703(a)(2) of Title VII of the Civil Rights Act of 1964 and § 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under *Griggs* v. *Duke Power Co.*, 401 U. S. 424, and *Smith* v. *City of Jackson*, 544 U. S. 228, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity's analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci* v. *DeStefano*, 557 U. S. 557, 578. These cases provide essential background and instruction in the case at issue. Pp. 530–533.

(b) Under the FHA it is unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic, § 804(a), or "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristic, § 805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States* v. *Giles*, 300 U. S. 41, 48. And this phrase is equivalent in function and purpose to Title VII's and the ADEA's "otherwise adversely affect" language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word "otherwise" also signals a shift in emphasis from an actor's intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

Syllabus

The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, *e. g.*, *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15, 16–18. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, *e. g.*, if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs*, *supra*, at 431. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 533–546.

747 F. 3d 275, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 547. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 557.

Scott A. Keller, Solicitor General of Texas, argued the cause for petitioners. With him on the briefs were *Ken Paxton*, Attorney General, *Charles E. Roy*, First Assistant Attorney General, *Joseph D. Hughes*, *Beth Klusmann*, and *Alex Potapov*, Assistant Solicitors General, and *Greg Abbott*, former Attorney General, *Jonathan F. Mitchell*, former Solicitor General, *Daniel T. Hodge*, former First Assistant Attorney General, and *Andrew S. Oldham*, former Deputy Solicitor General. *Brent M. Rosenthal* filed a brief for respondent Frazier Revitalization Inc. under this Court's Rule 12.6 in support of petitioners.

Michael M. Daniel argued the cause for respondent Inclusive Communities Project, Inc., et al. With him on the brief was *Laura B. Beshara*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on

Counsel

the brief were *Acting Assistant Attorney General Gupta*, *Deputy Solicitor General Gershengorn*, *Sarah E. Harrington*, *Dennis J. Dimsey*, *April J. Anderson*, and *Michelle Aronowitz*.*

---

*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *Lisa S. Blatt*, *Nancy L. Perkins*, and *Anthony J. Franze*; for the American Civil Rights Union by *Peter J. Ferrara*; for the American Financial Services Association et al. by *Paul F. Hancock* and *Andrew C. Glass*; for the American Institute Association et al. by *Kannon K. Shanmugam* and *Allison B. Jones*; for the Consumer Data Industry Association et al. by *Christopher A. Mohr*; for the Houston Housing Authority by *Michael W. Skojec* and *Bryan J. Harrison*; for Judicial Watch, Inc., et al. by *Paul J. Orfanedes*, *Robert D. Popper*, and *Chris Fedeli*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard*, *Ralph W. Kasarda*, and *Joshua P. Thompson*; for the Project on Fair Representation by *William S. Consovoy*, *Thomas R. McCarthy*, and *J. Michael Connolly*; for the Texas Apartment Association by *Sean D. Jordan* and *John Sepehri*; for the Washington Legal Foundation by *Cory L. Andrews* and *Richard A. Samp*; for Gail Heriot et al. by *Anthony T. Caso* and *Ms. Heriot*, *pro se*; and for James P. Scanlan by *Mr. Scanlan*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *Martha Coakley*, Attorney General of Massachusetts, *Jonathan B. Miller* and *Genevieve C. Nadeau*, Assistant Attorneys General, *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Kristen Clarke*, Chief, Civil Rights Bureau, and *Matthew W. Grieco*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Lori Swanson* of Minnesota, *Chris Koster* of Missouri, *Joseph A. Foster* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Sean D. Reyes* of Utah, *William H. Sorrell* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the City of San Francisco et al. by *David T. Goldberg*, *Dennis J. Herrera*, *Christine Van Aken*, *Laura S. Burton*, *George Nilson*, *William R. Phelan, Jr.*, *Herman Morris*, *Michael B. Brough*, *Teresa Knox*, *Barry A. Lindahl*, *Zachary W. Carter*, *Peter S. Holmes*, *Michael N. Feuer*, *James P. Clark*, and *Adam Loukx*; for the American Planning Association et al. by *Edward Sullivan*; for Current and Former Members of Congress by *Deepak Gupta*; for Housing Scholars by *Daniel R. Shulman* and *Stephen Menendian*; for the Lawyers' Com-

JUSTICE KENNEDY delivered the opinion of the Court.

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate ra-

---

mittee for Civil Rights Under Law et al. by *Bill Lann Lee*, *Philip D. Tegeler*, *Thomas Silverstein*, *Alan Jenkins*, *Wade J. Henderson*, and *Lisa M. Bornstein*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Leslie M. Proll*, *John Paul Schnapper-Casteras*, *Sherrilyn Ifill*, *Janai Nelson*, *Christina Swarns*, *Jin Hee Lee*, and *Rachel M. Kleinman*; for the National Association for the Advancement of Colored People et al. by *Stephen M. Dane*; for the National Black Law Students Association by *Deborah N. Archer*; for the National Community Land Trust Network by *Joseph M. Sellers*; for the National Fair Housing Alliance et al. by *John P. Relman* and *Sasha Samberg-Champion*; for Real Estate Professional Trade Organizations by *Michael B. de Leeuw* and *Linda Riefberg*; for Sociologists et al. by *Eva Paterson*, *Richard A. Rothschild*, *William C. Kennedy*, and *Rachel D. Godsil*; and for John R. Dunne et al. by *Samuel R. Bagenstos*.

Briefs of *amici curiae* were filed for AARP et al. by *Susan Ann Silverstein*; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Laurence M. Schwartztol*, *Sandra S. Park*, *Lenora M. Lapidus*, and *Stuart T. Rossman*; for the Constitutional Accountability Center by *Douglas B. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, and *Brianne J. Gorod*; for the Housing Equality Center of Pennsylvania by *Mark A. Packman*; for the Howard University School of Law Fair Housing Clinic et al. by *Valerie Schneider* and *Aderson Bellegarde François*; for the National Association of Home Builders by *Devala A. Janardan* and *Thomas J. Ward*; for the National Leased Housing Association et al. by *John C. Hayes, Jr.*; for the New York University School of Law Seminar on Critical Narratives in Civil Rights by *Mr. François* and *Peggy Cooper Davis*; for Ian Ayres by *Rachel J. Geman* and *Jason L. Lichtman*; and for Henry G. Cisneros et al. by *Diane L. Houk*.

tionale. *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks omitted). The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U. S. C. § 3601 *et seq.*

I

A

Before turning to the question presented, it is necessary to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U. S. C. § 42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. § 42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, § 42(m)(1)(C), as well as certain preferences, including that low-income housing units "contribut[e] to a concerted community revitalization plan" and be built in census tracts populated predominantly by low-income residents. §§ 42(m)(1)(B)(ii)(III), 42(d)(5)(B)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer's application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. Tex. Govt. Code Ann. §§ 2306.6710(a)–(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, *4–*6.

The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§ 804(a) and 805(a) of the FHA. The ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a prima facie case of disparate impact. It relied on two pieces of statistical evidence. First, it found "from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." 749 F. Supp. 2d 486, 499 (ND Tex. 2010). Second, it found "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP's prima facie showing of disparate impact. 860 F. Supp. 2d 312, 322–323 (2012). After assuming the Department's proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove "that there are no other less discriminatory alternatives to advancing their proffered interests," *ibid.* Because, in its view, the Department "failed to meet [its] burden of proving that there are no less discriminatory alternatives," the District Court ruled for the ICP. *Id.*, at 331.

The District Court's remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7, 2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR § 100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." § 100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed. Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cogniza-

ble under the FHA. 747 F. 3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a prima facie case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department's hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15 (1988) (*per curiam*), and certiorari followed, 573 U. S. 991 (2014). It is now appropriate to provide a brief history of the FHA's enactment and its later amendment.

B

De jure residential segregation by race was declared unconstitutional almost a century ago, *Buchanan* v. *Warley*, 245 U. S. 60 (1917), but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed,

sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, *e. g.*, M. Klarman, Unfinished Business: Racial Equality in American History 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. See K. Clark, Dark Ghetto: Dilemmas of Social Power 11, 21–26 (1965).

The mid-1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight." *Id.*, at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." *Id.*, at 1. To reverse "[t]his deepening racial division," *ibid.*, it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . .

on the basis of race, creed, color, or national origin." *Id.*, at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, § 804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued § 703(a)(2) covers the discriminatory effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

> "It shall be an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on § 703(a)(2). *Griggs*, 401 U. S., at 426, n. 1.

In interpreting § 703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in § 703(a)(2), Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*, at 431. For that reason, as the Court noted, "Congress directed the thrust of [§ 703(a)(2)] to the consequences of employment practices, not simply the motivation." *Id.*, at 432 (emphasis deleted). In light of the statute's goal of achieving "equality of employment opportunities and remov[ing] barriers that have operated in the past" to favor some races over others, the Court held § 703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.*, at 429–430.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under § 703(a)(2). In this respect, the Court held that "business necessity" constitutes a defense to disparate-impact claims. *Id.*, at 431. This rule provides, for example, that in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a "manifest relationship" to job performance. *Id.*, at 432; see also *Ricci*, 557 U. S., at 587–589 (emphasizing the importance of the business necessity defense

to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U. S., at 431–432.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.*, as amended. Section 4(a) of the ADEA provides:

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U. S. C. § 623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). There, a group of older employees challenged their employer's decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* "represented the better reading of [Title VII's] statutory text," 544 U. S., at 235, a plurality of the Court concluded that the same reasoning pertained to § 4(a)(2) of the ADEA. The *Smith* plurality emphasized that both § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA contain language "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such indi-

vidual's' race or age." *Id.*, at 235. As the plurality observed, the text of these provisions "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer" and therefore compels recognition of disparate-impact liability. *Id.*, at 236. In a separate opinion, JUSTICE SCALIA found the ADEA's text ambiguous and thus deferred under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA to impose disparate-impact liability, see 544 U. S., at 243–247 (opinion concurring in part and concurring in judgment).

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci*, *supra*, at 578. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Turning to the FHA, the ICP relies on two provisions. Section 804(a) provides that it shall be unlawful:

> "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. § 3604(a).

Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

> "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." § 3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress' use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States* v. *Giles*, 300 U. S. 41, 48 (1937) (explaining that the "word 'make' has many meanings, among them '[t]o cause to exist, appear or occur' " (quoting Webster's New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith*, *supra*, at 236. The Court has construed statutory language similar to § 805(a) to include disparate-impact liability. See, *e. g.*, *Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130, 140–141 (1979) (holding the term "discriminat[e]" encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure).

A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with

prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell[,] . . . or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith*, however, dispose of this argument. Both Title VII and the ADEA contain identical "because of" language, see 42 U. S. C. §2000e–2(a)(2); 29 U. S. C. §623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See *Huntington Branch, NAACP* v. *Hun-*

tington, 844 F. 2d 926, 935–936 (CA2 1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F. 2d 126, 146 (CA3 1977); *Smith* v. *Clarkton*, 682 F. 2d 1055, 1065 (CA4 1982); *Hanson* v. *Veterans Administration*, 800 F. 2d 1381, 1386 (CA5 1986); *Arthur* v. *Toledo*, 782 F. 2d 565, 574–575 (CA6 1986); *Metropolitan Housing Development Corp.* v. *Arlington Heights*, 558 F. 2d 1283, 1290 (CA7 1977); *United States* v. *Black Jack*, 508 F. 2d 1179, 1184–1185 (CA8 1974); *Halet* v. *Wend Investment Co.*, 672 F. 2d 1305, 1311 (CA9 1982); *United States* v. *Marengo Cty. Comm'n*, 731 F. 2d 1546, 1559, n. 20 (CA11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H. R. Rep. No. 100–711, p. 21, n. 52 (1988) (H. R. Rep.) (discussing suits premised on disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Congress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H. R. Rep., at 89–93.

Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, Reading Law: The

Interpretation of Legal Texts 322 (2012); see also *Forest Grove School Dist.* v. *T. A.*, 557 U. S. 230, 244, n. 11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute"); *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, "[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government").

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First, Congress added a clarifying provision: "Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U. S. C. § 3605(c). Second, Congress provided: "Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." § 3607(b)(4). And finally, Congress specified: "Nothing in [the FHA] limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling." § 3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact

liability did not exist under the FHA. See *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment liability. See, *e. g.*, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, *e. g.*, *Kimbrough* v. *United States*, 552 U. S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the exemption from liability for real-estate appraisers is in the same section as § 805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under § 805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith*'s discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U. S. C. § 623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the

Smith plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U. S., at 239. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.*, at 238.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U. S. C. § 3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see § 4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

Recognition of disparate-impact claims is consistent with the FHA's central purpose. See *Smith*, *supra*, at 235 (plurality opinion); *Griggs*, 401 U. S., at 432. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. See 42 U. S. C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"); H. R. Rep., at 15 (explaining the FHA "provides a clear national policy against discrimination in housing").

These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, *e. g.*, *Huntington*, 488 U. S., at 16–18 (invalidating zoning law preventing con-

struction of multifamily rental units); *Black Jack*, 508 F. 2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center* v. *St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–578 (ED La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only "'blood relative[s]'" in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, *e. g.*, *Huntington*, *supra*, at 18. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. *Griggs*, *supra*, at 431. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this

case involves a novel theory of liability. See Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed. Reg. 11470 (explaining that HUD did not use the phrase "business necessity" because that "phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities"). As the Court explained in *Ricci*, an entity "could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity." 557 U. S., at 587. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," *Griggs*, *supra*, at 436, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must

be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic." 78 Fed. Reg. 11476.

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. § 2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U. S., at 653.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to chal-

lenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F. 3d, at 283–284 (specially concurring opinion).

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici*, in addition to the well-stated principal dissenting opinion in this case, see *post*, at 557–558, 584–586 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher* v. *Magner*, 619 F. 3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] . . . artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." *Ibid.* If additional measures are adopted, courts should

strive to design them to eliminate racial disparities through race-neutral means. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 509 (1989) (plurality opinion) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 789 (2007) (KENNEDY, J., concurring in part and concurring in judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods"). Just as this Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process," *Ricci*, 557 U. S., at 585, it likewise does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of

disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 ("Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address"). Indeed, many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to . . . dire consequences." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 196 (2012).

Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," *Parents Involved*, *supra*, at 797 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1. The

Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO's dissent in full. I write separately to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971)—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, *id.*, at 429–431, represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis*, I would not amplify its error by importing its disparate-impact scheme into yet another statute.

I

A

We should drop the pretense that *Griggs*' interpretation of Title VII was legitimate. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009). It did not include an implicit one either. Instead, Title VII's operative provision, 42 U. S. C. § 2000e–2(a) (1964 ed.), addressed only employer decisions motivated by a protected characteristic. That provision made it "an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or

> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin." § 703, 78 Stat. 255 (emphasis added).[1]

Each paragraph in § 2000e–2(a) is limited to actions taken "because of" a protected trait, and "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (some internal quotation marks omitted). Section 2000e–2(a) thus applies only when a protected characteristic "was the 'reason' that the employer decided to act." *Id.*, at 350 (some internal quotation marks omitted).[2] In other words, "to take an action against an individual *because of*" a protected trait "plainly requires discriminatory intent." *Smith* v. *City of Jackson*, 544 U. S. 228, 249 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment) (internal quotation marks omitted); accord, *e. g.*, *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009).

---

[1] The current version of § 2000e–2(a) is almost identical, except that § 2000e–2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (Emphasis added.) This change, which does not impact my analysis, was made in 1972. 86 Stat. 109.

[2] In 1991, Congress added § 2000e–2(m) to Title VII, which permits a plaintiff to establish that an employer acted "because of" a protected characteristic by showing that the characteristic was "a motivating factor" in the employer's decision. Civil Rights Act of 1991, § 107(a), 105 Stat. 1075. That amended definition obviously does not legitimize disparate-impact liability, which is distinguished from disparate-treatment liability precisely because the former does not require any discriminatory motive.

No one disputes that understanding of § 2000e–2(a)(1). We have repeatedly explained that a plaintiff bringing an action under this provision "must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci*, *supra*, at 577 (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988)). The only dispute is whether the same language—"because of"—means something different in § 2000e–2(a)(2) than it does in § 2000e–2(a)(1).

The answer to that question *should* be obvious. We ordinarily presume that "identical words used in different parts of the same act are intended to have the same meaning," *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 101 (2003) (internal quotation marks omitted), and § 2000e–2(a)(2) contains nothing to warrant a departure from that presumption. That paragraph "uses the phrase 'because of . . . [a protected characteristic]' in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's [protected characteristic]." *Smith*, *supra*, at 249 (opinion of O'Connor, J.) (interpreting nearly identical provision of the Age Discrimination in Employment Act of 1967 (ADEA)).

The only difference between § 2000e–2(a)(1) and § 2000e–2(a)(2) is the type of employment decisions they address. See *Smith*, *supra*, at 249 (opinion of O'Connor, J.). Section 2000e–2(a)(1) addresses hiring, firing, and setting the terms of employment, whereas § 2000e–2(a)(2) generally addresses limiting, segregating, or classifying employees. But *no* decision is an unlawful employment practice under these paragraphs unless it occurs "*because of* such individual's race, color, religion, sex, or national origin." §§ 2000e–2(a)(1), (2) (emphasis added).

Contrary to the majority's assumption, see *ante*, at 533–535, the fact that § 2000e–2(a)(2) uses the phrase "otherwise adversely affect" in defining the employment decisions tar-

geted by that paragraph does not eliminate its mandate that the prohibited decision be made "because of" a protected characteristic. Section 2000e–2(a)(2) does not make unlawful all employment decisions that "limit, segregate, or classify . . . employees . . . in any way which would . . . otherwise adversely affect [an individual's] status as an employee," but those that "otherwise adversely affect [an individual's] status as an employee, *because of such individual's race, color, religion, sex, or national origin*." (Emphasis added); accord, 78 Stat. 255. Reading § 2000e–2(a)(2) to sanction employers solely on the basis of the effects of their decisions would delete an entire clause of this provision, a result we generally try to avoid. Under any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims.[3]

B

The author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC). EEOC's "own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional." H. Graham, The Civil Rights Era: Origins and Development of National Policy 1960–1972, p. 248 (1990). The Commissioners and their legal staff thought that "discrimination" had become "less often an individual act of disparate treatment flowing from an evil state of mind" and "more institutionalized." Jackson, EEOC vs. Discrimina-

[3] Even "[f]ans . . . of *Griggs* [v. *Duke Power Co.*, 401 U. S. 424 (1971),] tend to agree that the decision is difficult to square with the available indications of congressional intent." Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 399, n. 155 (2010). In the words of one of the decision's defenders, *Griggs* "was poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress." W. Eskridge, Dynamic Statutory Interpretation 78 (1994).

tion, Inc., 75 The Crisis 16 (1968). They consequently decided they should target employment practices "which prove to have a demonstrable racial effect without a clear and convincing business motive." *Id.*, at 16–17 (emphasis deleted). EEOC's "legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts" to penalize employers for practices that had a disparate impact, yet chose "to defy Title VII's restrictions and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent." Graham, *supra*, at 248, 250.

The lack of legal authority for their agenda apparently did not trouble them much. For example, Alfred Blumrosen, one of the principal creators of disparate-impact liability at EEOC, rejected what he described as a "defeatist view of Title VII" that saw the statute as a "compromise" with a limited scope. A. Blumrosen, Black Employment and the Law 57–58 (1971). Blumrosen "felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." *Id.*, at 59.

EEOC's guidelines from those years are a case study in Blumrosen's "creative interpretation." Although EEOC lacked substantive rulemaking authority, see *Faragher* v. *Boca Raton*, 524 U. S. 775, 811, n. 1 (1998) (THOMAS, J., dissenting), it repeatedly issued guidelines on the subject of disparate impact. In 1966, for example, EEOC issued guidelines suggesting that the use of employment tests in hiring decisions could violate Title VII based on disparate impact, notwithstanding the statute's express statement that "it shall not be an unlawful employment practice . . . to give and to act upon the results of any professionally developed ability test provided that such test . . . is not *designed, intended, or used* to discriminate because of race, color, religion, sex, or national origin," § 2000e–2(h) (emphasis added). See EEOC, Guidelines on Employment Testing Procedures 2–4 (Aug. 24,

1966). EEOC followed this up with a 1970 guideline that was even more explicit, declaring that, unless certain criteria were met, "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination." 35 Fed. Reg. 12334 (1970).

EEOC was initially hesitant to take its approach to this Court, but the *Griggs* plaintiffs forced its hand. After they lost on their disparate-impact argument in the Court of Appeals, EEOC's deputy general counsel urged the plaintiffs not to seek review because he believed "'that the record in the case present[ed] a most unappealing situation for finding tests unlawful,'" even though he found the lower court's adherence to an intent requirement to be "'tragic.'" Graham, *supra*, at 385. The plaintiffs ignored his advice. Perhaps realizing that a ruling on its disparate-impact theory was inevitable, EEOC filed an *amicus* brief in this Court seeking deference for its position.[4]

EEOC's strategy paid off. The Court embraced EEOC's theory of disparate impact, concluding that the agency's posi-

---

[4] Efforts by Executive Branch officials to influence this Court's disparate-impact jurisprudence may not be a thing of the past. According to a joint congressional staff report, after we granted a writ of certiorari in *Magner* v. *Gallagher*, 565 U. S. 1013 (2011), to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez—now Secretary of Labor—entered into a secret deal with the petitioners in that case, various officials of St. Paul, Minnesota, to prevent this Court from answering the question. Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case. See House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, DOJ's *Quid Pro Quo* With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law, Joint Staff Report, 113th Cong., 1st Sess., 1–2 (2013). Additionally, just nine days after we granted a writ of certiorari in *Magner*, and before its dismissal, the Department of Housing and Urban Development proposed the disparate-impact regulation at issue in this case. See 76 Fed. Reg. 70921 (2011).

tion was "entitled to great deference." *Griggs*, 401 U. S., at 433–434. With only a brief nod to the text of § 2000e–2(a)(2) in a footnote, *id.*, at 426, n. 1, the Court tied this novel theory of discrimination to "the statute's perceived *purpose*" and EEOC's view of the best way of effectuating it, *Smith*, 544 U. S., at 262 (opinion of O'Connor, J.); see *id.*, at 235 (plurality opinion). But statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution. We should not replace the former with the latter, see *Wyeth* v. *Levine*, 555 U. S. 555, 586 (2009) (THOMAS, J., concurring in judgment), nor should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking substantive rulemaking authority, see *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119–124 (2015) (THOMAS, J., concurring in judgment).

II

Griggs' disparate-impact doctrine defies not only the statutory text, but reality itself. In their quest to eradicate what they view as institutionalized discrimination, disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it. See T. Sowell, Intellectuals and Race 132 (2013) (Sowell). That might be true, or it might not. Standing alone, the fact that a practice has a disparate impact is not conclusive evidence, as the *Griggs* Court appeared to believe, that a practice is "discriminatory," 401 U. S., at 431. "Although presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 750 (2007) (THOMAS, J., concurring) (emphasis added).[5]

[5] It takes considerable audacity for today's majority to describe the origins of racial imbalances in housing, *ante*, at 528–529, without acknowledging this Court's role in the development of this phenomenon. In the past, we have admitted that the sweeping desegregation remedies of the federal

We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.

As best I can tell, the reason for this wholesale inversion of our law's usual approach is the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society. But the absence of racial disparities in multiethnic societies has been the exception, not the rule. When it comes to "proportiona[l] represent[ation]" of ethnic groups, "few, if any, societies have ever approximated this description." D. Horowitz, Ethnic Groups in Conflict 677 (1985). "All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and, often, types) of education, receive different incomes, and occupy a different place in the social hierarchy." Weiner, The Pursuit of Ethnic Equality Through Preferential Policies: A Comparative Public Policy Perspective, in From Independence to Statehood 64 (R. Goldmann & A. Wilson eds. 1984).

Racial imbalances do not always disfavor minorities. At various times in history, "racial or ethnic minorities . . . have owned or directed more than half of whole industries in particular nations." Sowell 8. These minorities "have included the Chinese in Malaysia, the Lebanese in West Africa, Greeks in the Ottoman Empire, Britons in Argentina, Belgians in Russia, Jews in Poland, and Spaniards in Chile—among many others." *Ibid.* (footnotes omitted). "In the seventeenth century Ottoman Empire," this phenomenon was seen in the palace itself, where the "medical staff consisted of 41 Jews and 21 Muslims." *Ibid.* And in our own

---

courts contributed to "'white flight'" from our Nation's cities, see *Missouri* v. *Jenkins*, 515 U. S. 70, 95, n. 8 (1995); *id.*, at 114 (THOMAS, J., concurring), in turn causing the racial imbalances that make it difficult to avoid disparate impact from housing development decisions. Today's majority, however, apparently is as content to rewrite history as it is to rewrite statutes.

country, for roughly a quarter century now, over 70 percent of National Basketball Association players have been black. R. Lapchick, D. Donovan, E. Loomer, & L. Martinez, Institute for Diversity and Ethics in Sport, U. of Central Fla., The 2014 Racial and Gender Report Card: National Basketball Association 21 (June 24, 2014). To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.

Yet, if disparate-impact liability is not based on this assumption and is instead simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaffirmed that "'racial balancing'" by state actors is "'patently unconstitutional,'" even when it supposedly springs from good intentions. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 311 (2013). And if that "racial balancing" is achieved through disparate-impact claims limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a Court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color. A problem with doing so should be obvious: "Government action that classifies individuals on the basis of race is inherently suspect." *Schuette* v. *BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion); accord, *id.*, at 323–324 (SCALIA, J., concurring in judgment). That is no less true when judges are the ones doing the classifying. See *id.*, at 308 (plurality opinion); *id.*, at 323–324 (SCALIA, J., concurring in judgment). Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.

III

The decision in *Griggs* was bad enough, but this Court's subsequent decisions have allowed it to move to other areas of the law. In *Smith*, for example, a plurality of this Court relied on *Griggs* to include disparate-impact liability in the

ADEA. See 544 U. S., at 236. As both I and the author of today's majority opinion recognized at the time, that decision was as incorrect as it was regrettable. See *id.*, at 248–249 (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Because we knew that Congress did not create disparate-impact liability under Title VII, we explained that "there [wa]s no reason to suppose that Congress in 1967"—four years before *Griggs*—"could have foreseen the interpretation of Title VII that was to come." *Smith*, *supra*, at 260 (opinion of O'Connor, J.). It made little sense to repeat *Griggs*' error in a new context.

My position remains the same. Whatever deference is due *Griggs* as a matter of *stare decisis*, we should at the very least confine it to Title VII. We should not incorporate it into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*. See *Smith*, *supra*, at 260 (opinion of O'Connor, J.). And we should certainly not allow it to spread to statutes like the Fair Housing Act, whose operative text, unlike that of the ADEA's, does not even mirror Title VII's.

Today, however, the majority inexplicably declares that "the logic of *Griggs* and *Smith*" leads to the conclusion that "the FHA encompasses disparate-impact claims." *Ante*, at 534. JUSTICE ALITO ably dismantles this argument. *Post*, at 576–583 (dissenting opinion). But, even if the majority were correct, I would not join it in following that "logic" here. "[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, *stare decisis*, designed to be a principle of stability and repose, would become a vehicle of change . . . distorting the law." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 469–470 (2008) (THOMAS, J., dissenting) (footnote omitted). Making the same mistake in different areas of the law furthers neither certainty nor judicial economy. It furthers error.

That error will take its toll. The recent experience of the Houston Housing Authority (HHA) illustrates some of the many costs of disparate-impact liability. HHA, which provides affordable housing developments to low-income residents of Houston, has over 43,000 families on its waiting lists. The overwhelming majority of those families are black. Because Houston is a majority-minority city with minority concentrations in all but the more affluent areas, any HHA developments built outside of those areas will increase the concentration of racial minorities. Unsurprisingly, the threat of disparate-impact suits based on those concentrations has hindered HHA's efforts to provide affordable housing. State and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability. Brief for Houston Housing Authority as *Amicus Curiae* 8–12. That the majority believes that these are not "'dire consequences,'" *ante,* at 546, is cold comfort for those who actually need a home.

* * *

I agree with the majority that *Griggs* "provide[s] essential background" in this case, *ante,* at 533: It shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation we should expect from a court of law. Today, the majority repeats that error.

I respectfully dissent.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

No one wants to live in a rat's nest. Yet in *Gallagher* v. *Magner*, 619 F. 3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U. S. C. § 3601 *et seq.*, could be

used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. 619 F. 3d, at 830. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. *Id.*, at 833. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. *Id.*, at 830, 835. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, *i. e.*, there was a "disparate impact." *Id.*, at 834. The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner*.[1] This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.

I

Everyone agrees that the FHA punishes intentional discrimination. Treating someone "less favorably than others because of a protected trait" is "'the most easily understood type of discrimination.'" *Ricci* v. *DeStefano*, 557 U. S. 557,

[1] We granted certiorari in *Magner* v. *Gallagher*, 565 U. S. 1013 (2011). Before oral argument, however, the parties settled. 565 U. S. 1187 (2012). The same thing happened again in *Township of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.*, 571 U. S. 1020 (2013).

577 (2009) (quoting *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977); some internal quotation marks omitted). Indeed, this classic form of discrimination—called disparate treatment—is the only one prohibited by the Constitution itself. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977). It is obvious that Congress intended the FHA to cover disparate treatment.

The question presented here, however, is whether the FHA also punishes "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci*, *supra*, at 577. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law's meaning.

A

I begin with the text. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." 42 U. S. C. § 3604(a) (emphasis added). Similarly, § 805(a) prohibits any party "whose business includes engaging in residential real estate-related transactions" from "discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." § 3605(a) (emphasis added).

In both sections, the key phrase is "because of." These provisions list covered actions ("refus[ing] to sell or rent . . . a dwelling," "refus[ing] to negotiate for the sale or rental of . . . a dwelling," "discriminat[ing]" in a residential real estate transaction, etc.) and protected characteristics ("race," "reli-

gion," etc.). The link between the actions and the protected characteristics is "because of."

What "because of" means is no mystery. Two Terms ago, we held that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (quoting *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009); some internal quotation marks omitted). A person acts "because of" something else, we explained, if that something else "'was the "reason" that the [person] decided to act.'" 570 U. S., at 350.

Indeed, just weeks ago, the Court made this same point in interpreting a provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(m), that makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job applicant or discharging an employee) "because of" religion. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768, 773 (2015). The Court wrote: "'Because of' in §2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it." *Ibid.*

Nor is this understanding of "because of" an arcane feature of legal usage. When English speakers say that someone did something "because of" a factor, what they mean is that the factor was a reason for what was done. For example, on the day this case was argued, January 21, 2015, Westlaw and Lexis searches reveal that the phrase "because of" appeared in 14 Washington Post print articles. In every single one, the phrase linked an action and a reason for the action.[2]

[2] See al-Mujahed & Naylor, Rebels Assault Key Sites in Yemen, pp. A1, A12 ("A government official . . . spoke on the condition of anonymity because of concern for his safety"); Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 ("Jury selection is expected to last four to five months because of a massive pool of potential jurors"); Davidson, Some VA Whistleblowers Get Relief From Retaliation, p. A18 ("In April, they moved to fire her because of an alleged 'lack of collegiality'"); Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 ("The Postal Service lost $5.5 billion in 2014, in large part because of continuing declines in first-

Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions "because of"—meaning "by reason of" or "on account of," *Nassar*, *supra*, at 350—race, religion, etc. Put another way, "the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful." *American Ins. Assn.* v. *Department of Housing and Urban Development*, 74 F. Supp. 3d 30, 41, n. 20 (DC 2014). Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.

It follows that the FHA does not authorize disparate-impact suits. Under a statute like the FHA that prohibits

---

class mail volume"); Editorial, Last Responders, p. A20 ("Metro's initial emergency call mentioned only smoke but no stuck train [in part] . . . because of the firefighters' uncertainty that power had been shut off to the third rail"); Letter to the Editor, Metro's Safety Flaws, p. A20 ("[A] circuit breaker automatically opened because of electrical arcing"); Bernstein, He Formed Swingle Singers and Made Bach Swing, p. B6 ("The group retained freshness because of the 'stunning musicianship of these singers' "); Schudel, TV Producer, Director Invented Instant Replay, p. B7 ("[The 1963 Army-Navy football game was] [d]elayed one week because of the assassination of President John F. Kennedy"); Contrera & Thompson, 50 Years On, Cheering a Civil Rights Matriarch, pp. C1, C5 ("[T]he first 1965 protest march from Selma to Montgomery . . . became known as 'Bloody Sunday' because of state troopers' violent assault on the marchers"); Pressley, 'Life Sucks': Aaron Posner's Latest Raging Riff on Chekhov, pp. C1, C9 (" 'The Seagull' gave Posner ample license to experiment because of its writer and actress characters and its pronouncements on art"); A Rumpus on 'The Bachelor,' p. C2 ("Anderson has stood out from the pack . . . mostly because of that post-production censoring of her nether regions" (ellipsis in original)); Steinberg, KD2DC, Keeping Hype Alive, pp. D1, D4 (explaining that a commenter "asked that his name not be used because of his real job"); Boren, Former FSU Boss Bowden Wants 12 Wins To Be Restored, p. D2 ("[T]he NCAA restored the 111 victories that were taken from the late Joe Paterno because of the Jerry Sandusky child sex-abuse scandal"); Oklahoma City Finally Moves Past .500 Mark, p. D4 ("Trail Blazers all-star LaMarcus Aldridge won't play in Wednesday night's game against the Phoenix Suns because of a left thumb injury").

actions taken "because of" protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on "'subjective intent.'" *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 53 (2003). Instead, "'treat[ing] [a] particular person less favorably than others *because of*' a protected trait" is "'disparate treatment,'" *not disparate impact*. *Ricci*, 557 U. S., at 577 (emphasis added). See also, *e. g.*, *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (explaining the difference between "because of" and "in spite of"); *Hernandez* v. *New York*, 500 U. S. 352, 359–360 (1991) (plurality opinion) (same); *Alexander* v. *Sandoval*, 532 U. S. 275, 278, 280 (2001) (holding that it is "beyond dispute" that banning discrimination "'on the ground of race'" "prohibits only intentional discrimination").

This is precisely how Congress used the phrase "because of" elsewhere in the FHA. The FHA makes it a crime to willfully "interfere with . . . any person because of his race" (or other protected characteristic) who is engaging in a variety of real-estate-related activities, such as "selling, purchasing, [or] renting" a dwelling. 42 U. S. C. § 3631(a). No one thinks a defendant could be convicted of this crime without proof that he acted "because of," *i. e.*, on account of or by reason of, one of the protected characteristics. But the critical language in this section—"because of"—is identical to the critical language in the sections at issue in this case. "One ordinarily assumes" Congress means the same words in the same statute to mean the same thing. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 319 (2014). There is no reason to doubt that ordinary assumption here.

Like the FHA, many other federal statutes use the phrase "because of" to signify what that phrase means in ordinary speech. For instance, the federal hate crime statute, 18 U. S. C. § 249, authorizes enhanced sentences for defendants convicted of committing certain crimes "because of" race, color, religion, or other listed characteristics. Hate crimes require bad intent—indeed, that is the whole point of these

laws. See, *e. g.*, *Wisconsin* v. *Mitchell*, 508 U. S. 476, 484–485 (1993) ("[T]he same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status"). All of this confirms that "because of" in the FHA should be read to mean what it says.

B

In an effort to find at least a sliver of support for disparate-impact liability in the text of the FHA, the principal respondent, the Solicitor General, and the Court pounce on the phrase "make unavailable." Under § 804(a), it is unlawful "[t]o . . . make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. § 3604(a). See also § 3605(a) (barring "discriminat[ion] against any person in making available such a [housing] transaction . . . because of race, color, religion, sex, handicap, familial status, or national origin"). The Solicitor General argues that "[t]he plain meaning of the phrase 'make unavailable' includes actions that *have the result* of making housing or transactions unavailable, regardless of whether the actions were intended to have that result." Brief for United States as *Amicus Curiae* 18 (emphasis added). This argument is not consistent with ordinary English usage.

It is doubtful that the Solicitor General's argument accurately captures the "plain meaning" of the phrase "make unavailable" even when that phrase is not linked to the phrase "because of." "[M]ake unavailable" must be viewed together with the rest of the actions covered by § 804(a), which applies when a party "*refuse[s]* to sell or rent" a dwelling, "*refuse[s]* to negotiate for the sale or rental" of a dwelling, "*den[ies]* a dwelling to any person," "or otherwise *make[s] unavailable*" a dwelling. § 3604(a) (emphasis added). When a statute contains a list like this, we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to

the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995) (quoting *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)). See also, *e. g.*, *Yates* v. *United States*, 574 U. S. 528, 543 (2015) (plurality opinion); *id.*, at 549 (ALITO, J., concurring in judgment). Here, the phrases that precede "make unavailable" unmistakably describe *intentional* deprivations of equal treatment, not merely actions that happen to have a disparate effect. See *American Ins. Assn.*, *supra*, at 40–41 (citing Webster's Third New International Dictionary 603, 648, 1363, 1910 (1966)). Section 804(a), moreover, prefaces "make unavailable" with "or otherwise," thus creating a catchall. Catchalls must be read "restrictively" to be "like" the listed terms. *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384–385 (2003). The result of these ordinary rules of interpretation is that even without "because of," the phrase "make unavailable" likely would require intentionality.

The FHA's inclusion of "because of," however, removes any doubt. Sections 804(a) and 805(a) apply only when a party makes a dwelling or transaction unavailable "because of" race or another protected characteristic. In ordinary English usage, when a person makes something unavailable "because of" some factor, that factor must be a reason for the act.

Here is an example. Suppose that Congress increases the minimum wage. Some economists believe that such legislation reduces the number of jobs available for "unskilled workers," Fuller & Geide-Stevenson, Consensus Among Economists: Revisited, 34 J. Econ. Educ. 369, 378 (2003), and minorities tend to be disproportionately represented in this group, see, *e. g.*, Dept. of Commerce, Bureau of Census, Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2014, online at http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html (all Internet materials as visited

June 23, 2015, and available in Clerk of Court's case file). Assuming for the sake of argument that these economists are correct, would it be fair to say that Congress made jobs unavailable to African-Americans or Latinos "because of" their race or ethnicity?

A second example. Of the 32 college players selected by National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities. See Draft 2015, http://www.nfl.com/draft/2015. See also Miller, Powerful Sports Agents Representing Color, Los Angeles Sentinel, Feb. 6, 2014, p. B3 (noting "there are 96 players (76 of whom are African-American) chosen in the first rounds of the 2009, 2010, and 2011 NFL drafts"). Teams presumably chose the players they think are most likely to help them win games. Would anyone say the NFL teams made draft slots unavailable to white players "because of" their race?

A third example. During the present Court Term, of the 21 attorneys from the Solicitor General's Office who argued cases in this Court, it appears that all but 5 (76%) were under the age of 45. Would the Solicitor General say he made argument opportunities unavailable to older attorneys "because of" their age?

The text of the FHA simply cannot be twisted to authorize disparate-impact claims. It is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done "because of race, color, religion, sex, familial status, or national origin."

II

The circumstances in which the FHA was enacted only confirm what the text says. In 1968, "the predominant focus of antidiscrimination law was on intentional discrimination." *Smith* v. *City of Jackson*, 544 U. S. 228, 258 (2005) (O'Connor, J., concurring in judgment). The very "concept of disparate impact liability, by contrast, was quite novel." *Ibid.* (collect-

ing citations). See also Tr. of Oral Arg. 15 ("JUSTICE GINSBURG: . . . If we're going to be realistic about this, . . . in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact"). It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text.

Eradicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all. The Court recalls the country's shameful history of segregation and *de jure* housing discrimination and then jumps to the conclusion that the FHA authorized disparate-impact claims as a method of combating that evil. *Ante*, at 528–530. But the fact that the 1968 Congress sought to end housing discrimination says nothing about the means it devised to achieve that end. The FHA's text plainly identifies the weapon Congress chose—outlawing disparate treatment "because of race" or another protected characteristic. 42 U. S. C. §§ 3604(a), 3605(a). Accordingly, in any FHA claim, "[p]roof of discriminatory motive is critical." *Teamsters*, 431 U. S., at 335, n. 15.

III

Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done "because of" protected characteristics. Today, they still forbid certain housing practices if done "because of" protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved.

Rather than confronting the plain text of §§ 804(a) and 805(a), the Solicitor General and the Court place heavy reliance on certain amendments enacted in 1988, but those amendments did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, 102 Stat. 1619, Congress expanded the list of protected characteristics. See 42 U. S. C. §§ 3604(a), (f)(1). Congress

also gave the Department of Housing and Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. See §§ 3612, 3614a. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that "[n]othing in [the FHA]" prohibits (1) certain actions taken by real property appraisers, (2) certain occupancy requirements, and (3) the treatment of persons convicted of manufacturing or distributing illegal drugs.[3]

According to the Solicitor General and the Court, these amendments show that the FHA authorizes disparate-impact claims. Indeed, the Court says that they are "of crucial importance." *Ante*, at 535. This "crucial" argument, however, cannot stand.

A

The Solicitor General and the Court contend that the 1988 Congress implicitly authorized disparate-impact liability by adopting the amendments just noted while leaving the operative provisions of the FHA untouched. Congress knew at that time, they maintain, that the Courts of Appeals had held that the FHA sanctions disparate-impact claims, but Congress failed to enact bills that would have rejected that theory of liability. Based on this, they submit that Congress

---

[3] These new provisions state:

"Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." § 3605(c).

"Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." § 3607(b)(1).

"Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21." § 3607(b)(4).

silently ratified those decisions. See *ante*, at 535–537; Brief for United States as *Amicus Curiae* 23–24. This argument is deeply flawed.

Not the greatest of its defects is its assessment of what Congress must have known about the Judiciary's interpretation of the FHA. The Court writes that by 1988, "all nine *Courts of Appeals* to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims." *Ante*, at 535 (emphasis added). See also Brief for United States as *Amicus Curiae* 12. But *this Court* had not addressed that question. While we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has "no warrant to ignore clear statutory language on the ground that other courts have done so," even if they have "'consistently'" done so for "'30 years.'" *Milner* v. *Department of Navy*, 562 U. S. 562, 575–576 (2011). See also, *e. g.*, *CSX Transp., Inc.* v. *McBride*, 564 U. S. 685, 715 (2011) (ROBERTS, C. J., dissenting) (explaining that this Court does not interpret statutes by asking for "a show of hands" (citing *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598 (2001); *McNally* v. *United States*, 483 U. S. 350 (1987))).

In any event, there is no need to ponder whether it would have been reasonable for the 1988 Congress, without considering the clear meaning of §§ 804(a) and 805(a), to assume that the decisions of the lower courts effectively settled the matter. While the Court highlights the decisions of the Courts of Appeals, it fails to mention something that is of at least equal importance: the official view of the United States in 1988.

Shortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination. See Brief for United States as *Amicus Curiae* in *Huntington* v. *Huntington Branch, NAACP*, O. T. 1988, No. 87–1961, p. 15 ("An action taken because of some factor other than race, *i. e.*, fi-

nancial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute"); *id.*, at 14 ("The words 'because of' plainly connote a causal connection between the housing-related action and the person's race or color").[4] This was the same position that the United States had taken in lower courts for years. See, *e. g.*, *United States* v. *Birmingham*, 538 F. Supp. 819, 827, n. 9 (ED Mich. 1982) (noting positional change), aff'd, 727 F. 2d 560, 565–566 (CA6 1984) (adopting United States' "concession" that there must be a " 'discriminatory motive' "). It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States' considered and public view that those decisions were wrong.

This fact is fatal to any notion that Congress implicitly ratified disparate impact in 1988. The canon of interpretation on which the Court and the Solicitor General purport to rely—the so-called "prior-construction canon"—does not apply where lawyers cannot "justifiably regard the point as settled" or when "other sound rules of interpretation" are implicated. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 324, 325 (2012). That was the case here. Especially after the United States began repudiating disparate impact, no one could have reasonably thought that the question was settled.

Nor can such a faulty argument be salvaged by pointing to Congress' failure in 1988 to enact language that would have made it clear that the FHA does not authorize disparate-impact suits based on zoning decisions. See *ante*, at 535–537.[5] To change the meaning of language in an already

[4] In response to the United States' argument, we reserved decision on the question. See *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15, 18 (1988) (*per curiam*) ("Since appellants conceded the applicability of the disparate-impact test . . . we do not reach the question whether that test is the appropriate one").

[5] In any event, the Court overstates the importance of that failed amendment. The amendment's sponsor disavowed that it had anything to do with the broader question whether the FHA authorizes disparate-impact suits. Rather, it "left to caselaw and eventual Supreme Court

enacted law, Congress must pass a new law amending that language. See, *e. g.*, *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 100, 101, and n. 7 (1991). Intent that finds no expression in a statute is irrelevant. See, *e. g.*, *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519, 544–545 (1979); Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 538–540 (1983). Hence, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering* v. *Hallock*, 309 U. S. 106, 121 (1940).

Unsurprisingly, we have rejected *identical* arguments about implicit ratification in other cases. For example, in *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994), a party argued that § 10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because "Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret § 10(b) to cover aiding and abetting, but ha[d] done so without providing that aiding and abetting liability is not available under § 10(b)." *Id.*, at 186. "From that," a party asked the Court to "infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of § 10(b)." *Ibid.* The Court dismissed this argument in words that apply almost verbatim here:

> "'It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of as-

---

resolution whether a discriminatory intent or discriminatory effects standard is appropriate . . . [in] all situations but zoning." H. R. Rep. No. 100–711, p. 89 (1988). Some in Congress, moreover, supported the amendment *and* the House bill. Compare *ibid.* with 134 Cong. Rec. 16511 (1988). It is hard to believe they thought the bill—which was silent on disparate impact—nonetheless decided the broader question. It is for such reasons that failed amendments tell us "little" about what a statute means. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). Footnotes in House Reports and law professor testimony tell us even less. *Ante*, at 535–537.

> surance that congressional failure to act represents" affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U. S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.' *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting))." *Ibid.* (alterations omitted).

We made the same point again in *Sandoval*, 532 U. S. 275. There it was argued that amendments to Title VI of the Civil Rights Act of 1964 implicitly ratified lower court decisions upholding a private right of action. We rejected that argument out of hand. See *id.*, at 292–293.

Without explanation, the Court ignores these cases.

B

The Court contends that the 1988 amendments provide "convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA" because the three safe-harbor provisions included in those amendments "would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA." *Ante*, at 537–538. As just explained, however, what matters is what Congress *did*, not what it might have "assumed." And although the Court characterizes these provisions as "exemptions," that characterization is inaccurate. They make no reference to § 804(a) or § 805(a) or any other provision of the FHA; nor do they state that they apply to conduct that would otherwise be prohibited. Instead, they simply make clear that certain conduct is not forbidden by the Act. *E. g.*, 42 U. S. C. § 3607(b)(4) ("Nothing in this subchapter prohibits . . . "). The Court should read these amendments to mean what they say.

In 1988, policymakers were not of one mind about disparate-impact housing suits. Some favored the theory and presumably would have been happy to have it enshrined in the FHA. See *ante*, at 535–537; 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy). Others worried about disparate-impact liability and recognized that this Court had not decided whether disparate-impact claims were authorized under the 1968 Act. See H. R. Rep. No. 100–711, pp. 89–93 (1988). Still others disapproved of disparate-impact liability and believed that the 1968 Act did not authorize it. That was the view of President Reagan when he signed the amendments. See Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. of Pres. Doc. 1140, 1141 (1988) (explaining that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact" because the FHA "speaks only to intentional discrimination").[6]

The 1988 safe-harbor provisions have all the hallmarks of a compromise among these factions. These provisions neither authorize nor bar disparate-impact claims, but they do pro-

[6] At the same hearings to which the Court refers, *ante*, at 536, Senator Hatch stated that if the "intent test versus the effects test" were to "becom[e] an issue," a "fair housing law" might not be enacted at all, and he noted that failed legislation in the past had gotten "bogged down" because of that "battle." Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 5 (1987). He also noted that the bill under consideration did "not really go one way or the other" on disparate impact since the sponsors were content to "rely" on the lower court opinions. *Ibid.* And he emphasized that "the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court." *Ibid.* See also *id.*, at 10 ("It is not always a violation to refuse to sell, but only to refuse to sell 'because of' another's race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate . . . . To use any standard other than discriminatory intent . . . would jeopardize many kinds of beneficial zoning and local ordinances" (statement of Sen. Hatch)).

vide additional protection for persons and entities engaging in certain practices that Congress especially wished to shield. We "must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U. S. 81, 93–94 (2002).

It is not hard to see why such a compromise was attractive. For Members of Congress who supported disparate impact, the safe harbors left the favorable lower court decisions in place. And for those who hoped that this Court would ultimately agree with the position being urged by the United States, those provisions were not surplusage. In the Circuits in which disparate-impact FHA liability had been accepted, the safe-harbor provisions furnished a measure of interim protection until the question was resolved by this Court. They also provided partial protection in the event that this Court ultimately rejected the United States' argument. Neither the Court, the principal respondent, nor the Solicitor General has cited any case in which the canon against surplusage has been applied in circumstances like these.[7]

---

[7] In any event, even in disparate-treatment suits, the safe harbors are not superfluous. For instance, they affect "the burden-shifting framework" in disparate-treatment cases. *American Ins. Assn.* v. *Department of Housing and Urban Development*, 74 F. Supp. 3d 30, 43 (DC 2014). Under the second step of the burden-shifting scheme from *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), which some courts have applied in disparate-treatment housing cases, see, *e. g.*, *2922 Sherman Avenue Tenants' Assn.* v. *District of Columbia*, 444 F. 3d 673, 682 (CADC 2006) (collecting cases), a defendant must proffer a legitimate reason for the challenged conduct, and the safe-harbor provisions set out reasons that are necessarily legitimate. Moreover, while a factfinder in a disparate-treatment case can sometimes infer bad intent based on facially neutral conduct, these safe harbors protect against such inferences. Without more, conduct within a safe harbor is insufficient to support such an inference as a matter of law. And finally, even if there is additional evidence, these safe harbors make it harder to show pretext. See *Fair Housing Advocates Assn., Inc.* v. *Richmond Heights*, 209 F. 3d 626, 636–637, and n. 7 (CA6 2000).

Even if they were superfluous, moreover, our "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States*

On the contrary, we have previously refused to interpret enactments like the 1988 safe-harbor provisions in such a way. Our decision in *O'Gilvie* v. *United States*, 519 U. S. 79 (1996)—also ignored by the Court today—is instructive. In that case, the question was whether a provision of the Internal Revenue Code excluding a recovery for personal injury from gross income applied to punitive damages. Well after the critical provision was enacted, Congress adopted an amendment providing that punitive damages for nonphysical injuries were not excluded. Pointing to this amendment, a taxpayer argued: "Why . . . would Congress have enacted this amendment removing punitive damages (in nonphysical injury cases) unless Congress believed that, in the amendment's absence, punitive damages did fall within the provision's coverage?" *Id.*, at 89. This argument, of course, is precisely the same as the argument made in this case. To paraphrase *O'Gilvie*, the Court today asks: Why would Congress have enacted the 1988 amendments, providing safe harbors from three types of disparate-impact claims, unless Congress believed that, in the amendments' absence, disparate-impact claims did fall within the FHA's coverage?

The Court rejected the argument in *O'Gilvie*. "The short answer," the Court wrote, is that Congress might have simply wanted to "clarify the matter in respect to nonphysical injuries" while otherwise "leav[ing] the law where it found it." *Ibid.* Although other aspects of *O'Gilvie* triggered a dissent, see *id.*, at 94–101 (opinion of SCALIA, J.), no one quarreled with this self-evident piece of the Court's analysis. Nor was the *O'Gilvie* Court troubled that Congress' amendment regarding nonphysical injuries turned out to have been unnecessary because punitive damages for any injuries were not excluded all along.

Trustee, 540 U. S. 526, 536 (2004). We "presume that a legislature says in a statute what it means," notwithstanding "[r]edundanc[y]." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992).

The Court saw the flaw in the argument in *O'Gilvie*, and the same argument is no better here. It is true that *O'Gilvie* involved a dry question of tax law while this case involves a controversial civil rights issue. But how we read statutes should not turn on such distinctions.

In sum, as the principal respondent's attorney candidly admitted, the 1988 amendments did not create disparate-impact liability. See Tr. of Oral Arg. 36 ("[D]id the things that [Congress] actually did in 1988 expand the coverage of the Act? MR. DANIEL: No, Justice").

C

The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation. Even if the FHA were ambiguous, however, we do not defer "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012).

Here, 43 years after the FHA was enacted and nine days after the Court granted certiorari in *Magner* (the "rodent infestation" case), HUD proposed "to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (2011). After *Magner* settled, the Court called for the views of the Solicitor General in *Township of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.*, 568 U. S. 976 (2012), another case raising the same question. Before the Solicitor General filed his brief, however, HUD adopted disparate-impact regulations. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The Solicitor General then urged HUD's

rule as a reason to deny certiorari. We granted certiorari anyway, 570 U. S. 904 (2013), and shortly thereafter *Mount Holly* also unexpectedly settled. Given this unusual pattern, there is an argument that deference may be unwarranted. Cf. *Young* v. *United Parcel Service, Inc.*, 575 U. S. 206, 225 (2015) (refusing to defer where "[t]he EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari" (discussing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944))).[8]

There is no need to dwell on these circumstances, however, because deference is inapt for a more familiar reason: The FHA is not ambiguous. The FHA prohibits only disparate treatment, not disparate impact. It is a bedrock rule that an agency can never "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group*, 573 U. S., at 328. This rule makes even more sense where the agency's view would open up a deeply disruptive avenue of liability that Congress never contemplated.

IV

Not only does disparate-impact liability run headlong into the text of the FHA, it also is irreconcilable with our precedents. The Court's decision today reads far too much into *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and far too little into *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). In *Smith*, the Court explained that the statutory justification for the decision in *Griggs* depends on language that has no parallel in the FHA. And when the *Smith* Court addressed a provision that does have such a parallel in the FHA, the Court concluded—*unanimously*—that it does not authorize disparate-impact liability. The same result should apply here.

[8] At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*. See Tr. of Oral Arg. 46 ("[I]t overestimates the efficiency of the government to think that you could get, you know, a supposed rule-making on an issue like this out within seven days"). The Government also argued that HUD had recognized disparate-impact liability in adjudications for years. *Ibid.*

A

Rather than focusing on the text of the FHA, much of the Court's reasoning today turns on *Griggs*. In *Griggs*, the Court held that black employees who sued their employer under § 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(2), could recover without proving that the employer's conduct—requiring a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs—was motivated by a discriminatory intent. Instead, the Court held that, unless it was proved that the requirements were "job related," the plaintiffs could recover by showing that the requirements "operated to render ineligible a markedly disproportionate number of Negroes." 401 U. S., at 429.

Griggs was a case in which an intent to discriminate might well have been inferred. The company had "openly discriminated on the basis of race" prior to the date on which the 1964 Civil Rights Act took effect. *Id.*, at 427. Once that date arrived, the company imposed new educational requirements for those wishing to transfer into jobs that were then being performed by white workers who did not meet those requirements. *Id.*, at 427–428. These new hurdles disproportionately burdened African-Americans, who had "long received inferior education in segregated schools." *Id.*, at 430. Despite all this, the lower courts found that the company lacked discriminatory intent. See *id.*, at 428. By convention, we do not overturn a finding of fact accepted by two lower courts, see, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982); *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949), so the Court was confronted with the question whether Title VII always demands intentional discrimination.

Although *Griggs* involved a question of statutory interpretation, the body of the Court's opinion—quite remarkably—does not even cite the provision of Title VII on which

the plaintiffs' claims were based. The only reference to § 703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim. See 401 U. S., at 426, n. 1. Instead, the Court based its decision on the "objective" of Title VII, which the Court described as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*, at 429–430.

That text-free reasoning caused confusion, see, *e. g.*, *Smith*, *supra*, at 261–262 (O'Connor, J., concurring in judgment), and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* Court, often made little effort to ground their decisions in the statutory text. For example, in one of the earliest cases in this line, *United States* v. *Black Jack*, 508 F. 2d 1179 (CA8 1974), the heart of the court's analysis was this: "Just as Congress requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing." *Id.*, at 1184 (quoting *Griggs*, *supra*, at 430–431; citation omitted).

Unlike these lower courts, however, this Court has never interpreted *Griggs* as imposing a rule that applies to all antidiscrimination statutes. See, *e. g.*, *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 607, n. 27 (1983) (holding that Title VI, 42 U. S. C. § 2000d *et seq.*, does "not allow compensatory relief in the absence of proof of discriminatory intent"); *Sandoval*, 532 U. S., at 280 (similar). Indeed, we have never held that *Griggs* even establishes a rule for all *employment* discrimination statutes. In *Teamsters*, the Court rejected "the *Griggs* rationale" in evaluating a company's seniority rules. 431 U. S., at 349–350. And because *Griggs* was focused on a particular problem, the Court

had held that its rule does not apply where, as here, the context is different. In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), for instance, the Court refused to apply *Griggs* to pensions under the Equal Pay Act of 1963, 29 U. S. C. §206(d), or Title VII, even if a plan has a "disproportionately heavy impact on male employees." 435 U. S., at 711, n. 20. We explained that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Ibid.*

B

Although the opinion in *Griggs* did not grapple with the text of the provision at issue, the Court was finally required to face that task in *Smith*, 544 U. S. 228, which addressed whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, authorizes disparate-impact suits. The Court considered two provisions of the ADEA, §§4(a)(1) and (a)(2), 29 U. S. C. §§623(a)(1) and (a)(2).

The Court unanimously agreed that the first of these provisions, §4(a)(1), does not authorize disparate-impact claims. See 544 U. S., at 236, n. 6 (plurality opinion); *id.*, at 243 (SCALIA, J., concurring in part and concurring in judgment) (agreeing with the plurality's reasoning); *id.*, at 249 (O'Connor, J., concurring in judgment) (reasoning that this provision "obvious[ly]" does not allow disparate-impact claims).

By contrast, a majority of the Justices found that the terms of §4(a)(2) either clearly authorize disparate-impact claims (the position of the plurality) or at least are ambiguous enough to provide a basis for deferring to such an interpretation by the Equal Employment Opportunity Commission (the position of JUSTICE SCALIA). See *id.*, at 233–240 (plurality opinion); *id.*, at 243–247 (opinion of SCALIA, J.).

In reaching this conclusion, these Justices reasoned that §4(a)(2) of the ADEA was modeled on and is virtually identi-

cal to the provision in *Griggs*, 42 U. S. C. §2000e–2(a)(2). Section 4(a)(2) provides as follows:

> "It shall be unlawful for an employer—
> . . . . . .
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age*." 29 U. S. C. §623(a) (emphasis added).

The provision of Title VII at issue in *Griggs* says this:

> "It shall be an unlawful employment practice for an employer—
> . . . . . .
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex, or national origin*." 42 U. S. C. §2000e–2(a)(2) (emphasis added).

For purposes here, the only relevant difference between these provisions is that the ADEA provision refers to "age" and the Title VII provision refers to "race, color, religion, or national origin." Because identical language in two statutes having similar purposes should generally be presumed to have the same meaning, the plurality in *Smith*, echoed by JUSTICE SCALIA, saw *Griggs* as "compelling" support for the conclusion that §4(a)(2) of the ADEA authorizes disparate-impact claims. 544 U. S., at 233–234 (plurality opinion) (citing *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*)).

When it came to the other ADEA provision addressed in *Smith*, namely, §4(a)(1), the Court unanimously reached the opposite conclusion. Section 4(a)(1) states:

> "It shall be unlawful for an employer—

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." 29 U. S. C. § 623(a)(1) (emphasis added).

The plurality opinion's reasoning, with which JUSTICE SCALIA agreed, can be summarized as follows. Under § 4(a)(1), *the employer* must act because of age, and thus must have discriminatory intent. See 544 U. S., at 236, n. 6.[9] Under § 4(a)(2), on the other hand, it is enough if the *employer's actions* "adversely affect" an individual "because of . . . age." 29 U. S. C. § 623(a).

This analysis of §§ 4(a)(1) and (a)(2) of the ADEA confirms that the FHA does not allow disparate-impact claims. Sections 804(a) and 805(a) of the FHA resemble § 4(a)(1) of the ADEA, which the *Smith* Court unanimously agreed does not encompass disparate-impact liability. Under these provisions of the FHA, like § 4(a)(1) of the ADEA, a defendant must act "because of" race or one of the other prohibited grounds. That is, it is unlawful for a person or entity "[t]o refuse to sell or rent," "refuse to negotiate," "otherwise

---

[9] The plurality stated:

"Paragraph (a)(1) makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age.' (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer 'to limit . . . his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* age.' (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact." 544 U. S., at 236, n. 6.

make unavailable," etc., for a forbidden reason. These provisions of the FHA, unlike the Title VII provision in *Griggs* or § 4(a)(2) of the ADEA, do not make it unlawful to take an action that happens to adversely affect a person because of race, religion, etc.

The *Smith* plurality's analysis, moreover, also depended on other language, unique to the ADEA, declaring that "it shall not be unlawful for an employer 'to take any action *otherwise prohibited* . . . where the differentiation is based on reasonable factors other than age.'" 544 U. S., at 238 (quoting 81 Stat. 603; emphasis added). This "otherwise prohibited" language was key to the plurality opinion's reading of the statute because it arguably suggested disparate-impact liability. See 544 U. S., at 238. This language, moreover, was *essential* to JUSTICE SCALIA's controlling opinion. Without it, JUSTICE SCALIA would have agreed with Justices O'Connor, KENNEDY, and THOMAS that *nothing* in the ADEA authorizes disparate-impact suits. See *id.*, at 245–246. In fact, even with this "otherwise prohibited" language, JUSTICE SCALIA merely concluded that § 4(a)(2) was ambiguous—*not* that disparate-impacts suits are required. *Id.*, at 243.

The FHA does not contain any phrase like "otherwise prohibited." Such language certainly is nowhere to be found in §§ 804(a) and 805(a). And for all the reasons already explained, the 1988 amendments do not presuppose disparate-impact liability. To the contrary, legislative enactments declaring only that certain actions are *not* grounds for liability do not implicitly create a new theory of liability that all other facets of the statute foreclose.

C

This discussion of our cases refutes any notion that "[t]ogether, *Griggs* holds[10] and the plurality in *Smith* instructs

[10] *Griggs*, of course, "holds" nothing of the sort. Indeed, even the plurality opinion in *Smith* (to say nothing of JUSTICE SCALIA's controlling opinion or Justice O'Connor's opinion concurring in the judgment) did not

that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Ante*, at 533. The Court stumbles in concluding that § 804(a) of the FHA is more like § 4(a)(2) of the ADEA than § 4(a)(1). The operative language in § 4(a)(1) of the ADEA—which, per *Smith*, does not authorize disparate-impact claims—is materially indistinguishable from the operative language in § 804(a) of the FHA.

Even more baffling, neither alone nor in combination do *Griggs* and *Smith* support the Court's conclusion that § 805(a) of the FHA allows disparate-impact suits. The action forbidden by that provision is "*discriminat[ion]* . . . because of" race, religion, etc. 42 U. S. C. § 3605(a) (emphasis added). This is precisely the formulation used in § 4(a)(1) of the ADEA, which prohibits "*discriminat[ion]* . . . because of such individual's age," 29 U. S. C. § 623(a)(1) (emphasis added), and which *Smith* holds *does not* authorize disparate-impact claims.

In an effort to explain why § 805(a)'s reference to "discrimination" allows disparate-impact suits, the Court argues that in *Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130 (1979), "statutory language similar to § 805(a) [was construed] to include disparate-impact liability." *Ante*, at 534. In fact, the statutory language in *Harris* was quite different. The law there was § 706(d)(1)(B) of the 1972 Emergency School Aid Act, which barred assisting education agencies that "'had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation . . . *or* otherwise engaged in discrimination based upon race, color, or national

---

understand *Griggs* to create such a rule. See 544 U. S., at 240 (plurality opinion) (relying on multiple considerations). If *Griggs* already answered the question for all statutes (even those that do not use effects language), *Smith* is inexplicable.

origin in the hiring, promotion, or assignment of employees.' " 444 U. S., at 132–133, 142 (emphasis added).

After stating that the first clause in that unusual statute referred to a "disparate-impact test," the *Harris* Court concluded that "a similar standard" should apply to the textually "closely connected" second clause. *Id.*, at 143. This was so, the Court thought, even though the second clause, standing alone, may very well have required discriminatory "intent." *Id.*, at 139. The Court explained that the Act's "less than careful draftsmanship" regarding the relationship between the clauses made the "wording of the statute . . . ambiguous" about teacher assignments, thus forcing the Court to "look closely at the structure and context of the statute and to review its legislative history." *Id.*, at 138–140. It was the combined force of all those markers that persuaded the Court that disparate impact applied to the second clause too.

Harris, in other words, has nothing to do with § 805(a) of the FHA. The "wording" is different; the "structure" is different; the "context" is different; and the "legislative history" is different. *Id.*, at 140. Rather than digging up a 36-year-old case that Justices of this Court have cited all of twice, and never once for the proposition offered today, the Court would do well to recall our many cases explaining what the phase "because of" means.

V

Not only is the decision of the Court inconsistent with what the FHA says and our precedents, it will have unfortunate consequences. Disparate-impact liability has very different implications in housing and employment cases.

Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city's good-faith attempt to remedy deplorable housing conditions can be branded "dis-

criminatory." 619 F. 3d, at 834. Disparate-impact claims thus threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington* v. *Davis*, 426 U. S. 229, 248 (1976).

This case illustrates the point. The Texas Department of Housing and Community Affairs (Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families—including many minority families—will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit.[11]

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But *another* respondent argues that giving credits to wealthy neighborhoods violates "the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities." Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal law often favors projects that revitalize low-income communities. See *ante*, at 525.

No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress

---

[11] Tr. of Oral Arg. 44–45 ("Community A wants the development to be in the suburbs. And the next state, the community wants it to be in the poor neighborhood. Is it your position . . . that in either case, step one has been satisfied[?] GENERAL VERRILLI: That may be right").

surely did not mean to put local governments in such a position.

The Solicitor General's answer to such problems is that HUD will come to the rescue. In particular, HUD regulations provide a defense against disparate-impact liability if a defendant can show that its actions serve "substantial, legitimate, nondiscriminatory interests" that "necessar[ily]" cannot be met by "another practice that has a less discriminatory effect." 24 CFR § 100.500(b) (2014). (There is, of course, no hint of anything like this defense in the text of the FHA. But then, there is no hint of disparate-impact liability in the text of the FHA either.)

The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a "substantial" interest? Is there a difference between a "legitimate" interest and a "nondiscriminatory" interest? To what degree must an interest be met for a practice to be "necessary"? How are parties and courts to measure "discriminatory effect"?

These questions are not answered by the Court's assurance that the FHA's disparate-impact "analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.'" *Ante*, at 527 (quoting 78 Fed. Reg. 11470). See also *ante*, at 541 (likening the defense to "the business necessity standard"). The business-necessity defense is complicated enough in employment cases; what it means when plopped into the housing context is anybody's guess. What is the FHA analogue of "job related"? Is it "housing related"? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of "business necessity"? "Housing-policy necessity"? What does that mean?

Compounding the problem, the Court proclaims that "governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Ante*, at 544. But what does the

Court mean by a "legitimate" objective? And does the Court mean to say that there can be no disparate-impact lawsuit if the objective is "legitimate"? That is certainly not the view of the Government, which takes the position that a disparate-impact claim may be brought to challenge actions taken with such worthy objectives as improving housing in poor neighborhoods and making financially sound lending decisions. See Brief for United States as *Amicus Curiae* 30, n. 7.

Because HUD's regulations and the Court's pronouncements are so "hazy," *Central Bank*, 511 U. S., at 188–189, courts—lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help. Local governments make countless decisions that may have some disparate impact related to housing. See *ante*, at 542–543. Certainly Congress did not intend to "engage the federal courts in an endless exercise of second-guessing" local programs. *Canton* v. *Harris*, 489 U. S. 378, 392 (1989).

Even if a city or private entity named in a disparate-impact suit believes that it is likely to prevail if a disparate-impact suit is fully litigated, the costs of litigation, including the expense of discovery and experts, may "push cost-conscious defendants to settle even anemic cases." *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 559 (2007). Defendants may feel compelled to "abandon substantial defenses and . . . pay settlements in order to avoid the expense and risk of going to trial." *Central Bank*, *supra*, at 189. And parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether. Cf. *Ricci*, 557 U. S., at 563. All the while, similar dynamics may drive litigation against private actors. *Ante*, at 541–542.

This is not the Fair Housing Act that Congress enacted.

VI

Against all of this, the Court offers several additional counterarguments. None is persuasive.

A

The Court is understandably worried about pretext. No one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses. Disparate-treatment liability, however, is attuned to this difficulty. Disparate impact can be *evidence* of disparate treatment. *E. g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 541–542 (1993) (opinion of KENNEDY, J.); *Hunter* v. *Underwood*, 471 U. S. 222, 233 (1985). As noted, the facially neutral requirements in *Griggs* created a strong inference of discriminatory intent. Nearly a half century later, federal judges have decades of experience sniffing out pretext.

B

The Court also stresses that "many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA." *Ante*, at 546.

This nod to federalism is puzzling. Only a minority of the States and only a small fraction of the Nation's municipalities have urged us to hold that the FHA allows disparate-impact suits. And even if a majority supported the Court's position, that would not be a relevant consideration for a court. In any event, nothing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability. See 42 U. S. C. § 3615 (recognizing local authority).

The Court also claims that "[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades" has not created "'dire consequences.'" *Ante*, at 546. But the Court concedes that disparate impact can be dangerous. See *ante*, at 540–545. Compare *Magner*, 619 F. 3d, at 833–838 (holding that efforts to prevent violations of the housing code may violate the

FHA), with 114 Cong. Rec. 2528 (1968) (remarks of Sen. Tydings) (urging enactment of the FHA to help combat violations of the housing code, including "rat problem[s]"). In the Court's words, it is "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing." *Ante*, at 541. Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).

C

At last I come to the "purpose" driving the Court's analysis: the desire to eliminate the "vestiges" of "residential segregation by race." *Ante*, at 528, 546. We agree that all Americans should be able "to buy decent houses without discrimination . . . *because of* the color of their skin." 114 Cong. Rec. 2533 (remarks of Sen. Tydings) (emphasis added). See 42 U. S. C. §§ 3604(a), 3605(a) ("because of race"). But this Court has no license to expand the scope of the FHA to beyond what Congress enacted.

When interpreting statutes, "'[w]hat the legislative intention was, can be derived only from the words . . . used; and we cannot speculate beyond the reasonable import of these words.'" *Nassar*, 570 U. S., at 353 (quoting *Gardner* v. *Collins*, 2 Pet. 58, 93 (1829)). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) (*per curiam*). See also, *e. g.*, *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 373–374 (1986) (explaining that "'broad purposes'" arguments "ignor[e] the complexity of the problems Congress is called upon to address").

Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to "perpetuate race-based considerations rather than move beyond them." *Ante*, at 543.

And it agrees that "racial quotas . . . rais[e] serious constitutional concerns." *Ante*, at 543. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such "difficult constitutional questions." *Ante*, at 545. By any measure, the Court today makes a serious mistake.

* * *

I would interpret the Fair Housing Act as written and so would reverse the judgment of the Court of Appeals.

Syllabus

JOHNSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 13–7120. Argued November 5, 2014—Reargued April 20, 2015—Decided June 26, 2015

After petitioner Johnson pleaded guilty to being a felon in possession of a firearm, see 18 U. S. C. § 922(g), the Government sought an enhanced sentence under the Armed Career Criminal Act, which imposes an increased prison term upon a defendant with three prior convictions for a "violent felony," § 924(e)(1), a term defined by § 924(e)(2)(B)'s residual clause to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The Government argued that Johnson's prior conviction for unlawful possession of a short-barreled shotgun met this definition, making the third conviction of a violent felony. This Court had previously pronounced upon the meaning of the residual clause in *James* v. *United States*, 550 U. S. 192; *Begay* v. *United States*, 553 U. S. 137; *Chambers* v. *United States*, 555 U. S. 122; and *Sykes* v. *United States*, 564 U. S. 1, and had rejected suggestions by dissenting Justices in both *James* and *Sykes* that the clause is void for vagueness. Here, the District Court held that the residual clause does cover unlawful possession of a short-barreled shotgun, and imposed a 15-year sentence under ACCA. The Eighth Circuit affirmed.

Held: Imposing an increased sentence under ACCA's residual clause violates due process. Pp. 595–606.

(a) The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357–358. Courts must use the "categorical approach" when deciding whether an offense is a violent felony, looking "only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor* v. *United States*, 495 U. S. 575, 600. Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James*, *supra*, at 208. Pp. 595–597.

(b) Two features of the residual clause conspire to make it unconstitutionally vague. By tying the judicial assessment of risk to a judicially

imagined "ordinary case" of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. See *James*, *supra*, at 211. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Taken together, these uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates. This Court's repeated failure to craft a principled standard out of the residual clause and the lower courts' persistent inability to apply the clause in a consistent way confirm its hopeless indeterminacy. Pp. 597–602.

(c) This Court's cases squarely contradict the theory that the residual clause is constitutional merely because some underlying crimes may clearly pose a serious potential risk of physical injury to another. See, *e. g.*, *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89. Holding the residual clause void for vagueness does not put other criminal laws that use terms such as "substantial risk" in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime. Pp. 602–605.

(d) The doctrine of *stare decisis* does not require continued adherence to *James* and *Sykes*. Experience leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. *James* and *Sykes* opined about vagueness without full briefing or argument. And continued adherence to those decisions would undermine, rather than promote, the goals of evenhandedness, predictability, and consistency served by *stare decisis*. Pp. 605–606.

526 Fed. Appx. 708, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., *post*, p. 607, and THOMAS, J., *post*, p. 607, filed opinions concurring in the judgment. ALITO, J., filed a dissenting opinion, *post*, p. 624.

Katherine M. Menendez argued and reargued the cause for petitioner. With her on the briefs were *Katherian D. Roe* and *Douglas H. R. Olson*.

Deputy Solicitor General Dreeben reargued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *John F. Bash*, and *Scott A. C. Meisler*. *Mr. Bash* argued the cause for the United States on the original argument.

With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Caldwell*, and *Deputy Solicitor General Dreeben*.*

JUSTICE SCALIA delivered the opinion of the Court.

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

I

Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson* v. *United States*, 559 U. S. 133, 136 (2010). The Act defines "violent felony" as follows:

---

*Briefs of *amici curiae* urging reversal were filed for Gun Owners of America, Inc., et al. by *Herbert W. Titus*, *Jeremiah L. Morgan*, *William J. Olson*, *John S. Miles*, and *Michael Connelly*; and for the National Association of Criminal Defense Lawyers et al. by *David Debold*, *Molly Claflin*, *Ashley E. Johnson*, *Peter Goldberger*, *Ilya Shapiro*, *Sarah S. Gannett*, *Daniel Kaplan*, *Donna F. Coltharp*, *Mary Price*, and *David M. Porter*.

Briefs of *amici curiae* urging affirmance were filed for the Brady Center to Prevent Gun Violence et al. by *Gregory G. Little* and *Jonathan E. Lowy*; and for Law Professors by *Stephen Rushin*, *pro se*.

> "any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act's residual clause. Since 2007, this Court has decided four cases attempting to discern its meaning. We have held that the residual clause (1) covers Florida's offense of attempted burglary, *James* v. *United States*, 550 U. S. 192 (2007); (2) does *not* cover New Mexico's offense of driving under the influence, *Begay* v. *United States*, 553 U. S. 137 (2008); (3) does *not* cover Illinois' offense of failure to report to a penal institution, *Chambers* v. *United States*, 555 U. S. 122 (2009); and (4) does cover Indiana's offense of vehicular flight from a law-enforcement officer, *Sykes* v. *United States*, 564 U. S. 1 (2011). In both *James* and *Sykes*, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws. Compare *James*, 550 U. S., at 210, n. 6, with *id.*, at 230 (SCALIA, J., dissenting); compare *Sykes*, 564 U. S., at 15–16, with *id.*, at 33–35 (SCALIA, J., dissenting).

This case involves the application of the residual clause to another crime, Minnesota's offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson is a felon with a long criminal record. In 2010, the Federal Bureau of Investigation began to monitor him because of his involvement in a white-supremacist organization that the Bureau suspected was planning to commit acts of terrorism. During the investigation, Johnson disclosed to undercover agents that he had manufactured explosives and that he

planned to attack "the Mexican consulate" in Minnesota, "progressive bookstores," and "'liberals.'" Revised Presentence Investigation in No. 0:12CR00104–001 (D Minn.), p. 5, ¶16. Johnson showed the agents his AK–47 rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition.

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses—including unlawful possession of a short-barreled shotgun, see Minn. Stat. § 609.67 (2006)—qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. 526 Fed. Appx. 708 (CA8 2013) (*per curiam*). We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. 572 U. S. 1059 (2014). We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws. 574 U. S. 1069 (2015).

II

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357–358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process."

Connally v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979).

In *Taylor* v. *United States*, 495 U. S. 575, 600 (1990), this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, *supra*, at 141.

Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James*, *supra*, at 208. The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime "has *as an element* the use . . . of physical force," the residual clause asks whether the crime "*involves conduct*" that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering.

We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

A

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *United States* v. *Mayer*, 560 F. 3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue." 550 U. S., at 211. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away."

Id., at 226 (opinion of SCALIA, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay*, 553 U. S., at 143. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 91 (1921). Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. Three of the Court's previous four decisions about the clause concentrated on the level of risk posed by the crime in question, though in each case we found it necessary to resort to a different ad hoc test to guide our inquiry. In *James*, we asked whether "the risk posed by attempted burglary is comparable to that posed by its closest analog

among the enumerated offenses," namely completed burglary; we concluded that it was. 550 U. S., at 203. That rule takes care of attempted burglary, but offers no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes. "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?" *Id.*, at 215 (SCALIA, J., dissenting).

Chambers, our next case to focus on risk, relied principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" 555 U. S., at 128–129. So much for failure to report to prison, but what about the tens of thousands of federal and state crimes for which no comparable reports exist? And even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves. See *Sykes*, 564 U. S., at 31–33 (SCALIA, J., dissenting); *id.*, at 40, n. 4 (KAGAN, J., dissenting).

Our most recent case, *Sykes*, also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id.*, at 10 (majority opinion). But common sense is a much less useful criterion than it sounds—as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. See *id.*, at 38–39 (KAGAN, J., dissenting). How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum? Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with

respect to thousands of unenumerated crimes. All in all, *James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.

The remaining case, *Begay*, which preceded *Chambers* and *Sykes*, took an entirely different approach. The Court held that in order to qualify as a violent felony under the residual clause, a crime must resemble the enumerated offenses "in kind as well as in degree of risk posed." 553 U. S., at 143. The Court deemed drunk driving insufficiently similar to the listed crimes, because it typically does not involve "purposeful, violent, and aggressive conduct." *Id.*, at 144–145 (internal quotation marks omitted). Alas, *Begay* did not succeed in bringing clarity to the meaning of the residual clause. It did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime. In addition, the enumerated crimes are not much more similar to one another in kind than in degree of risk posed, and the concept of "aggressive conduct" is far from clear. *Sykes* criticized the "purposeful, violent, and aggressive" test as an "addition to the statutory text," explained that "levels of risk" would normally be dispositive, and confined *Begay* to "strict liability, negligence, and recklessness crimes." 564 U. S., at 12–13.

The present case, our fifth about the meaning of the residual clause, opens a new front of uncertainty. When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers.

This Court is not the only one that has had trouble making sense of the residual clause. The clause has "created numerous splits among the lower federal courts," where it has proved "nearly impossible to apply consistently." *Chambers*, 555 U. S., at 133 (ALITO, J., concurring in judgment). The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider. Some judges have concluded that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the "simple act of agreeing [to commit a crime]," *United States* v. *Whitson*, 597 F. 3d 1218, 1222 (CA11 2010) (*per curiam*); others have also considered the probability that the agreement will be carried out, *United States* v. *White*, 571 F. 3d 365, 370–371 (CA4 2009). Some judges have assumed that the battery of a police officer (defined to include the slightest touching) could "explode into violence and result in physical injury," *United States* v. *Williams*, 559 F. 3d 1143, 1149 (CA10 2009); others have felt that it "do[es] a great disservice to law enforcement officers" to assume that they would "explod[e] into violence" rather than "rely on their training and experience to determine the best method of responding," *United States* v. *Carthorne*, 726 F. 3d 503, 514 (CA4 2013). Some judges considering whether statutory rape qualifies as a violent felony have concentrated on cases involving a perpetrator much older than the victim, *United States* v. *Daye*, 571 F. 3d 225, 230–231 (CA2 2009); others have tried to account for the possibility that "the perpetrator and the victim [might be] close in age," *United States* v. *McDonald*, 592 F. 3d 808, 815 (CA7 2010). Disagreements like these go well beyond disputes over matters of degree.

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a

failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." *United States* v. *Evans*, 333 U. S. 483, 495 (1948). Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.

B

The Government and the dissent claim that there will be straightforward cases under the residual clause, because some crimes clearly pose a serious potential risk of physical injury to another. See *post*, at 637 (opinion of ALITO, J.). True enough, though we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of "rioting at a correctional institution." See *United States* v. *Johnson*, 616 F. 3d 85 (CA2 2010). That certainly sounds like a violent felony—until one realizes that Connecticut defines this offense to include taking part in "any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations" of the prison. Conn. Gen. Stat. § 53a–179b(a) (2012). Who is to say which the ordinary "disorder" most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a "passive and nonviolent [act] such as disregarding an order to move," *Johnson*, 616 F. 3d, at 95 (Parker, J., dissenting)?

In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.*, 255

U. S., at 89. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates* v. *Cincinnati*, 402 U. S. 611 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Resisting the force of these decisions, the dissent insists that "a statute is void for vagueness only if it is vague in all its applications." *Post*, at 624–625. It claims that the prohibition of unjust or unreasonable rates in *L. Cohen Grocery* was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. *Post*, at 639. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?

The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. See *post*, at 630. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *James*, 550 U. S., at 230, n. 7 (SCALIA, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not

doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," *Nash* v. *United States*, 229 U. S. 373, 377 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *International Harvester Co. of America* v. *Kentucky*, 234 U. S. 216, 223 (1914).

Finally, the dissent urges us to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime. See *post*, at 631–636. In other words, the dissent suggests that we jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor*, see 495 U. S., at 599–602, and reaffirmed in each of our four residual-clause cases, see *James*, 550 U. S., at 202; *Begay*, 553 U. S., at 141; *Chambers*, 555 U. S., at 125; *Sykes*, 564 U. S., at 7. We decline the dissent's invitation. In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U. S., at 600. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the

facts underlying the prior convictions." *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. "[T]he only plausible interpretation" of the law, therefore, requires use of the categorical approach. *Id.*, at 602.

C

That brings us to *stare decisis*. This is the first case in which the Court has received briefing and heard argument from the parties about whether the residual clause is void for vagueness. In *James*, however, the Court stated in a footnote that it was "not persuaded by [the principal dissent's] suggestion . . . that the residual provision is unconstitutionally vague." 550 U. S., at 210, n. 6. In *Sykes*, the Court again rejected a dissenting opinion's claim of vagueness. 564 U. S., at 15–16.

The doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction." *United States* v. *Vann*, 660 F. 3d 771, 787 (CA4 2011) (Agee, J., concurring).

This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. See, *e. g.*, *United States* v. *Dixon*, 509 U. S. 688, 711 (1993); *Payne*, 501 U. S., at 828–830. But *James* and *Sykes* opined about vagueness without full briefing or argument on that issue—a circumstance that leaves us "less constrained to follow precedent," *Hohn* v. *United States*, 524 U. S. 236, 251 (1998). The brief discussions of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase "serious potential risk"; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime. 550 U. S., at 210, n. 6; 564 U. S., at 15–16. And departing from those decisions does not raise any concerns about upsetting private reliance interests.

Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, *supra*, at 827. Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.

* * *

We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

We reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

In my view, and for the reasons well stated by JUSTICE ALITO in dissent, the residual clause of the Armed Career Criminal Act is not unconstitutionally vague under the categorical approach or a record-based approach. On the assumption that the categorical approach ought to still control, and for the reasons given by JUSTICE THOMAS in Part I of his opinion concurring in the judgment, Johnson's conviction for possession of a short-barreled shotgun does not qualify as a violent felony.

For these reasons, I concur in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Johnson's sentence cannot stand. But rather than use the Fifth Amendment's Due Process Clause to nullify an Act of Congress, I would resolve this case on more ordinary grounds. Under conventional principles of interpretation and our precedents, the offense of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under the residual clause of the Armed Career Criminal Act (ACCA).

The majority wants more. Not content to engage in the usual business of interpreting statutes, it holds this clause to be unconstitutionally vague, notwithstanding the fact that on four previous occasions we found it determinate enough for judicial application. As JUSTICE ALITO explains, that decision cannot be reconciled with our precedents concerning the vagueness doctrine. See *post*, at 636–639 (dissenting opinion). But even if it were a closer case under those decisions, I would be wary of holding the residual clause to be unconstitutionally vague. Although I have joined the Court in applying our modern vagueness doctrine in the past, see *FCC* v. *Fox Television Stations, Inc.*, 567 U. S. 239, 253–258 (2012), I have become increasingly concerned about its origins and application. Simply put, our vagueness doctrine shares an uncomfortably similar history with substantive

due process, a judicially created doctrine lacking any basis in the Constitution.

I

We could have easily disposed of this case without nullifying ACCA's residual clause. Under ordinary principles of statutory interpretation, the crime of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under ACCA. In relevant part, ACCA defines a "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that either

> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B).

The offense of unlawfully possessing a short-barreled shotgun neither satisfies the first clause of this definition nor falls within the enumerated offenses in the second. It therefore can constitute a violent felony only if it falls within ACCA's so-called "residual clause"—*i. e.*, if it "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

To determine whether an offense falls within the residual clause, we consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U. S. 192, 208 (2007). The specific crimes listed in § 924(e)(2)(B)(ii)—arson, extortion, burglary, and an offense involving the use of explosives—offer a "baseline against which to measure the degree of risk" a crime must present to fall within that clause. *Id.*, at 208. Those offenses do not provide a high threshold, see *id.*, at 203, 207–208, but the crime in question must still present a "'seri-

ous'"—a "'significant' or 'important'"—risk of physical injury to be deemed a violent felony, *Begay* v. *United States*, 553 U. S. 137, 156 (2008) (ALITO, J., dissenting); accord, *Chambers* v. *United States*, 555 U. S. 122, 128 (2009).

To qualify as serious, the risk of injury generally must be closely related to the offense itself. Our precedents provide useful examples of the close relationship that must exist between the conduct of the offense and the risk presented. In *Sykes* v. *United States*, 564 U. S. 1 (2011), for instance, we held that the offense of intentional vehicular flight constitutes a violent felony because that conduct always triggers a dangerous confrontation, *id.*, at 9–10. As we explained, vehicular flights "by definitional necessity occur when police are present" and are done "in defiance of their instructions . . . with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Id.*, at 10. In *James*, we likewise held that attempted burglary offenses "requir[ing] an overt act directed toward the entry of a structure" are violent felonies because the underlying conduct often results in a dangerous confrontation. 550 U. S., at 204, 206. But we distinguished those crimes from "the more attenuated conduct encompassed by" attempt offenses "that c[an] be satisfied by preparatory conduct that does not pose the same risk of violent confrontation," such as "'possessing burglary tools.'" *Id.*, at 205, 206, and n. 4. At some point, in other words, the risk of injury from the crime may be too attenuated for the conviction to fall within the residual clause, such as when an additional, voluntary act (*e. g.*, the *use* of burglary tools to enter a structure) is necessary to bring about the risk of physical injury to another.

In light of the elements of and reported convictions for the unlawful possession of a short-barreled shotgun, this crime does not "involv[e] conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii). The acts that form the basis of this offense are simply too remote from a risk of physical injury to fall within the residual clause.

Standing alone, the elements of this offense—(1) unlawfully (2) possessing (3) a short-barreled shotgun—do not describe inherently dangerous conduct. As a conceptual matter, "simple possession [of a firearm], even by a felon, takes place in a variety of ways (*e. g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *United States* v. *Doe*, 960 F. 2d 221, 225 (CA1 1992). These weapons also can be stored in a manner posing a danger to no one, such as unloaded, disassembled, or locked away. By themselves, the elements of this offense indicate that the ordinary commission of this crime is far less risky than ACCA's enumerated offenses.

Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others. A few examples suffice. In one case, officers found the sawed-off shotgun locked inside a gun cabinet in an empty home. *State* v. *Salyers*, 858 N. W. 2d 156, 157–158 (Minn. 2015). In another, the firearm was retrieved from the trunk of the defendant's car. *State* v. *Ellenberger*, 543 N. W. 2d 673, 674 (Minn. App. 1996). In still another, the weapon was found missing a firing pin. *State* v. *Johnson*, 171 Wis. 2d 175, 178, 491 N. W. 2d 110, 111 (App. 1992). In these instances and others, the offense threatened no one.

The Government's theory for why this crime should nonetheless qualify as a "violent felony" is unpersuasive. Although it does not dispute that the unlawful possession of a short-barreled shotgun can occur in a nondangerous manner, the Government contends that this offense poses a serious risk of physical injury due to the connection between short-barreled shotguns and other serious crimes. As the Government explains, these firearms are "weapons not typically possessed by law-abiding citizens for lawful purposes," *District of Columbia* v. *Heller*, 554 U. S. 570, 625 (2008), but

are instead primarily intended for use in criminal activity. In light of that intended use, the Government reasons that the ordinary case of this possession offense will involve the *use* of a short-barreled shotgun in a serious crime, a scenario obviously posing a serious risk of physical injury.

But even assuming that those who unlawfully possess these weapons typically intend to use them in a serious crime, the risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it. Unlike attempted burglary (at least of the type at issue in *James*) or intentional vehicular flight—conduct that by itself often or always invites a dangerous confrontation—possession of a short-barreled shotgun poses a threat *only* when an offender decides to engage in additional, voluntary conduct that is not included in the elements of the crime. Until this weapon is assembled, loaded, or used, for example, it poses no risk of injury to others in and of itself. The risk of injury to others from mere possession of this firearm is too attenuated to treat this offense as a violent felony. I would reverse the Court of Appeals on that basis.

II

As the foregoing analysis demonstrates, ACCA's residual clause can be applied in a principled manner. One would have thought this proposition well established given that we have already decided four cases addressing this clause. The majority nonetheless concludes that the operation of this provision violates the Fifth Amendment's Due Process Clause.

JUSTICE ALITO shows why that analysis is wrong under our precedents. See *post*, at 636–639 (dissenting opinion). But I have some concerns about our modern vagueness doctrine itself. Whether that doctrine is defensible under the original meaning of "due process of law" is a difficult question I leave for another day, but the doctrine's history should

prompt us at least to examine its constitutional underpinnings more closely before we use it to nullify yet another duly enacted law.

A

We have become accustomed to using the Due Process Clauses to invalidate laws on the ground of "vagueness." The doctrine we have developed is quite sweeping: "A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill* v. *Colorado*, 530 U. S. 703, 732 (2000). Using this framework, we have nullified a wide range of enactments. We have struck down laws ranging from city ordinances, *Papachristou* v. *Jacksonville*, 405 U. S. 156, 165–171 (1972), to Acts of Congress, *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89–93 (1921). We have struck down laws whether they are penal, *Lanzetta* v. *New Jersey*, 306 U. S. 451, 452, 458 (1939), or not, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 597–604 (1967).[1] We have struck down laws addressing subjects ranging from abortion, *Colautti* v. *Franklin*, 439 U. S. 379, 390 (1979), and obscenity, *Winters* v. *New York*, 333 U. S. 507, 517–520 (1948), to the minimum wage, *Connally* v. *General Constr. Co.*, 269 U. S. 385, 390–395 (1926), and antitrust, *Cline* v. *Frink Dairy Co.*,

[1] By "penal," I mean laws "authoriz[ing] criminal punishment" as well as those "authorizing fines or forfeitures . . . [that] are enforced through civil rather than criminal process." Cf. C. Nelson, Statutory Interpretation 108 (2011) (discussing definition of "penal" for purposes of rule of lenity). A law requiring termination of employment from public institutions, for instance, is not penal. See *Keyishian*, 385 U. S., at 597–604. Nor is a law creating an "obligation to pay taxes." *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 271 (1935). Conversely, a law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 661–669 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

274 U. S. 445, 453–465 (1927). We have even struck down a law using a term that has been used to describe criminal conduct in this country since before the Constitution was ratified. *Chicago* v. *Morales*, 527 U. S. 41, 51 (1999) (invalidating a "loitering" law); see *id.*, at 113, and n. 10 (THOMAS, J., dissenting) (discussing a 1764 Georgia law requiring the apprehension of "all able bodied persons . . . who shall be found loitering").

That we have repeatedly used a doctrine to invalidate laws does not make it legitimate. Cf., *e. g.*, *Dred Scott* v. *Sandford*, 19 How. 393, 450–452 (1857) (stating that an Act of Congress prohibiting slavery in certain Federal Territories violated the substantive due process rights of slaveowners and was therefore void). This Court has a history of wielding doctrines purportedly rooted in "due process of law" to achieve its own policy goals, substantive due process being the poster child. See *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not"). Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.

1

The problem of vague penal statutes is nothing new. The notion that such laws may be void under the Constitution's Due Process Clauses, however, is a more recent development.

Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law. This rule of construction—better known today as the rule of lenity—first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses,

though it did not gain broad acceptance until the following century. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749–751 (1935); see also 1 L. Radzinowicz, A History of English Criminal Law and Its Administration From 1750, pp. 10–11 (1948) (noting that some of the following crimes triggered the death penalty: "marking the edges of any current coin of the kingdom," "maliciously cutting any hop-binds growing on poles in any plantation of hops," and "being in the company of gypsies"). Courts relied on this rule of construction in refusing to apply vague capital-offense statutes to prosecutions before them. As an example of this rule, William Blackstone described a notable instance in which an English statute imposing the death penalty on anyone convicted of "stealing sheep, *or other cattle*," was "held to extend to nothing but mere sheep" as "th[e] general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence." 1 Commentaries on the Laws of England 88 (1765).[2]

Vague statutes surfaced on this side of the Atlantic as well. Shortly after the First Congress proposed the Bill of Rights, for instance, it passed a law providing "[t]hat every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license," must forfeit the offending goods. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–138. At first glance, punishing the unlicensed possession of "merchandise . . . usually vended to the Indians," *ibid.*, would seem far more likely to "invit[e]

---

[2] At the time, the ordinary meaning of the word "cattle" was not limited to cows, but instead encompassed all "[b]easts of pasture; not wild nor domestick." 1 S. Johnson, A Dictionary of the English Language 286 (4th ed. 1773). Parliament responded to the judicial refusal to apply the provision to "cattle" by passing "another statute, 15 Geo. II. c. 34, extending the [law] to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." 1 Blackstone, Commentaries on the Laws of England, at 88.

arbitrary enforcement," *ante,* at 597, than does the residual clause.

But rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly. See, *e. g.*, *United States* v. *Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815) (Washington, J.). In *Sharp*, for instance, several defendants charged with violating an Act rendering it a capital offense for "any seaman" to "make a revolt in [a] ship," Act of Apr. 30, 1790, §8, 1 Stat. 114, objected that "the offence of making a revolt, [wa]s not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon [them]." 27 F. Cas., at 1043. Justice Washington, riding circuit, apparently agreed, observing that the common definitions for the phrase "make a revolt" were "so multifarious, and so different," that he could not "avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature." *Ibid.* Remarking that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid," he refused to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*

Such analysis does not mean that federal courts believed they had the power to invalidate vague penal laws as unconstitutional. Indeed, there is good evidence that courts at the time understood judicial review to consist "of a refusal to give a statute effect as operative law in resolving a case," a notion quite distinct from our modern practice of "'strik-[ing] down' legislation." Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010). The process of refusing

to apply such laws appeared to occur on a case-by-case basis. For instance, notwithstanding his doubts expressed in *Sharp*, Justice Washington, writing for this Court, later rejected the argument that lower courts could arrest a judgment under the same ship-revolt statute because it "does not define the offence of endeavouring to make a revolt." *United States* v. *Kelly*, 11 Wheat. 417, 418 (1826). The Court explained that "it is . . . competent to the Court to give a judicial definition" of "the offence of endeavouring to make a revolt," and that such definition "consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person." *Id.*, at 418–419. In dealing with statutory indeterminacy, federal courts saw themselves engaged in construction, not judicial review as it is now understood.[3]

2

Although vagueness concerns played a role in the strict construction of penal statutes from early on, there is little

[3] Early American state courts also sometimes refused to apply a law they found completely unintelligible, even outside of the penal context. In one antebellum decision, the Pennsylvania Supreme Court did not even attempt to apply a statute that gave the Pennsylvania state treasurer "'as many votes'" in state bank elections as "'were held by *individuals*'" without providing guidance as to which individuals it was referring. *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (1842). Concluding that it had "seldom, if ever, found the language of legislation so devoid of certainty," the court withdrew the case. *Ibid.*; see also *Drake* v. *Drake*, 15 N. C. 110, 115 (1833) ("Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative"). This practice is distinct from our modern vagueness doctrine, which applies to laws that are intelligible but vague.

indication that anyone before the late 19th century believed that courts had the power under the Due Process Clauses to nullify statutes on that ground. Instead, our modern vagueness doctrine materialized after the rise of substantive due process. Following the ratification of the Fourteenth Amendment, corporations began to use that Amendment's Due Process Clause to challenge state laws that attached penalties to unauthorized commercial conduct. In addition to claiming that these laws violated their substantive due process rights, these litigants began—with some success—to contend that such laws were unconstitutionally indefinite. In one case, a railroad company challenged a Tennessee law authorizing penalties against any railroad that demanded "more than a just and reasonable compensation" or engaged in "unjust and unreasonable discrimination" in setting its rates. *Louisville & Nashville R. Co.* v. *Railroad Comm'n of Tenn.*, 19 F. 679, 690 (CC MD Tenn. 1884) (internal quotation marks omitted). Without specifying the constitutional authority for its holding, the Circuit Court concluded that "[n]o citizen . . . can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, under and by force of such indefinite legislation." *Id.*, at 693 (emphasis deleted).

Justice Brewer—widely recognized as "a leading spokesman for 'substantized' due process," Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615, 627 (1965)—employed similar reasoning while riding circuit, though he did not identify the constitutional source of judicial authority to nullify vague laws. In reviewing an Iowa law authorizing fines against railroads for charging more than a "reasonable and just" rate, Justice Brewer mentioned in dictum that "no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Chicago & N. W. R. Co.* v. *Dey*, 35 F. 866, 876 (CC SD Iowa 1888).

Constitutional vagueness challenges in this Court initially met with some resistance. Although the Court appeared to acknowledge the possibility of unconstitutionally indefinite enactments, it repeatedly rejected vagueness challenges to penal laws addressing railroad rates, *Railroad Comm'n Cases*, 116 U. S. 307, 336–337 (1886), liquor sales, *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, 450–451 (1904), and anticompetitive conduct, *Nash* v. *United States*, 229 U. S. 373, 376–378 (1913); *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 108–111 (1909).

In 1914, however, the Court nullified a law on vagueness grounds under the Due Process Clause for the first time. In *International Harvester Co. of America* v. *Kentucky*, 234 U. S. 216 (1914), a tobacco company brought a Fourteenth Amendment challenge against several Kentucky antitrust laws that had been construed to render unlawful "any combination [made] . . . for the purpose or with the effect of fixing a price that was greater or less than the real value of the article," *id.*, at 221. The company argued that by referring to "real value," the laws provided "no standard of conduct that it is possible to know." *Ibid.* The Court agreed. *Id.*, at 223–224. Although it did not specify in that case which portion of the Fourteenth Amendment served as the basis for its holding, *ibid.*, it explained in a related case that the lack of a knowable standard of conduct in the Kentucky statutes "violated the fundamental principles of justice embraced in the conception of due process of law," *Collins* v. *Kentucky*, 234 U. S. 634, 638 (1914).

3

Since that time, the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process. During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, *e. g.*, *Lochner* v. *New York*, 198 U. S. 45, 57 (1905), the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activ-

ity.[4] Among the penal laws it found to be impermissibly vague were a state law regulating the production of crude oil, *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 242–243 (1932), a state antitrust law, *Cline*, 274 U. S., at 453–465, a state minimum-wage law, *Connally*, 269 U. S., at 390–395, and a federal price-control statute, *L. Cohen Grocery Co.*, 255 U. S., at 89–93.[5]

Around the time the Court began shifting the focus of its substantive due process (and equal protection) jurisprudence from economic interests to "discrete and insular minorities," see *United States* v. *Carolene Products Co.*, 304 U. S. 144,

[4] During this time, the Court would apply its new vagueness doctrine outside of the penal context as well. In *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925), a sugar dealer raised a defense to a breach-of-contract suit that the contracts themselves were unlawful under several provisions of the Lever Act, including one making it "'unlawful for any person . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries,' or to agree with another 'to exact excessive prices for any necessaries,'" *id.*, at 238. Applying *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921), which had held that provision to be unconstitutionally vague, the Court rejected the dealer's argument. 267 U. S., at 238–239. The Court explained that "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Id.*, at 239. That doctrine thus applied to penalties as well as "[a]ny other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it." *Ibid.*

[5] Vagueness challenges to laws regulating speech during this period were less successful. Among the laws the Court found to be sufficiently definite included a state law making it a misdemeanor to publish, among other things, materials "'which shall tend to encourage or advocate disrespect for law or for any court or courts of justice,'" *Fox* v. *Washington*, 236 U. S. 273, 275–277 (1915), a federal statute criminalizing candidate solicitation of contributions for "'any political purpose whatever,'" *United States* v. *Wurzbach*, 280 U. S. 396, 398–399 (1930), and a state prohibition on becoming a member of any organization that advocates using unlawful violence to effect "'any political change,'" *Whitney* v. *California*, 274 U. S. 357, 359–360, 368–369 (1927). But see *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931) (holding state statute punishing the use of any symbol "'of opposition to organized government'" to be impermissibly vague).

153, n. 4 (1938), the target of its vagueness doctrine changed as well. The Court began to use the vagueness doctrine to invalidate noneconomic regulations, such as state statutes penalizing obscenity, *Winters*, 333 U. S., at 517–520, and membership in a gang, *Lanzetta*, 306 U. S., at 458.

Successful vagueness challenges to regulations penalizing commercial conduct, by contrast, largely fell by the wayside. The Court, for instance, upheld a federal regulation punishing the knowing violation of an order instructing drivers transporting dangerous chemicals to "'avoid, so far as practicable, . . . driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,'" *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 338–339, 343 (1952). And notwithstanding its earlier conclusion that an Oklahoma law requiring state employees and contractors to be paid "'not less than the current rate of per diem wages in the locality where the work is performed'" was unconstitutionally vague, *Connally*, *supra*, at 393, the Court found sufficiently definite a federal law prohibiting radio broadcasting companies from attempting to compel by threat or duress a licensee to hire "'persons in excess of the number of employees needed by such licensee to perform actual services,'" *United States* v. *Petrillo*, 332 U. S. 1, 3, 6–7 (1947).

In more recent times, the Court's substantive due process jurisprudence has focused on abortions, and our vagueness doctrine has played a correspondingly significant role. In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe* v. *Wade*, 410 U. S. 113 (1973), on the theory that laws prohibiting all abortions save for those done "for the purpose of saving the life of the mother" forced abortionists to guess when this exception would apply on penalty of conviction. See B. Schwartz, The Unpublished Opinions of the Burger Court 116–118 (1988) (reprinting first draft of *Roe*). *Roe*, of course, turned out as a substantive due process opinion. See 410 U. S., at 164.

But since then, the Court has repeatedly deployed the vagueness doctrine to nullify even mild regulations of the abortion industry. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 451–452 (1983) (nullifying law requiring "'that the remains of the unborn child [be] disposed of in a humane and sanitary manner'"); *Colautti*, 439 U. S., at 381 (nullifying law mandating abortionists adhere to a prescribed standard of care if "there is 'sufficient reason to believe that the fetus may be viable'").[6]

In one of our most recent decisions nullifying a law on vagueness grounds, substantive due process was again lurking in the background. In *Morales*, a plurality of this Court insisted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," 527 U. S., at 53, a conclusion that colored its analysis that an ordinance prohibiting loitering was unconstitutionally indeterminate, see *id.*, at 55 ("When vagueness permeates the text of" a penal law "infring[ing] on constitutionally protected rights," "it is subject to facial attack").

I find this history unsettling. It has long been understood that one of the problems with holding a statute "void for 'indefiniteness'" is that "'indefiniteness' . . . is itself an indefinite concept," *Winters*, *supra*, at 524 (Frankfurter, J., dissenting), and we as a Court have a bad habit of using indefinite concepts—especially ones rooted in "due process"—to invalidate democratically enacted laws.

---

[6] All the while, however, the Court has rejected vagueness challenges to laws punishing those on the other side of the abortion debate. When it comes to restricting the speech of abortion opponents, the Court has dismissed concerns about vagueness with the observation that "'we can never expect mathematical certainty from our language,'" *Hill* v. *Colorado*, 530 U. S. 703, 733 (2000), even though such restrictions are arguably "at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades," *id.*, at 774 (KENNEDY, J., dissenting).

B

It is also not clear that our vagueness doctrine can be reconciled with the original understanding of the term "due process of law." Our traditional justification for this doctrine has been the need for notice: "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U. S. 285, 304 (2008); accord, *ante*, at 595. Presumably, that justification rests on the view expressed in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), that "due process of law" constrains the legislative branch by guaranteeing "usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," *id.*, at 277. That justification assumes further that providing "a person of ordinary intelligence [with] fair notice of what is prohibited," *Williams*, *supra*, at 304, is one such usage or mode.[7]

[7] As a general matter, we should be cautious about relying on general theories of "fair notice" in our due process jurisprudence, as they have been exploited to achieve particular ends. In *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), for instance, the Court held that the Due Process Clause imposed limits on punitive damages because the Clause guaranteed "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *id.*, at 574. That was true even though "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts," and "no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 26–27 (1991) (SCALIA, J., concurring in judgment). Even under the view of the Due Process Clause articulated in *Murray's Lessee*, then, we should not allow nebulous principles to supplant more specific, historically grounded rules. See 499 U. S., at 37–38 (opinion of SCALIA, J.).

To accept the vagueness doctrine as founded in our Constitution, then, one must reject the possibility "that the Due Process Clause requires only that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions," which may be all that the original meaning of this provision demands. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 589 (2004) (THOMAS, J., dissenting) (some internal quotation marks omitted); accord, *Turner* v. *Rogers*, 564 U. S. 431, 450 (2011) (THOMAS, J., dissenting). Although *Murray's Lessee* stated the contrary, 18 How., at 276, a number of scholars and jurists have concluded that "considerable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 272 (1985); see also, *e. g.*, *In re Winship*, 397 U. S. 358, 378–382 (1970) (Black, J., dissenting). Others have disagreed. See, *e. g.*, Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1679 (2012) (arguing that, as originally understood, "the principle of due process" required, among other things, that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review").

I need not choose between these two understandings of "due process of law" in this case. JUSTICE ALITO explains why the majority's decision is wrong even under our precedents. See *post*, at 636–639 (dissenting opinion). And more generally, I adhere to the view that "'[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face,'" *Morales*, 527 U. S., at 112 (THOMAS, J., dissenting), and there is no question that ACCA's residual clause meets that description, see *ante*,

at 602 (agreeing with the Government that "there will be straightforward cases under the residual clause").

* * *

I have no love for our residual clause jurisprudence: As I observed when we first got into this business, the Sixth Amendment problem with allowing district courts to conduct factfinding to determine whether an offense is a "violent felony" made our attempt to construe the residual clause "'an unnecessary exercise.'" *James*, 550 U. S., at 231 (dissenting opinion). But the Court rejected my argument, choosing instead to begin that unnecessary exercise. I see no principled way that, four cases later, the Court can now declare that the residual clause has become too indeterminate to apply. Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one. I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct, and I concur only in its judgment.

JUSTICE ALITO, dissenting.

The Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is

void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive.

I

A

Petitioner Samuel Johnson (unlike his famous namesake) has led a life of crime and violence. His presentence investigation report sets out a resume of petty and serious crimes, beginning when he was 12 years old. Johnson's adult record includes convictions for, among other things, robbery, attempted robbery, illegal possession of a sawed-off shotgun, and a drug offense.

In 2010, the Federal Bureau of Investigation (FBI) began monitoring Johnson because of his involvement with the National Socialist Movement, a white-supremacist organization suspected of plotting acts of terrorism. In June of that year, Johnson left the group and formed his own radical organization, the Aryan Liberation Movement, which he planned to finance by counterfeiting United States currency. In the course of the Government's investigation, Johnson "disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives for" his new organization. 526 Fed. Appx. 708, 709 (CA8 2013) (*per curiam*). He also showed the agents an AK–47 rifle, a semiautomatic rifle, a semiautomatic pistol, and a cache of approximately 1,100 rounds of ammunition. Later, Johnson told an undercover agent: "You know I'd love to assassinate some . . . hoodrats as much as the next guy, but I think we really got to stick with high priority targets." Revised Presentence Investigation Report (PSR) ¶15. Among the top targets that he mentioned were "the Mexican consulate," "progressive bookstores," and individuals he viewed as "liberals." *Id.*, ¶16.

In April 2012, Johnson was arrested, and he was subsequently indicted on four counts of possession of a firearm by a felon and two counts of possession of ammunition by a felon, in violation of 18 U. S. C. §§ 922(g) and 924(e). He pleaded guilty to one of the firearms counts, and the District Court sentenced him to the statutory minimum of 15 years' imprisonment under ACCA, based on his prior felony convictions for robbery, attempted robbery, and illegal possession of a sawed-off shotgun.

B

ACCA provides a mandatory minimum sentence for certain violations of § 922(g), which prohibits the shipment, transportation, or possession of firearms or ammunition by convicted felons, persons previously committed to a mental institution, and certain others. Federal law normally provides a maximum sentence of 10 years' imprisonment for such crimes. See § 924(a)(2). Under ACCA, however, if a defendant convicted under § 922(g) has three prior convictions "for a violent felony or a serious drug offense," the sentencing court must impose a sentence of at least 15 years' imprisonment. § 924(e)(1).

ACCA's definition of a "violent felony" has three parts. First, a felony qualifies if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Second, the Act specifically names four categories of qualifying felonies: burglary, arson, extortion, and offenses involving the use of explosives. See § 924(e)(2)(B)(ii). Third, the Act contains what we have called a "residual clause," which reaches any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.*

The present case concerns the residual clause. The sole question raised in Johnson's certiorari petition was whether possession of a sawed-off shotgun under Minnesota law qualifies as a violent felony under that clause. Although Johnson argued in the lower courts that the residual clause is uncon-

stitutionally vague, he did not renew that argument here. Nevertheless, after oral argument, the Court raised the question of vagueness on its own. The Court now holds that the residual clause is unconstitutionally vague in all its applications. I cannot agree.

II

I begin with *stare decisis*. Eight years ago in *James* v. *United States*, 550 U. S. 192 (2007), JUSTICE SCALIA, the author of today's opinion for the Court, fired an opening shot at the residual clause. In dissent, he suggested that the residual clause is void for vagueness. *Id.*, at 230. The Court held otherwise, explaining that the standard in the residual clause "is not so indefinite as to prevent an ordinary person from understanding" its scope. *Id.*, at 210, n. 6.

Four years later, in *Sykes* v. *United States*, 564 U. S. 1 (2011), JUSTICE SCALIA fired another round. Dissenting once again, he argued that the residual clause is void for vagueness and rehearsed the same basic arguments that the Court now adopts. See *id.*, at 33–35; see also *Derby* v. *United States*, 564 U. S. 1047, 1048–1049 (2011) (SCALIA, J., dissenting from denial of certiorari). As in *James*, the Court rejected his arguments. See *Sykes*, 564 U. S., at 15–16. In fact, JUSTICE SCALIA was the *only* Member of the *Sykes* Court who took the position that the residual clause could not be intelligibly applied to the offense at issue. The opinion of the Court, which five Justices joined, expressly held that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" *Id.*, at 15 (quoting *Chicago* v. *Morales*, 527 U. S. 41, 58 (1999) (plurality opinion)). JUSTICE THOMAS' concurrence, while disagreeing in part with the Court's interpretation of the residual clause, did not question its constitutionality. See *Sykes*, 564 U. S., at 16–17 (opinion concurring in judgment). And JUSTICE KAGAN's dissent, which JUSTICE GINSBURG joined, argued that a proper application of the provision required a different re-

sult. See *id.*, at 36. Thus, eight Members of the Court found the statute capable of principled application.

It is, of course, true that "[*s*]*tare decisis* is not an inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). But neither is it an empty Latin phrase. There must be good reasons for overruling a precedent, and there is none here. Nothing has changed since our decisions in *James* and *Sykes*—nothing, that is, except the Court's weariness with ACCA cases.

Reprising an argument that JUSTICE SCALIA made to no avail in *Sykes*, *supra*, at 34 (dissenting opinion), the Court reasons that the residual clause must be unconstitutionally vague because we have had trouble settling on an interpretation. See *ante*, at 598. But disagreement about the meaning and application of the clause is not new. We were divided in *James* and in *Sykes* and in our intervening decisions in *Begay* v. *United States*, 553 U. S. 137 (2008), and *Chambers* v. *United States*, 555 U. S. 122 (2009). And that pattern is not unique to ACCA; we have been unable to come to an agreement on many recurring legal questions. The Confrontation Clause is one example that comes readily to mind. See, *e. g.*, *Williams* v. *Illinois*, 567 U. S. 50 (2012); *Bullcoming* v. *New Mexico*, 564 U. S. 647 (2011); *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009). Our disagreements about the meaning of that provision do not prove that the Confrontation Clause has no ascertainable meaning. Likewise, our disagreements on the residual clause do not prove that it is unconstitutionally vague.

The Court also points to conflicts in the decisions of the lower courts as proof that the statute is unconstitutional. See *ante*, at 601. The Court overstates the degree of disagreement below. For many crimes, there is no dispute that the residual clause applies. And our certiorari docket provides a skewed picture because the decisions that we are asked to review are usually those involving issues on which there is at least an arguable circuit conflict. But in any

event, it has never been thought that conflicting interpretations of a statute justify judicial elimination of the statute. One of our chief responsibilities is to resolve those disagreements, see this Court's Rule 10, not to strike down the laws that create this work.

The Court may not relish the task of resolving residual clause questions on which the circuits disagree, but the provision has not placed a crushing burden on our docket. In the eight years since *James*, we have decided all of three cases involving the residual clause. See *Begay*, *supra*; *Chambers*, *supra*; *Sykes*, *supra*. Nevertheless, faced with the unappealing prospect of resolving more circuit splits on various residual clause issues, see *ante*, at 601, six Members of the Court have thrown in the towel. That is not responsible.

III

Even if we put *stare decisis* aside, the Court's decision remains indefensible. The residual clause is not unconstitutionally vague.

A

The Fifth Amendment prohibits the enforcement of vague criminal laws, but the threshold for declaring a law void for vagueness is high. "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963). Rather, it is sufficient if a statute sets out an "ascertainable standard." *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). A statute is thus void for vagueness only if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U. S. 285, 304 (2008).

The bar is even higher for sentencing provisions. The fair notice concerns that inform our vagueness doctrine are aimed at ensuring that a "'person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982) (quoting *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972)). The fear is that vague laws will "'trap the innocent.'" 455 U. S., at 498. These concerns have less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question. Due process does not require, as Johnson oddly suggests, that a "prospective criminal" be able to calculate the precise penalty that a conviction would bring. Supp. Brief for Petitioner 5; see *Chapman* v. *United States*, 500 U. S. 453, 467–468 (1991) (concluding that a vagueness challenge was "particularly" weak "since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct").

B

ACCA's residual clause unquestionably provides an ascertainable standard. It defines "violent felony" to include any offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii). That language is by no means incomprehensible. Nor is it unusual. There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99-page appendix setting out some of these laws. See App. to Supp. Brief for United States; see also *James*, 550 U. S., at 210, n. 6. If all these laws are unconstitutionally vague, today's decision is not a blast from a sawed-off shotgun; it is a nuclear explosion.

Attempting to avoid such devastation, the Court distinguishes these laws primarily on the ground that almost all of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*."

Ante, at 603 (emphasis in original). The Court thus admits that, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Ante*, at 603–604. Its complaint is that the residual clause "requires application of the 'serious potential risk' standard to an *idealized ordinary case of the crime*." *Ante*, at 604 (emphasis added). Thus, according to the Court, ACCA's residual clause is unconstitutionally vague because its standard must be applied to "an idealized ordinary case of the crime" and not, like the vast majority of the laws in the Solicitor General's appendix, to "real-world conduct."

ACCA, however, makes no reference to "an idealized ordinary case of the crime." That requirement was the handiwork of this Court in *Taylor* v. *United States*, 495 U. S. 575 (1990). And as I will show, the residual clause can reasonably be interpreted to refer to "real-world conduct."[1]

C

When a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). As one treatise puts it, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 38, p. 247 (2012). This

[1] The Court also says that the residual clause's reference to the enumerated offenses is "confusing." *Ante*, at 603. But this is another argument we rejected in *James* v. *United States*, 550 U. S. 192 (2007), and *Sykes* v. *United States*, 564 U. S. 1 (2011), and it is no more persuasive now. Although the risk level varies among the enumerated offenses, all four categories of offenses involve conduct that presents a serious potential risk of harm to others. If the Court's concern is that some of the enumerated offenses do not seem especially risky, all that means is that the statute "sets a low baseline level for risk." *Id.*, at 18 (THOMAS, J., concurring in judgment).

canon applies fully when considering vagueness challenges. In cases like this one, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 571 (1973); see also *Skilling* v. *United States*, 561 U. S. 358, 403 (2010). Indeed, "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.*, at 406 (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895); emphasis deleted); see also *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.).

The Court all but concedes that the residual clause would be constitutional if it applied to "real-world conduct." Whether that is the *best* interpretation of the residual clause is beside the point. What matters is whether it is a reasonable interpretation of the statute. And it surely is that.

First, this interpretation heeds the pointed distinction that ACCA draws between the "element[s]" of an offense and "conduct." Under § 924(e)(2)(B)(i), a crime qualifies as a "violent felony" if one of its "element[s]" involves "the use, attempted use, or threatened use of physical force against the person of another." But the residual clause, which appears in the very next subsection, § 924(e)(2)(B)(ii), focuses on "conduct"—specifically, "conduct that presents a serious potential risk of physical injury to another." The use of these two different terms in § 924(e) indicates that "conduct" refers to things done during the commission of an offense that are not part of the elements needed for conviction. Because those extra actions vary from case to case, it is natural to interpret "conduct" to mean real-world conduct, not the conduct involved in some Platonic ideal of the offense.

Second, as the Court points out, standards like the one in the residual clause almost always appear in laws that call for application by a trier of fact. This strongly suggests that the residual clause calls for the same sort of application.

Third, if the Court is correct that the residual clause is nearly incomprehensible when interpreted as applying to an "idealized ordinary case of the crime," then that is telling evidence that this is not what Congress intended. When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply?

D

Not only does the "real-world conduct" interpretation fit the terms of the residual clause, but the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases.

In *Taylor*, the question before the Court concerned the meaning of "burglary," one of ACCA's enumerated offenses. The Court gave three reasons for holding that a judge making an ACCA determination should generally look only at the elements of the offense of conviction and not to other things that the defendant did during the commission of the offense. First, the Court thought that ACCA's use of the term "convictions" pointed to the categorical approach. The Court wrote: "Section 924(e)(1) refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U. S., at 600. Second, the Court relied on legislative history, noting that ACCA had previously contained a generic definition of burglary and that "the deletion of [this] definition . . . may have been an inadvertent casualty of a complex drafting process." *Id.*, at 589–590, 601. Third, the Court felt that "the practical difficulties and potential unfairness of a factual approach [were] daunting." *Id.*, at 601.

None of these three grounds dictates that the categorical approach must be used in residual clause cases. The second ground, which concerned the deletion of a generic definition

of burglary, obviously has no application to the residual clause. And the first ground has much less force in residual clause cases. In *Taylor*, the Court reasoned that a defendant has a "conviction" for burglary only if burglary is the offense set out in the judgment of conviction. For instance, if a defendant commits a burglary but pleads guilty, under a plea bargain, to possession of burglar's tools, the *Taylor* Court thought that it would be unnatural to say that the defendant had a *conviction* for burglary. Now consider a case in which a gang member is convicted of illegal possession of a sawed-off shotgun and the evidence shows that he concealed the weapon under his coat, while searching for a rival gang member who had just killed his brother. In that situation, it is not at all unnatural to say that the defendant had a conviction for a crime that "involve[d] *conduct* that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii) (emphasis added). At the very least, it would be a reasonable way to describe the defendant's conviction.

The *Taylor* Court's remaining reasons for adopting the categorical approach cannot justify an interpretation that renders the residual clause unconstitutional. While the *Taylor* Court feared that a conduct-specific approach would unduly burden the courts, experience has shown that application of the categorical approach has not always been easy. Indeed, the Court's main argument for overturning the statute is that this approach is unmanageable in residual clause cases.

As for the notion that the categorical approach is more forgiving to defendants, there is a strong argument that the opposite is true, at least with respect to the residual clause. Consider two criminal laws: Injury occurs in 10% of cases involving the violation of statute A, but in 90% of cases involving the violation of statute B. Under the categorical approach, a truly dangerous crime under statute A might not qualify as a violent felony, while a crime with no measurable risk of harm under statute B would count against the defend-

ant. Under a conduct-specific inquiry, on the other hand, a defendant's actual conduct would determine whether ACCA's mandatory penalty applies.

It is also significant that the allocation of the burden of proof protects defendants. The prosecution bears the burden of proving that a defendant has convictions that qualify for sentencing under ACCA. If evidentiary deficiencies, poor recordkeeping, or anything else prevents the prosecution from discharging that burden under the conduct-specific approach, a defendant would not receive an ACCA sentence.

Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. See *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct.

The Court's only reason for refusing to consider this interpretation is that "the Government has not asked us to abandon the categorical approach in residual-clause cases." *Ante*, at 604. But the Court cites no case in which we have suggested that a saving interpretation may be adopted only if it is proposed by one of the parties. Nor does the Court cite any secondary authorities advocating this rule. Cf. Scalia, Reading Law §38 (stating the canon with no such limitation). On the contrary, we have long recognized that it is "our plain duty to adopt that construction which will save [a] statute from constitutional infirmity," where fairly possible. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909). It would be strange if we could fulfill that "plain duty" only when a party asks us to do so. And the Court's refusal to consider a saving interpretation not advocated by the Government is hard

to square with the Court's adoption of an argument that petitioner chose not to raise. As noted, Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument. The Court's refusal to look beyond the arguments of the parties apparently applies only to arguments that the Court does not want to hear.

E

Even if the categorical approach is used in residual clause cases, however, the clause is still not void for vagueness. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on an as-applied basis. *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard* v. *Cartwright*, 486 U. S. 356, 361 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid "only if the enactment is impermissibly vague in *all* of its applications." *Hoffman Estates*, 455 U. S., at 494–495 (emphasis added); see also *Chapman*, 500 U. S., at 467.[2]

[2] This rule is simply an application of the broader rule that, except in First Amendment cases, we will hold that a statute is facially unconstitutional only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). A void-for-vagueness challenge is a facial challenge. See *Hoffman Estates*, 455 U. S., at 494–495, and nn. 5, 6, 7; *Chicago* v. *Morales*, 527 U. S. 41, 79 (1999) (SCALIA, J., dissenting). Consequently, there is no reason why the no-set-of-circumstances rule should not apply in this context. I assume that the Court does not mean to abrogate the no-set-of-circumstances rule in its entirety, but the Court provides no justification for its refusal to apply that rule here. Perhaps the Court has concluded, for some undisclosed reason, that void-for-vagueness claims are different from all other facial challenges not based on the First Amendment. Or perhaps the Court has simply created an ACCA exception.

In concluding that the residual clause is facially void for vagueness, the Court flatly contravenes this rule. The Court admits "that there will be straightforward cases under the residual clause." *Ante*, at 602. But rather than exercising the restraint that our vagueness cases prescribe, the Court holds that the residual clause is unconstitutionally vague even when its application is clear.

The Court's treatment of this issue is startling. Its facial invalidation precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court previously found to fall within the residual clause. See *James*, 550 U. S., at 203–209 (attempted burglary); *Sykes*, 564 U. S., at 7–12 (flight from law enforcement in a vehicle). Still worse, the Court holds that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned. Attempted rape is an example. See, *e. g.*, *Dawson* v. *United States*, 702 F. 3d 347, 351–352 (CA6 2012). Can there be any doubt that "an idealized ordinary case of th[is] crime" "involves conduct that presents a serious potential risk of physical injury to another"? How about attempted arson,[3] attempted kidnapping,[4] solicitation to commit aggravated assault,[5] possession of a loaded weapon with the intent to use it unlawfully against another person,[6] possession of a weapon in prison,[7] or compelling a person to act as a prostitute?[8] Is there much doubt that those offenses "involve conduct that presents a serious potential risk of physical injury to another"?

---

[3] *United States* v. *Rainey*, 362 F. 3d 733, 735–736 (CA11) (*per curiam*), cert. denied, 541 U. S. 1081 (2004).

[4] *United States* v. *Kaplansky*, 42 F. 3d 320, 323–324 (CA6 1994) (en banc).

[5] *United States* v. *Benton*, 639 F. 3d 723, 731–732 (CA6), cert. denied, 565 U. S. 1044 (2011).

[6] *United States* v. *Lynch*, 518 F. 3d 164, 172–173 (CA2 2008), cert. denied, 555 U. S. 1177 (2009).

[7] *United States* v. *Boyce*, 633 F. 3d 708, 711–712 (CA8 2011), cert. denied, 565 U. S. 1116 (2012).

[8] *United States* v. *Brown*, 273 F. 3d 747, 749–751 (CA7 2001).

Transforming vagueness doctrine, the Court claims that we have never actually *held* that a statute may be voided for vagueness only when it is vague in all its applications. But that is simply wrong. In *Hoffman Estates*, we reversed a Seventh Circuit decision that voided an ordinance prohibiting the sale of certain items. See 455 U. S., at 491. The Seventh Circuit struck down the ordinance because it was "unclear in *some* of its applications," but we reversed and emphasized that a law is void for vagueness "only if [it] is impermissibly vague in all of its applications." *Id.*, at 494–495; see also *id.*, at 495, n. 7 (collecting cases). Applying that principle, we held that the "facial challenge [wa]s unavailing" because "at least some of the items sold . . . [we]re covered" by the ordinance. *Id.*, at 500. These statements were not dicta. They were the holding of the case. Yet the Court does not even mention this binding precedent.

Instead, the Court says that the facts of two *earlier* cases support a broader application of the vagueness doctrine. See *ante*, at 602–603. That, too, is incorrect. Neither case remotely suggested that mere overbreadth is enough for facial invalidation under the Fifth Amendment.

In *Coates* v. *Cincinnati*, 402 U. S. 611, 612 (1971), we addressed an ordinance that restricted free assembly and association rights by prohibiting "annoying" conduct. Our analysis turned in large part on those First Amendment concerns. In fact, we specifically explained that the "vice of the ordinance lies not alone in its violation of the due process standard of vagueness." *Id.*, at 615. In the present case, by contrast, no First Amendment rights are at issue. Thus, *Coates* cannot support the Court's rejection of our repeated statements that "vagueness challenges to statutes which *do not involve First Amendment freedoms* must be examined in light of the facts . . . at hand." *Mazurie*, *supra*, at 550 (emphasis added).

Likewise, *L. Cohen Grocery Co.*, 255 U. S. 81, proves precisely the opposite of what the Court claims. In that case,

we struck down a statute prohibiting "'unjust or unreasonable rate[s]'" because it provided no "ascertainable standard of guilt" and left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.*, at 89. The clear import of this language is that the law at issue was impermissibly vague in all applications. And in the years since, we have never adopted the majority's contradictory interpretation. On the contrary, we have characterized the case as involving a statute that could "not constitutionally be applied to any set of facts." *United States* v. *Powell*, 423 U. S. 87, 92 (1975). Thus, our holdings and our dicta prohibit the Court's expansion of the vagueness doctrine. The Constitution does not allow us to hold a statute void for vagueness unless it is vague in all its applications.

IV

Because I would not strike down ACCA's residual clause, it is necessary for me to address whether Johnson's conviction for possessing a sawed-off shotgun qualifies as a violent felony. Under either the categorical approach or a conduct-specific inquiry, it does.

A

The categorical approach requires us to determine whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James*, 550 U. S., at 208. This is an "inherently probabilistic" determination that considers the circumstances and conduct that ordinarily attend the offense. *Id.*, at 207. The mere fact that a crime *could* be committed without a risk of physical harm does not exclude it from the statute's reach. See *id.*, at 207–208. Instead, the residual clause speaks of "potential risk[s]," § 924(e)(2)(B)(ii), a term suggesting "that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty," *id.*, at 207–208.

Under these principles, unlawful possession of a sawed-off shotgun qualifies as a violent felony. As we recognized in *District of Columbia* v. *Heller*, 554 U. S. 570, 625 (2008), sawed-off shotguns are "not typically possessed by law-abiding citizens for lawful purposes." Instead, they are uniquely attractive to violent criminals. Much easier to conceal than long-barreled shotguns used for hunting and other lawful purposes, short-barreled shotguns can be hidden under a coat, tucked into a bag, or stowed under a car seat. And like a handgun, they can be fired with one hand—except to more lethal effect. These weapons thus combine the deadly characteristics of conventional shotguns with the more convenient handling of handguns. Unlike those common firearms, however, they are not typically possessed for lawful purposes. And when a person illegally possesses a sawed-off shotgun during the commission of a crime, the risk of violence is seriously increased. The ordinary case of unlawful possession of a sawed-off shotgun therefore "presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

Congress' treatment of sawed-off shotguns confirms this judgment. As the Government's initial brief colorfully recounts, sawed-off shotguns were a weapon of choice for gangsters and bank robbers during the Prohibition Era. See Brief for United States 4.[9] In response, Congress enacted the National Firearms Act of 1934, which required

---

[9] Al Capone's south-side Chicago henchmen used sawed-off shotguns when they executed their rivals from Bugs Moran's north-side gang during the infamous Saint Valentine's Day Massacre of 1929. See 7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms, N. Y. Times, Feb. 15, 1929, p. A1. Wild Bill Rooney was gunned down in Chicago by a "sawed-off shotgun [that] was pointed through a rear window" of a passing automobile. Union Boss Slain by Gang in Chicago, N. Y. Times, Mar. 20, 1931, p. 52. And when the infamous outlaws Bonnie and Clyde were killed by the police in 1934, Clyde was found "clutching a sawed-off shotgun in one hand." Barrow and Woman Are Slain by Police in Louisiana Trap, N. Y. Times, May 24, 1934, p. A1.

individuals possessing certain especially dangerous weapons—including sawed-off shotguns—to register with the Federal Government and pay a special tax. 26 U. S. C. §§ 5845(a)(1)–(2). The Act was passed on the understanding that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a . . . sawed-off shotgun." H. R. Rep. No. 1780, 73d Cong., 2d Sess., 1 (1934). As amended, the Act imposes strict registration requirements for any individual wishing to possess a covered shotgun, see, *e. g.*, §§ 5822, 5841(b), and illegal possession of such a weapon is punishable by imprisonment for up to 10 years. See §§ 5861(b)–(d), 5871. It is telling that this penalty exceeds that prescribed by federal law for quintessential violent felonies.[10] It thus seems perfectly clear that Congress has long regarded the illegal possession of a sawed-off shotgun as a crime that poses a serious risk of harm to others.

The majority of States agree. The Government informs the Court, and Johnson does not dispute, that 28 States have followed Congress' lead by making it a crime to possess an unregistered sawed-off shotgun, and 11 other States and the District of Columbia prohibit private possession of sawed-off shotguns entirely. See Brief for United States 8–9 (collecting statutes). Minnesota, where petitioner was convicted, has adopted a blanket ban, based on its judgment that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever." *State* v. *Ellenberger*, 543 N. W. 2d 673, 676 (Minn.

[10] See, *e. g.*, 18 U. S. C. § 111(a) (physical assault on federal officer punishable by not more than eight years' imprisonment); § 113(a)(7) (assault within maritime or territorial jurisdiction resulting in substantial bodily injury to an individual under the age of 16 punishable by up to five years' imprisonment); § 117(a) ("assault, sexual abuse, or serious violent felony against a spouse or intimate partner" by a habitual offender within maritime or territorial jurisdiction punishable by up to five years' imprisonment, except in cases of "substantial bodily injury").

App. 1996) (internal quotation marks omitted). Possession of a sawed-off shotgun in Minnesota is thus an inherently criminal act. It is fanciful to assume that a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is unlikely to use that weapon in violent ways.

B

If we were to abandon the categorical approach, the facts of Johnson's offense would satisfy the residual clause as well. According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs. When police responded to reports of drug activity in a parking lot, they were told by two people that "Johnson and another individual had approached them and offered to sell drugs." PSR ¶45. The police then searched the vehicle where Johnson was seated as a passenger, and they found a sawed-off shotgun and five bags of marijuana. Johnson admitted that the gun was his.

Understood in this context, Johnson's conduct posed an acute risk of physical injury to another. Drugs and guns are never a safe combination. If one of his drug deals had gone bad or if a rival dealer had arrived on the scene, Johnson's deadly weapon was close at hand. The sawed-off nature of the gun elevated the risk of collateral damage beyond any intended targets. And the location of the crime—a public parking lot—significantly increased the chance that innocent bystanders might be caught up in the carnage. This is not a case of "mere possession" as Johnson suggests. Brief for Petitioner i. He was not storing the gun in a safe, nor was it a family heirloom or collector's item. He illegally possessed the weapon in case he needed to use it during another crime. A judge or jury could thus conclude that Johnson's offense qualified as a violent felony.

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of

serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

Syllabus

OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in the petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of State. Pp. 656–681.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 656–663.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences. Pp. 656–659.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of

---

*Together with No. 14–562, *Tanco et al.* v. *Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575. In 2013, the federal Defense of Marriage Act was also struck down. *United States* v. *Windsor*, 570 U. S. 744. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 659–663.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 663–680.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e. g.*, *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long

protected. See, *e. g.*, *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 663–665.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e. g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at 772. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to

marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 665–671.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e. g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, *supra*, at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 671–675.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The state laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 675–676.

Syllabus

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. The respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 676–680.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 680–681.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 686. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 713. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 721. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 736.

Mary L. Bonauto argued the cause for petitioners in all cases on Question 1. With her on the briefs in No. 14–571 were *Carole M. Stanyar*, *Robert A. Sedler*, *Kenneth M. Mogill*, and *Dana M. Nessel*.

Counsel

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* on Question 1 urging reversal. With him on the brief were *Acting Associate Attorney General Delery*, *Acting Assistant Attorneys General Gupta* and *Mizer*, *Deputy Solicitor General Gershengorn*, *Deputy Assistant Attorneys General Brinkmann*, *Friel*, and *Karlan*, *Eric J. Feigin*, *Diana K. Flynn*, *Douglas N. Letter*, *Sharon M. McGowan*, *Michael Jay Singer*, *Robert A. Koch*, *Abby C. Wright*, and *Jeffrey E. Sandberg*.

John J. Bursch, Special Assistant Attorney General of Michigan, argued the cause for respondents in all cases on Question 1. With him on the briefs in No. 14–571 were *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Ann Sherman*, Assistant Solicitor General.

Douglas Hallward-Driemeier argued the cause for petitioners in all cases on Question 2. With him on the briefs in No. 14–562 were *Shannon P. Minter*, *David C. Codell*, *Christopher F. Stoll*, *Amy Whelan*, *Abby R. Rubenfeld*, *Phillip F. Cramer*, *John L. Farringer*, *Maureen T. Holland*, and *Regina M. Lambert*. *Alphonse A. Gerhardstein*, *Jennifer L. Branch*, *Jacklyn Gonzales Martin*, *Susan L. Sommer*, *Omar Gonzalez-Pagan*, *James D. Esseks*, *Steven R. Shapiro*, *Joshua A. Block*, *Chase B. Strangio*, *Ria Tabacco Mar*, *Louise Melling*, *Jon W. Davidson*, *Paul D. Castillo*, *Camilla B. Taylor*, and *Ellen Essig* filed briefs for petitioners in No. 14–556 on Question 2.

Joseph F. Whalen, Associate Solicitor General of Tennessee, argued the cause for respondents in all cases on Question 2. With him on the briefs in No. 14–562 were *Herbert H. Slatery III*, Attorney General of Tennessee, *Martha A. Campbell* and *Kevin G. Steiling*, Deputy Attorneys General, and *Alexander S. Rieger*, Assistant Attorney General. *Michael DeWine*, Attorney General of Ohio, *Eric E. Murphy*, State Solicitor, and *Stephen P. Carney* and *Peter T. Reed*,

Deputy Solicitors, filed a brief for respondent in No. 14–556 on Question 2.

Daniel J. Canon, *Laura Landenwich*, *Shannon Fauver*, *Dawn Elliott*, *Messrs. Esseks*, *Shapiro*, *Block*, and *Strangio*, *Leslie Cooper*, *Ms. Melling*, *Jeffrey L. Fisher*, *Brian Wolfman*, and *William E. Sharp* filed briefs for petitioners in No. 14–574 on both questions.

Leigh Gross Latherow, *William H. Jones, Jr.*, and *Gregory L. Monge* filed a brief for respondent in No. 14–574 on both questions.†

---

†Briefs of *amici curiae* urging reversal in all cases were filed for the State of Hawaii by *Russell A. Suzuki*, Attorney General, *Girard D. Lau*, Solicitor General, *Kimberly T. Guidry*, First Deputy Solicitor General, and *Robert T. Nakatsuji*, Deputy Solicitor General; for the Commonwealth of Massachusetts et al. by *Maura Healey*, Attorney General of Massachusetts, and *Jonathan B. Miller*, *Genevieve C. Nadeau*, and *Amanda R. Mangaser*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Joseph A. Foster* of New Hampshire, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the State of Minnesota by *Lori Swanson*, Attorney General, *Alan I. Gilbert*, Solicitor General, and *Jacob Campion*, Assistant Attorney General; for the Commonwealth of Virginia by *Mark R. Herring*, Attorney General, *Stuart A. Raphael*, Solicitor General, *Cynthia E. Hudson*, Chief Deputy Attorney General, *Trevor S. Cox*, Deputy Solicitor General, *Cynthia V. Bailey*, Deputy Attorney General, *Allyson K. Tysinger*, Senior Assistant Attorney General, and *Carly L. Rush*, Assistant Attorney General; for The Alliance: State Advocates for Women's Rights and Gender Equality by *Kathleen M. O'Sullivan*; for the American Academy of Matrimonial Lawyers et al. by *Diana Raimi* and *Brian C. Vertz*; for the American Federation of Labor and Congress of Industrial Organizations et al. by *Alice O'Brien*, *Jason Walta*, *Lynn K. Rhinehart*, *H. Craig Becker*, *Judith A. Scott*, *Nicole G. Berner*, and *Patrick J. Szymanski*; for the American Humanist Association et al. by *Elizabeth L. Hileman*, *David A. Niose*, and *Edward Tabash*; for the American Psychological Association et al. by

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow per-

---

Paul M. Smith, *Nathalie F. P. Gilfoyle*, and *Aaron M. Panner*; for the American Public Health Association et al. by *Boris Bershteyn*, *Sheree R. Kanner*, *Kenneth Y. Choe*, and *Daniel Bruner*; for the American Sociological Association by *Carmine D. Boccuzzi, Jr.*; for Americans United for Separation of Church and State by *Charles A. Rothfeld*, *Miriam R. Nemetz*, *Richard B. Katskee*, *Ayesha N. Khan*, *Alex J. Luchenitser*, and *Hannah Y. S. Chanoine*; for the Anti-Defamation League et al. by *Gregory E. Ostfeld*, *James P. Madigan*, *Steven M. Freeman*, *Hilarie Bass*, *Elliot H. Scherker*, and *Brigid F. Cech Samole*; for Bay Area Lawyers for Individual Freedom et al. by *Jerome C. Roth* and *Amelia L. B. Sargent*; for BiLaw by *Kyle C. Velte*, *Naomi Mezey*, *Ann Tweedy*, and *Diana Adams*; for the California Council of Churches et al. by *Eric Alan Isaacson* and *Stacey Marie Kaplan*; for the Campaign for Southern Equality et al. by *Cristina Alonso*, *Sylvia H. Walbolt*, *Meghann K. Burke*, *W. O. Brazil III*, *S. Luke Largess*, *Jacob H. Sussman*, *John W. Gresham*, and *Robert B. McDuff*; for the Cato Institute by *William N. Eskridge, Jr.*, and *Ilya Shapiro*; for the Cleveland Choral Arts Association Inc., aka The North Coast Men's Chorus, by *Harlan D. Karp* and *Tina R. Haddad*; for the Columbia Law School Sexuality and Gender Law Clinic by *Suzanne B. Goldberg* and *Henry P. Monaghan*; for Conflict of Law Scholars by *Robert A. Long* and *Tobias Barrington Wolff*, *pro se*; for Conflict of Laws and Family Law Professors by *Sean M. SeLegue*, *Trenton H. Norris*, *Marjory A. Gentry*, *John S. Throckmorton*, and *Joanna L. Grossman*; for the Constitutional Accountability Center for *Douglas T. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, and *Judith E. Schaeffer*; for Equality Ohio et al. by *Alan B. Morrison*; for the Experiential Learning Lab at New York University School of Law by *Peggy Cooper Davis* and *Aderson Bellegarde François*; for the Family Equality Council et al. by *Katherine Keating* and *William J. Hibsher*; for Family Law Scholars by *E. Joshua Rosenkranz* and *Joan Heifetz Hollinger*, *pro se*; for Freedom to Marry by *Walter Dellinger* and *Anton Metlitsky*; for Garden State Equality by *Lawrence S. Lustberg* and *Joseph A. Pace*; for GLMA: Health Professionals Advancing LGBT Equality et al. by *Nicholas M. O'Donnell* and *Hector Vargas*; for Historians of Marriage et al. by *Pratik A. Shah* and *Jessica M. Weisel*; for Howard University School of Law Civil Rights Clinic by *Mr. François* and *Benjamin G. Shatz*; for the Human Rights Campaign et al. by *Roberta A. Kaplan*, *Andrew J. Ehrlich*, *Jaren Janghorbani*, and *Dale Carpenter*; for Human Rights Watch et al. by *Richard L. Levine*, *Robert T. Vlasis III*, and *Anna*

sons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

M. Pohl; for Indiana University by *Jon Laramore*, *D. Lucetta Pope*, *Jane Dall Wilson*, and *Daniel E. Pulliam*; for the Institute for Justice by *William H. Mellor*, *Dana Berliner*, *Jeffrey T. Rowes*, and *Robert J. McNamara*; for Langley Hill Friends Meeting by *J. E. McNeil*; for Law Enforcement Officers et al. by *Hunter T. Carter* and *Matthew S. Trokenheim*; for Legal Services NYC by *Owen C. Pell*; for LGBT Student Organizations at Undergraduate, Graduate, and Professional Schools by *Andrew Melzer* and *Deborah Marcuse*; for the Liberty Education Forum by *Craig Engle*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John Paul Schnapper-Casteras*, *Sherrilyn Ifill*, *Janai Nelson*, *Christina Swarns*, *Jin Hee Lee*, *Rachel M. Kleinman*, and *Marshall W. Taylor*; for the National Family Civil Rights Center by *Douglas J. Callahan*; for the National Women's Law Center et al. by *Emily J. Martin*, *Marcia D. Greenberger*, *Nan D. Hunter*, *Barbara B. Brown*, *Stephen B. Kinnard*, and *Jennifer S. Baldocchi*; for Marriage Equality USA by *Martin N. Buchanan*; for the Mattachine Society of Washington, D. C., by *Paul M. Thompson*, *Lisa A. Linsky*, *Melissa Nott Davis*, *Michael R. Huttenlocher*, and *Mary D. Hallerman*; for the Organization of American Historians by *Catherine E. Stetson* and *Mary Helen Wimberly*; for Outserve-Servicemembers Legal Defense Network et al. by *Abbe David Lowell* and *Christopher D. Man*; for PFLAG, Inc., by *Andrew J. Davis* and *Jiyun Cameron Lee*; for the President of the House of Deputies of the Episcopal Church et al. by *Jeffrey S. Trachtman*, *Norman C. Simon*, *Jason M. Moff*, and *Kurt M. Denk*; for Scholars of the Constitutional Rights of Children by *Catherine E. Smith*; for Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders et al. by *Jonathan Jacob Nadler*; for Survivors of Sexual Orientation Change Therapies by *Sanford Jay Rosen*, *Gay Crosthwait Grunfeld*, and *Benjamin Bien-Kahn*; for Carlos A. Ball et al. by *Paul J. Hall*; for Ashutosh Bhagwat et al. by *Lori Alvino McGill* and *Diane M. Soubly*; for Stephen Clark by *Joseph P. Lombardo* and *Ilya Somin*; for Gary J. Gates by *J. Scott Ballenger* and *Melissa Arbus Sherry*; for Harold Hongju Koh et al. by *Ruth N. Borenstein* and *Marc A. Hearron*; for Lawrence J. Korb et al. by *Carter G. Phillips*, *Joseph R. Guerra*, and *Eamon P. Joyce*; for Douglas Laycock et al. by *Mr. Laycock*, *pro se*; for Kenneth B. Mehlman et al. by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Dina B. Mishra*, *Sean R. Gallagher*, and *Bennett L. Cohen*; for John K. Olson by

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one

G. Eric Brunstad, Jr., *Dennis H. Hranitzky*, and *Kate M. O'Keeffe*; for Kristen M. Perry et al. by *Theodore B. Olson*, *Matthew D. McGill*, *Amir C. Tayrani*, *Chantale Fiebig*, *David Boise*, *Joshua I. Schiller*, *Theodore J. Boutrous, Jr.*, *Theane Evangelis*, *Enrique A. Monagas*, *Charles B. Lustig*, and *Andrew M. Hendrick*; for Laurence H. Tribe et al. by *Christopher J. Wright* and *Timothy J. Simeone*; for 92 Plaintiffs in Marriage Cases in Alabama et al. by *Richard D. Bernsetein*, *Wesley R. Powell*, and *Mary J. Eaton*; for 156 Elected Officials and Former Officeholders by *Gregory L. Diskant*, *Travis J. Tu*, and *Jonah M. Knobler*; for 167 Members of the U. S. House of Representatives et al. by *Joseph F. Tringali* and *Heather C. Sawyer*; for 226 U. S. Mayors et al. by *Michael N. Feuer*, *Blithe Smith Bock*, *Lisa S. Berger*, *Dennis Herrera*, *Ronald P. Flynn*, *Christine Van Aken*, and *Mollie M. Lee*; and for 379 Employers et al. by *Susan Baker Manning*, *Michael L. Whitlock*, and *John A. Polito*.

William C. Hubbard, *David A. O'Neil*, and *Steven S. Michaels* filed a brief for the American Bar Association as *amicus curiae* urging reversal in Nos. 14–571 and 14–574.

Briefs of *amici curiae* urging reversal in No. 14–556 were filed for the County of Cuyahoga, Ohio, by *Majeed G. Makhlouf*, *Awatef Assad*, and *Doron M. Kalir*; for the Donaldson Adoption Institute et al. by *Aaron M. Tidman*, *A. W. Phinney III*, and *Jonathan A. Shapiro*; and for Chris Kluwe et al. by *John A. Dragseth* and *Timothy R. Holbrook*.

Michael L. Pitt filed a brief for Lisa Brown as *amicus curiae* urging reversal in No. 14–571.

Briefs of *amici curiae* urging affirmance in all cases were filed for the State of Alabama by *Luther Strange*, Attorney General, *Andrew L. Brasher*, Solicitor General, *David A. Cortman*, *James A. Campbell*, *David Austin R. Nimocks*, and *Douglas G. Wardlow*; for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, and *S. Kyle Duncan*, Special Assistant Attorney General, *Sean D. Reyes*, Attorney General of Utah, *Parker Douglas*, Utah Federal Solicitor, and *Ken Paxton*, Attorney General of Texas, and by the Attorneys General for their respective States as follows: *Craig W. Richards* of Alaska, *Mark Brnovic* of Arizona, *Leslie Rutledge* of Arkansas, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Marty J. Jackley* of South Dakota, and *Patrick Morissey* of West Virginia; for the State of South

man and one woman. See, *e. g.*, Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev. Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are

---

Carolina by *Alan Wilson*, Attorney General, *Robert D. Cook*, Solicitor General, *Brendan McDonald* and *Ian Weschler*, Assistant Attorneys General, and *J. Emory Smith, Jr.*, Deputy Solicitor General; for Agudath Israel of America by *Larry Loigman*; for the American College of Pediatricians et al. by *David C. Walker*; for Catholic Answers by *Charles S. LiMandri*; for CatholicVote.org Education Fund by *Patrick T. Gillen*; for the Committee for Justice by *Meir Katz* and *Curt Levey*; for Concerned Women for America by *Steven W. Fitschen*; for the Family Research Council by *Paul Benjamin Linton* and *Christopher M. Gacek*; for the Family Trust Foundation of Kentucky, Inc., by *Stanton L. Cave*; for the Foundation for Moral Law by *John A. Eidsmoe*; for Judicial Watch, Inc., by *James F. Peterson* and *Meredith L. Di Liberto*; for the Institute for Marriage and Public Policy et al. by *Teresa Stanton Collett*; for the International Conference of Evangelical Endorsers by *Arthur A. Schulcz, Sr.*; for Leaders of the 2012 Republican National Convention Committee on the Platform et al. by *James Bopp, Jr.*, and *Michael P. Laffey*; for Liberty Scholars et al. by *David R. Upham*; for the Lighted Candle Society by *George M. Weaver* and *John L. Harmer*; for Major Religious Organizations by *Alexander Dushku, R. Shawn Gunnarson*, and *Carl H. Esbeck*; for Mike Huckabee Policy Solutions et al. by *Jeffrey S. Wittenbrink*; for the National Coalition of Black Pastors et al. by *Richard Thompson, Erin Mersino*, and *William R. Wagner*; for the North Carolina Values Coalition et al. by *Deborah J. Dewart*; for Organizations and Scholars of Gender-Diverse Parenting by *Edward H. Trent* and *Cecilia M. Wood*; for Organizations that Promote Biological Parenting by *Timothy Tardibono*; for the Parents and Friends of Ex-Gays & Gays by *Dean R. Broyles*; for ProtectMarriage.com–Yes on 8 et al. by *Andrew P. Pugno*; for Public Advocate of the United States et al. by *William J. Olson, Herbert W. Titus, Jeremiah L. Morgan, Kerry L. Morgan, J. Mark Brewer*, and *Mark J. Fitzgibbons*; for the Public Affairs Campaign et al. by *John C. Eastman* and *Anthony T. Caso*; for Religious Organizations et al. by *Kelly J. Shackelford, Jeffrey C. Mateer*, and *Hiram S. Sasser III*; for the Ruth Institute et al. by *Sharee S. Langenstein*; for Same-Sex Attracted Men and Their Wives by *Darrin K. Johns*; for Scholars of Fertility and Marriage by *James R. Tate*; for Scholars of History and Related Disciplines by *Charles J. Cooper, Howard C. Nielson, Jr.*, and *Howard N. Slugh*; for Scholars of Originalism by *William C. Duncan*; for Scholars of the Welfare of Women, Children, and

deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Underprivileged Populations by *Messrs. Eastman* and *Caso*, and *Lynne Marie Kohm*; for the Southeastern Legal Foundation by *Shannon Lee Goessling*; for the Texas Eagle Forum et al. by *Andrew L. Schlafly*; for Texas Values by *David Lill*; for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr., Jeffrey Hunter Moon, Michael F. Moses*, and *Hillary E. Byrnes*; for Wyoming Legislators et al. by *Herbert K. Doby* and *Nathaniel S. Hibben*; for Ryan T. Anderson by *Michael F. Smith*; for Heather Barwick et al. by *David Boyle*; for Robert J. Bentley, Governor of Alabama, by *Algert S. Agricola, Jr.*, and *David B. Byrne, Jr.*; for David Boyle, by *Mr. Boyle, pro se*; for Theodore Coates by *Mr. Coates, pro se*; for Jason Feliciano et al. by *Sandra F. Gilbert*; for Lary S. Larson by *Sean J. Coletti*; for Richard A. Lawrence by *Mr. Lawrence, pro se*; for Algirdas M. Liepas, by *Mr. Liepas, pro se*; for Robert Oscar Lopez et al. by *Mr. Boyle*; for Earl M. Maltz et al. by *Herbert G. Grey*; for C. L. "Butch" Otter, Governor of Idaho, by *Gene C. Schaerr* and *Thomas C. Perry*; for Judith Reisman et al. by *Mathew D. Stave, Anita L. Stave, Horatio G. Mihet*, and *Mary E. McAlister*; for David A. Robinson by *Mr. Robinson, pro se*; for Jon Simmons by *Kevin E. Green*; for Dawn Stefanowicz et al. by *Mr. Boyle*; for 47 Scholars by *Robert P. George*; for 54 International and Comparative Law Experts from 27 Countries et al. by *Lynn D. Wardle, W. Cole Durham, Jr.*, and *Robert T. Smith*; for 57 Members of U. S. Congress by *D. John Sauer*; and for 100 Scholars of Marriage by *Gene C. Schaerr*.

Briefs of *amici curiae* urging affirmance in No. 14–571 were filed for American Family Association-Michigan by *Stephen M. Crampton, Thomas L. Brejcha*, and *Mr. Gillen*; and for the Michigan Catholic Conference by *James Walsh* and *Thomas J. Rheaume, Jr.*

Ronald D. Ray and *Richard L. Masters* filed a brief for 106 Members of the Kentucky General Assembly as *amici curiae* urging affirmance in No. 14–574.

Briefs of *amici curiae* were filed in all cases for Citizens United for the Individual Freedom to Define Marriage by *D'Arcy Winston Straub*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the General Conference of Seventh-day Adventists et al. by *Eric C. Rassbach, Hannah C. Smith, Asma T. Uddin, Todd McFarland*, and *Andrew G. Schultz*; for the Leadership Conference on Civil and Human Rights et al. by *Matthew M. Hoffman, Abigail Hemani, Wade J. Hender-*

The petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer* v. *Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. 1118 (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who

---

son, *Lisa M. Bornstein*, and *Joshua M. Daniels*; for Tri Valley Law, P. C., by *Marc A. Greendorfer*; for W. Burlette Carter by *Ms. Carter, pro se*; for Mae Kuykendall et al. by *Ms. Kuykendall, pro se*; for Dr. Paul McHugh by *Gerard V. Bradley*; and for Daniel N. Robinson by *Kevin T. Snider*.

find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point.

Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits

only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man

and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally Cott, *supra*; Coontz, *supra*; H. Hartog, Man and Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and wide-

spread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late-20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court over-

ruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States* v. *Windsor*, 570 U. S. 744 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at 764.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on

principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection* v. *Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced

to any formula." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki* v. *Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner* v. *Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e. g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed.* v. *LaFleur*,

414 U. S. 632, 639–640 (1974); *Griswold*, *supra*, at 486; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e. g.*, *Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e. g.*, *Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held "the right to marry is of fundamental impor-

tance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at 772. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving*, *supra*, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at 763. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925);

Meyer, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384 (quoting *Meyer*, *supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at 772. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at 772.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1900).

In *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general

free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at 765. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is

now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.*, at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving*, 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how

constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the *imprimatur* of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving*, the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treat-

ment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 660, invidious sex-based classifications in marriage remained

common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano* v. *Westcott*, 443 U. S. 76 (1979); *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B.* v. *S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt* v. *Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence*, the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the

legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: Same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e. g.*, *Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker* v. *Nelson* must be and now is overruled, and the state laws challenged by the petitioners in these cases are now held invalid to the extent they exclude

same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic

principle in *Schuette* v. *BAMN*, 572 U. S. 291 (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at 312. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.*, at 311. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.*, at 313. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Ibid.* It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law crimi-

nalizing same-sex intimacy. See 478 U. S., at 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may

exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen* v. *Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the princi-

ples that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complications" in the law of domestic relations. *Williams* v. *North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to

recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

APPENDIXES

A

State and Federal Judicial Decisions Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. *Howerton*, 673 F. 2d 1036 (CA9 1982)
Smelt v. *County of Orange*, 447 F. 3d 673 (CA9 2006)

Citizens for Equal Protection v. *Bruning*, 455 F. 3d 859 (CA8 2006)

Windsor v. *United States*, 699 F. 3d 169 (CA2 2012)

Massachusetts v. *Department of Health and Human Services*, 682 F. 3d 1 (CA1 2012)

Perry v. *Brown*, 671 F. 3d 1052 (CA9 2012)

Latta v. *Otter*, 771 F. 3d 456 (CA9 2014)

Baskin v. *Bogan*, 766 F. 3d 648 (CA7 2014)

Bishop v. *Smith*, 760 F. 3d 1070 (CA10 2014)

Bostic v. *Schaefer*, 760 F. 3d 352 (CA4 2014)

Kitchen v. *Herbert*, 755 F. 3d 1193 (CA10 2014)

DeBoer v. *Snyder*, 772 F. 3d 388 (CA6 2014)

Latta v. *Otter*, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. *Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)

Citizens for Equal Protection, Inc. v. *Bruning*, 290 F. Supp. 2d 1004 (Neb. 2003)

Citizens for Equal Protection, Inc. v. *Bruning*, 368 F. Supp. 2d 980 (Neb. 2005)

Wilson v. *Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)

Smelt v. *County of Orange*, 374 F. Supp. 2d 861 (CD Cal. 2005)

Bishop v. *Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (ND Okla. 2006)

Massachusetts v. *Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

Gill v. *Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

Perry v. *Schwarzenegger*, 704 F. Supp. 2d 921 (ND Cal. 2010)

Dragovich v. *Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

Golinski v. *Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

Dragovich v. *Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

Windsor v. *United States*, 833 F. Supp. 2d 394 (SDNY 2012)

Pedersen v. *Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

Jackson v. *Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

Sevcik v. *Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

Merritt v. *Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

Gray v. *Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

Lee v. *Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

Kitchen v. *Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

Obergefell v. *Wymyslo*, 962 F. Supp. 2d 968 (SD Ohio 2013)

Bishop v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

Bourke v. *Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

Lee v. *Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

Bostic v. *Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

De Leon v. *Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

Tanco v. *Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

DeBoer v. *Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

Henry v. *Himes*, 14 F. Supp. 3d 1036 (SD Ohio 2014)

Latta v. *Otter*, 19 F. Supp. 3d 1054 (Idaho 2014)

Geiger v. *Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)

Evans v. *Utah*, 21 F. Supp. 3d 1192 (Utah 2014)

Whitewood v. *Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)

Wolf v. *Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)

Baskin v. *Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)

Love v. *Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)

Burns v. *Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)

Bowling v. *Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)

Brenner v. *Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)

Robicheaux v. *Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)

General Synod of the United Church of Christ v. *Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)
Hamby v. *Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)
Fisher-Borne v. *Smith*, 14 F. Supp. 3d 695 (MDNC 2014)
Majors v. *Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)
Connolly v. *Jeanes*, 73 F. Supp. 3d 1094 (Ariz. 2014)
Guzzo v. *Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)
Conde-Vidal v. *Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)
Marie v. *Moser*, 65 F. Supp. 3d 1175 (Kan. 2014)
Lawson v. *Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)
McGee v. *Cole*, 66 F. Supp. 3d 747 (SD W. Va. 2014)
Condon v. *Haley*, 21 F. Supp. 3d 572 (SC 2014)
Bradacs v. *Haley*, 58 F. Supp. 3d 514 (SC 2014)
Rolando v. *Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)
Jernigan v. *Crane*, 64 F. Supp. 3d 1260 (ED Ark. 2014)
Campaign for Southern Equality v. *Bryant*, 64 F. Supp. 3d 906 (SD Miss. 2014)
Inniss v. *Aderhold*, 80 F. Supp. 3d 1335 (ND Ga. 2015)
Rosenbrahn v. *Daugaard*, 61 F. Supp. 3d 862 (SD 2015)
Caspar v. *Snyder*, 77 F. Supp. 3d 616 (ED Mich. 2015)
Searcy v. *Strange*, 81 F. Supp. 3d 1285 (SD Ala. 2015)
Strawser v. *Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)
Waters v. *Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. *Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)
Jones v. *Hallahan*, 501 S. W. 2d 588 (Ky. 1973)
Baehr v. *Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)
Dean v. *District of Columbia*, 653 A. 2d 307 (D. C. 1995)
Baker v. *State*, 170 Vt. 194, 744 A. 2d 864 (1999)
Brause v. *State*, 21 P. 3d 357 (Alaska 2001) (ripeness)
Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)
In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

Li v. *State*, 338 Ore. 376, 110 P. 3d 91 (2005)
Cote-Whitacre v. *Department of Public Health*, 446 Mass. 350, 844 N. E. 2d 623 (2006)
Lewis v. *Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)
Andersen v. *King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)
Hernandez v. *Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)
Conaway v. *Deane*, 401 Md. 219, 932 A. 2d 571 (2007)
In re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384 (2008)
Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)
Strauss v. *Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)
Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)
Griego v. *Oliver*, 2014–NMSC–003, 316 P. 3d 865 (2013)
Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)
Ex parte State ex rel. Alabama Policy Inst., 200 So. 3d 495 (Ala. 2015)

B

State Legislation and Judicial Decisions Legalizing Same-Sex Marriage

Legislation

Del. Code Ann., Tit. 13, § 129 (Cum. Supp. 2014)
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)
Haw. Rev. Stat. § 572–1 (2006 and 2013 Cum. Supp.)
Ill. Pub. Act No. 98–597
Me. Rev. Stat. Ann., Tit. 19, § 650–A (Cum. Supp. 2014)
2012 Md. Laws p. 9
2013 Minn. Laws p. 404
2009 N. H. Laws p. 60
2011 N. Y. Laws p. 749
2013 R. I. Laws p. 7
2009 Vt. Acts & Resolves p. 33
2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

Griego v. *Oliver*, 2014–NMSC–003, 316 P. 3d 865 (2013)

Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization deleted).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand mar-

riage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 664, 676. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the

Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 672 I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, at 657, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece* v. *Galloway*, 572 U. S. 565, 577 (2014).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*, at 657. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ibid.*; Tr. of Oral Arg. on Question 1, p. 12

(petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States* v. *Windsor*, 570 U. S. 744, 763 (2013).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct

sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman." *Ante*, at 659–660. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§ 78–79, pp. 39–40 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor*, 570 U. S., at 767 (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one

doubted what they meant. See *Jones* v. *Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy* v. *Ramsey*, 114 U. S. 15, 45 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); see *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given

way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. *Loving*, 388 U. S., at 6–7.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*, at 660. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante*, at 659.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker* v. *Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its

State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor Gen-

eral of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 665. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 656, 667. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions

and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (address at Stanford University) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that

when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.*, at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.*, at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.*, at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the ques-

tion whether statutes embodying them conflict with the Constitution." *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("we do not sit as a superlegislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be "objectively,

deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e. g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States* v. *Salerno*, 481 U. S. 739, 751 (1987); *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.*, at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel* v. *Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 671. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, *ante*, at 664, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,'

whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*, at 657, 658, 659, 681. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner* v. *Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification.

In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 730–731, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 665.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at 808 (ALITO, J., dissenting) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*, at 665. Although not entirely clear, this reference seems to corre-

spond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.*, at 485. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence* v. *Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. *Ante*, at 681. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.*, at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that

courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 728–732 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 671 (quoting 521 U. S., at 721). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. No-

body could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner* v. *New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 652. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 665. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 664. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 672. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. See 198 U. S., at 61 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 677. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to

implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown* v. *Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14–4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at 666, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 668, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 675, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Mar-

ried Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: The States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante*, at 679. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U. S., at 57.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Jus-

tice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 664. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 673. Absent from this portion of the opinion, how-

ever, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 672.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 675. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the an-

cillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 660–661, 663.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs

in these cases alone. *Ante*, at 663, 676. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 671–672. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 661. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *BAMN*, 572 U. S. 291, 313 (2014).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly

reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post,* at 714 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on

this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 679. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar

questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 672. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ibid.* The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante*, at 670, 672, 675, 678. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 741–742 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante*, at 671.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for

the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest

extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.[1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.[2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts,"[3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the free-

---

[1] Brief for Respondents in No. 14–571, p. 14.

[2] Accord, *Schuette* v. *BAMN*, 572 U. S. 291, 311 (2014) (plurality opinion).

[3] U. S. Const., Art. I, § 10.

[4] Art. IV, § 1.

[5] Amdt. 1.

dom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people"[9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."[10]
>
> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."[11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice

---

[6] *Ibid.*

[7] Amdt. 2.

[8] Amdt. 4.

[9] Amdt. 10.

[10] *United States* v. *Windsor*, 570 U. S. 744, 766 (2013) (internal quotation marks omitted).

[11] *Id.*, at 767.

that remained both universal and uncontroversial in the years after ratification.[12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . ."[14] One would think that sentence would continue: " . . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps " . . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."[16] Thus,

---

[12] See *Town of Greece* v. *Galloway*, 572 U. S. 565, 576–577 (2014).
[13] *Ante*, at 664.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*

rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman.[17]

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers[18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans[19]), or even a Protestant of any denomination. The strikingly unrepresenta-

---

[17] *Ante*, at 665–669.

[18] The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

[19] See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

tive character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not.* And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every

---

[20] *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty

---

[21] *Windsor*, 570 U. S., at 808 (ALITO, J., dissenting).

[22] If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[23] *Ante*, at 666.

[24] *Ante*, at 671–672.

[never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."[25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two Clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."[26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

---

[25] *Ante*, at 672.

[26] The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald* v. *Chicago*, 561 U. S. 742, 811–812 (2010) (opinion concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, § 1. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental right[s]'" protected by that document. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 953, 964 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in

part) (quoting *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of this Court, *ante*, at 677, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.[1]

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

---

[1] The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante*, at 672. Despite the "synergy" it finds "between th[ese] two protections," *ante*, at 673, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson* v. *New Orleans*, 96 U. S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e. g.*, *ibid.*, William Blackstone referred to this provision as protecting the "absolute rights of every Englishman." 1 Blackstone 123. And he formulated those

absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.*, at 125. He defined "the right of personal liberty" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.*, at 125, 130.[2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property."[3] State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly

---

[2] The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* . . . principally regards and taketh Care of," as "*Life*, *Liberty* and *Estate*," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e. g.*, *id.*, at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e. g.*, *id.*, at 185.

[3] Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.*, at 1891; see also N. H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.*, at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado* v. *California*, 110 U. S. 516, 534–535 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn* v. *Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.*, at 123–124, and implicitly rejected the dissent's argument that "'liberty'"

encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.*, at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, § 4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See *id.*, § 97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.*, § 22, at 13.[4]

[4] Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of Nature*" was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C. Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number

---

or control, unless by the law of nature," and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky* v. *Kerry*, *ante*, at 36 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions," 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.*, at 147–148.

of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government § 13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relation-

ships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke § 77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall

eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving* v. *Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3.[5] They were each sentenced to a year

---

[5] The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very Act that authorized lifelong slavery in the colony. *Id.*, at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexual-

of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.[6] In a similar vein, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377–378. And *Turner* v. *Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante*, at 652. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante*, at 671–672—better informed, we must assume, than that of the people who rati-

---

ity. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

[6] The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving* v. *Virginia*, O. T. 1966, No. 395, pp. 12–16.

fied the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid* v. *Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke § 99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, § 22, at 13; see also Hey §§ 52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke § 98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the

People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e. g.,* Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*; Conn. Gen. Stat. § 52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-day Adventists et al. as *Amici Curiae* 5. In our society, marriage

is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 679–680. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.[7]

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short circuits that process, with potentially ruinous consequences for religious liberty.

---

[7] Concerns about threats to religious liberty in this context are not unfounded. During the heyday of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. § 20–60 (1960).

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante,* at 656, 666, 678, 681.[8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can

---

[8] The majority also suggests that marriage confers "nobility" on individuals. *Ante,* at 656. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.[1] The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

---

[1] I use the phrase "recognize marriage" as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U. S. 744, 808 (2013) (ALITO, J., dissenting). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.
>
> "What [those arguing in favor of a constitutional right to same-sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have

cause for both caution and humility." *Id.*, at 808–809 (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.[2] This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to

---

[2] See, *e. g.*, Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, J. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmarital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf.

marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
>
> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.
>
> "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Con-

stitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U. S., at 809–810 (dissenting opinion) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E. g.*, *ante*, at 664–666. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 679–680. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The major-

ity today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Syllabus

MICHIGAN ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14–46. Argued March 25, 2015—Decided June 29, 2015*

The Clean Air Act directs the Environmental Protection Agency to regulate emissions of hazardous air pollutants from certain stationary sources (such as refineries and factories). 42 U. S. C. § 7412. The Agency may regulate power plants under this program only if it concludes that "regulation is appropriate and necessary" after studying hazards to public health posed by power-plant emissions. § 7412(n)(1)(A). Here, EPA found power-plant regulation "appropriate" because the plants' emissions pose risks to public health and the environment and because controls capable of reducing these emissions were available. It found regulation "necessary" because the imposition of other Clean Air Act requirements did not eliminate those risks. The Agency refused to consider cost when making its decision. It estimated, however, that the cost of its regulations to power plants would be $9.6 billion a year, but the quantifiable benefits from the resulting reduction in hazardous-air-pollutant emissions would be $4 to $6 million a year. Petitioners (including 23 States) sought review of EPA's rule in the D. C. Circuit, which upheld the Agency's refusal to consider costs in its decision to regulate.

Held: EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants. Pp. 750–760.

(a) Agency action is unlawful if it does not rest "'on a consideration of the relevant factors.'" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. Even under the deferential standard of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, which directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers, *id.*, at 842–843, EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a

---

*Together with No. 14–47, *Utility Air Regulatory Group* v. *Environmental Protection Agency et al.*, and No. 14–49, *National Mining Assn.* v. *Environmental Protection Agency et al.*, also on certiorari to the same court.

factor relevant to the appropriateness of regulating power plants. Pp. 750–751.

(b) "Appropriate and necessary" is a capacious phrase. Read naturally against the backdrop of established administrative law, this phrase plainly encompasses cost. It is not rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. Statutory context supports this reading. Section 7412(n)(1) required EPA to conduct three studies, including one that reflects concern about cost, see § 7412(n)(1)(B); and the Agency agrees that the term "appropriate and necessary" must be interpreted in light of all three studies. Pp. 751–754.

(c) EPA's counterarguments are unpersuasive. That other Clean Air Act provisions expressly mention cost only shows that § 7412(n)(1)(A)'s broad reference to appropriateness encompasses *multiple* relevant factors, one of which is cost. Similarly, the modest principle of *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457—when the Clean Air Act expressly directs EPA to regulate on the basis of a discrete factor that does not include cost, the Act should not be read as implicitly allowing consideration of cost anyway—has no bearing on these cases. Furthermore, the possibility of considering cost at a later stage, when deciding *how much* to regulate power plants, does not establish its irrelevance at *this* stage. And although the Clean Air Act makes cost irrelevant to the initial decision to regulate sources other than power plants, the whole point of having a separate provision for power plants was to treat power plants *differently*. Pp. 754–757.

(d) EPA must consider cost—including cost of compliance—before deciding whether regulation is appropriate and necessary. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost. Pp. 757–760.

748 F. 3d 1222, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 760. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 764.

Aaron D. Lindstrom, Solicitor General of Michigan, argued the cause for state petitioners. With him on the briefs for petitioners in No. 14–46 were *Bill Schuette*, Attorney General of Michigan, and *Neil D. Gordon*, Assistant Attorney General, *Luther Strange*, Attorney General of Alabama, *Michael C. Geraghty*, Attorney General of Alaska, and *Steven*

Counsel

E. Mulder, Assistant Attorney General, *Mark Brnovich*, Attorney General of Arizona, and *James T. Skardon*, Assistant Attorney General, *Leslie Ruthledge*, Attorney General of Arkansas, *Lawrence G. Wasden*, Attorney General of Idaho, *Gregory F. Zoeller*, Attorney General of Indiana, and *Valerie Tachtiris*, Deputy Attorney General, *Derek Schmidt*, Attorney General of Kansas, and *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Jack Conway*, Attorney General of Kentucky, *Jim Hood*, Attorney General of Mississippi, and *Harold E. Pizzetta III*, Assistant Attorney General, *Chris Koster*, Attorney General of Missouri, *James R. Layton*, Solicitor General, *Doug Peterson*, Attorney General of Nebraska, and *Dave Bydalek*, Chief Deputy Attorney General, *Blake Johnson*, Assistant Attorney General, *Wayne Stenehjem*, Attorney General of North Dakota, and *Margaret I. Olson*, Assistant Attorney General, *Michael DeWine*, Attorney General of Ohio, *E. Scott Pruitt*, Attorney General of Oklahoma, *Patrick Wyrick*, Solicitor General, and *P. Clayton Eubanks*, Deputy Solicitor General, *Alan Wilson*, Attorney General of South Carolina, *Robert D. Cook*, Solicitor General, and *James Emory Smith, Jr.*, Deputy Attorney General, *Ken Paxton*, Attorney General of Texas, *Charles E. Roy*, First Assistant Attorney General, *James E. Davis*, Deputy Attorney General, and *Jon Niermann*, *Mark Walters*, and *Mary E. Smith*, Assistant Attorneys General, *Sean D. Reyes*, Attorney General of Utah, *Patrick Morrisey*, Attorney General of West Virginia, *Peter K. Michael*, Attorney General of Wyoming, and *Michael J. McGrady* and *Jeremiah I. Williamson*, Senior Assistant Attorneys General.

F. William Brownell argued the cause for industry petitioners and respondents in support of petitioners. With him on the briefs in No. 14–47 were *Henry V. Nickel*, *Lee B. Zeugin*, *Elizabeth L. Horner*, *Leslie Sue Ritts*, *Bart E. Cassidy*, *Katherine L. Vaccaro*, *Michael Nasi*, *Dennis Lane*, and *Eric Groten*. *Peter S. Glaser* and *Carroll W. McGuffey III* filed briefs for petitioner in No. 14–49.

Counsel

Solicitor General Verrilli argued the cause for the federal respondents in all cases. With him on the brief were *Assistant Attorney General Cruden*, *Deputy Solicitor General Stewart*, *Roman Martinez*, and *Sonja L. Rodman*.

Paul M. Smith argued the cause for industry respondents in all cases. With him on the brief for respondent Calpine Corporation et al. were *Matthew E. Price*, *Erica L. Ross*, *Brendan K. Collins*, *Robert B. McKinstry, Jr.*, and *Lorene L. Boudreau*. *Maura Healey*, Attorney General of Massachusetts, filed a brief for state and local respondents in all cases. With her on the brief were *Melissa Hoffer* and *Tracy L. Triplett*, Assistant Attorneys General, *George A. Nilson*, *Zachary W. Carter*, and the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Lori Swanson* of Minnesota, *Joseph A. Foster* of New Hampshire, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, and *William H. Sorrell* of Vermont. *Sean H. Donahue*, *David T. Goldberg*, *Sanjay Narayan*, *James S. Pew*, *Neil E. Gormley*, *Vickie L. Patton*, *Graham McCahan*, *John Suttles*, and *Ann Brewster Weeks* filed a brief for respondent American Academy of Pediatrics et al. in all cases.*

---

*Briefs of *amici curiae* urging reversal were filed in all cases for the Cato Institute by *David B. Rivkin, Jr.*, *Andrew M. Grossman*, and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America et al. by *Sandra P. Franco*, *Bryan M. Killian*, *David B. Salmons*, *Kate Comerford Todd*, *Sheldon Gilbert*, *Quentin Riegel*, *Karen R. Harned*, *Elizabeth Milito*, *Amy C. Chai*, and *Thomas J. Ward*; and for Murray Energy Corp. by *J. Van Carson*, *Geoffrey K. Barnes*, *Wendlene M. Lavey*, and *John D. Lazzarentti*.

Briefs of *amici curiae* urging affirmance were filed in all cases for the American Thoracic Society by *Adam Babich*; for the Constitutional Ac-

JUSTICE SCALIA delivered the opinion of the Court.

The Clean Air Act directs the Environmental Protection Agency to regulate emissions of hazardous air pollutants from power plants if the Agency finds regulation "appropriate and necessary." We must decide whether it was reasonable for EPA to refuse to consider cost when making this finding.

I

The Clean Air Act establishes a series of regulatory programs to control air pollution from stationary sources (such as refineries and factories) and moving sources (such as cars and airplanes). 69 Stat. 322, as amended, 42 U. S. C. §§ 7401–7671q. One of these is the National Emissions Standards for Hazardous Air Pollutants Program—the hazardous-air-pollutants program, for short. Established in its current form by the Clean Air Act Amendments of 1990, 104 Stat. 2531, this program targets for regulation stationary-source emissions of more than 180 specified "hazardous air pollutants." § 7412(b).

For stationary sources in general, the applicability of the program depends in part on how much pollution the source emits. A source that emits more than 10 tons of a single pollutant or more than 25 tons of a combination of pollutants per year is called a major source. § 7412(a)(1). EPA is required to regulate all major sources under the program.

countability Center by *Douglas T. Kendall* and *Elizabeth B. Wydra*; for Emission Control Companies by *Erik S. Jaffe*; for Experts in Air Pollution Control and Air Quality Regulation by *Elizabeth J. Hubertz*; for Health Scientists by *Alan B. Morrison*; for the Institute for Policy Integrity at New York University School of Law by *Richard L. Revesz*, *Denise A. Grab*, *Jayni Foley Hein*, and *Jason A. Schwartz*; for the National Congress of American Indians et al. by *Kevin Lyskowski*, *Jared A. Goldstein*, *Riyaz Kanji*, *Phil Katzen*, *John Sledd*, *Richard A. Guest*, *Howard Bichler*, and *Colette Routel*; and for the Union of Concerned Scientists by *Wendy B. Jacobs* and *Shaun A. Goho*.

Laurence H. Tribe, *Tristan L. Duncan*, and *Jonathan S. Massey* filed a brief in all cases for the Peabody Energy Corp. as *amicus curiae*.

§ 7412(c)(1)–(2). A source whose emissions do not cross the just-mentioned thresholds is called an area source. § 7412(a)(2). The Agency is required to regulate an area source under the program if it "presents a threat of adverse effects to human health or the environment . . . warranting regulation." § 7412(c)(3).

At the same time, Congress established a unique procedure to determine the applicability of the program to fossil-fuel-fired power plants. The Act refers to these plants as electric utility steam generating units, but we will simply call them power plants. Quite apart from the hazardous-air-pollutants program, the Clean Air Act Amendments of 1990 subjected power plants to various regulatory requirements. The parties agree that these requirements were expected to have the collateral effect of reducing power plants' emissions of hazardous air pollutants, although the extent of the reduction was unclear. Congress directed the Agency to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of the requirements of this chapter." § 7412(n)(1)(A). If the Agency "finds . . . regulation is appropriate and necessary after considering the results of the study," it "shall regulate [power plants] under [§ 7412]." *Ibid.* EPA has interpreted the Act to mean that power plants become subject to regulation on the same terms as ordinary major and area sources, see 77 Fed. Reg. 9330 (2012), and we assume without deciding that it was correct to do so.

And what are those terms? EPA must first divide sources covered by the program into categories and subcategories in accordance with statutory criteria. § 7412(c)(1). For each category or subcategory, the Agency must promulgate certain minimum emission regulations, known as floor standards. § 7412(d)(1), (3). The statute generally calibrates the floor standards to reflect the emissions limitations already achieved by the best-performing 12% of sources

within the category or subcategory. § 7412(d)(3). In some circumstances, the Agency may also impose more stringent emission regulations, known as beyond-the-floor standards. The statute expressly requires the Agency to consider cost (alongside other specified factors) when imposing beyond-the-floor standards. § 7412(d)(2).

EPA completed the study required by § 7412(n)(1)(A) in 1998, 65 Fed. Reg. 79826 (2000), and concluded that regulation of coal- and oil-fired power plants was "appropriate and necessary" in 2000, *id.*, at 79830. In 2012, it reaffirmed the appropriate-and-necessary finding, divided power plants into subcategories, and promulgated floor standards. The Agency found regulation "appropriate" because (1) power plants' emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions. 77 Fed. Reg. 9363. It found regulation "necessary" because the imposition of the Act's other requirements did not eliminate these risks. *Ibid.* EPA concluded that "costs should not be considered" when deciding whether power plants should be regulated under § 7412. *Id.*, at 9326.

In accordance with Executive Order, the Agency issued a "Regulatory Impact Analysis" alongside its regulation. This analysis estimated that the regulation would force power plants to bear costs of $9.6 billion per year. *Id.*, at 9306. The Agency could not fully quantify the benefits of reducing power plants' emissions of hazardous air pollutants; to the extent it could, it estimated that these benefits were worth $4 to $6 million per year. *Ibid.* The costs to power plants were thus between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants. The Agency continued that its regulations would have ancillary benefits—including cutting power plants' emissions of particulate matter and sulfur dioxide, substances that are not covered by the hazardous-air-pollutants program. Although the Agency's appropriate-

and-necessary finding did not rest on these ancillary effects, *id.*, at 9320, the regulatory impact analysis took them into account, increasing the Agency's estimate of the quantifiable benefits of its regulation to $37 to $90 billion per year, *id.*, at 9306. EPA concedes that the regulatory impact analysis "played no role" in its appropriate-and-necessary finding. Brief for Federal Respondents 14.

Petitioners (who include 23 States) sought review of EPA's rule in the Court of Appeals for the D. C. Circuit. As relevant here, they challenged the Agency's refusal to consider cost when deciding whether to regulate power plants. The Court of Appeals upheld the Agency's decision not to consider cost, with Judge Kavanaugh concurring in part and dissenting in part. *White Stallion Energy Center, LLC* v. *EPA*, 748 F. 3d 1222 (2014) (*per curiam*). We granted certiorari. 574 U. S. 1021 (2014).

II

Federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Ibid.* It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted).

EPA's decision to regulate power plants under § 7412 allowed the Agency to reduce power plants' emissions of hazardous air pollutants and thus to improve public health and the environment. But the decision also ultimately cost power plants, according to the Agency's own estimate, nearly $10 billion a year. EPA refused to consider whether the costs of its decision outweighed the benefits. The Agency

gave cost no thought *at all*, because it considered cost irrelevant to its initial decision to regulate.

EPA's disregard of cost rested on its interpretation of § 7412(n)(1)(A), which, to repeat, directs the Agency to regulate power plants if it "finds such regulation is appropriate and necessary." The Agency accepts that it *could* have interpreted this provision to mean that cost is relevant to the decision to add power plants to the program. Tr. of Oral Arg. 44. But it chose to read the statute to mean that cost makes no difference to the initial decision to regulate. See 76 Fed. Reg. 24988 (2011) ("We further interpret the term 'appropriate' to not allow for the consideration of costs"); 77 Fed. Reg. 9327 ("Cost does not have to be read into the definition of 'appropriate' ").

We review this interpretation under the standard set out in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). *Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. *Id.*, at 842–843. Even under this deferential standard, however, "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 321 (2014) (internal quotation marks omitted). EPA strayed far beyond those bounds when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.

A

The Clean Air Act treats power plants differently from other sources for purposes of the hazardous-air-pollutants program. Elsewhere in § 7412, Congress established cabined criteria for EPA to apply when deciding whether to include sources in the program. It required the Agency to regulate sources whose emissions exceed specified numerical thresholds (major sources). It also required the Agency to regulate sources whose emissions fall short of these thresholds (area sources) if they "presen[t] a threat of adverse ef-

fects to human health or the environment . . . warranting regulation." § 7412(c)(3). In stark contrast, Congress instructed EPA to add power plants to the program if (but only if) the Agency finds regulation "appropriate and necessary." § 7412(n)(1)(A). One does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." 748 F. 3d, at 1266 (opinion of Kavanaugh, J.). Although this term leaves agencies with flexibility, an agency may not "entirely fai[l] to consider an important aspect of the problem" when deciding whether regulation is appropriate. *State Farm*, *supra*, at 43.

Read naturally in the present context, the phrase "appropriate and necessary" requires at least some attention to cost. One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, "cost" includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA's interpretation precludes the Agency from considering *any* type of cost—including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would *still* deem regulation appropriate. See Tr. of Oral Arg. 70. No regulation is "appropriate" if it does significantly more harm than good.

There are undoubtedly settings in which the phrase "appropriate and necessary" does not encompass cost. But this is not one of them. Section 7412(n)(1)(A) directs EPA to determine whether "*regulation* is appropriate and necessary." (Emphasis added.) Agencies have long treated cost

as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 233 (2009) (BREYER, J., concurring in part and dissenting in part). Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost.

Statutory context reinforces the relevance of cost. The procedures governing power plants that we consider today appear in § 7412(n)(1), which bears the caption "Electric utility steam generating units." In subparagraph (A), the part of the law that has occupied our attention so far, Congress required EPA to study the hazards to public health posed by power plants and to determine whether regulation is appropriate and necessary. But in subparagraphs (B) and (C), Congress called for two additional studies. One of them, a study into mercury emissions from power plants and other sources, must consider "the health and environmental effects of such emissions, technologies which are available to control such emissions, *and the costs of such technologies*." § 7412(n)(1)(B) (emphasis added). This directive to EPA to study cost is a further indication of the relevance of cost to the decision to regulate.

In an effort to minimize this express reference to cost, EPA now argues that § 7412(n)(1)(A) requires it to consider only the study mandated by that provision, not the separate mercury study, before deciding whether to regulate power plants. But when adopting the regulations before us, the Agency insisted that the provisions concerning all three

studies "provide a framework for [EPA's] determination of whether to regulate [power plants]." 76 Fed. Reg. 24987. It therefore decided "to interpret the scope of the appropriate and necessary finding *in the context of all three studies*." 77 Fed. Reg. 9325 (emphasis added). For example:

- EPA considered environmental effects relevant to the appropriate-and-necessary finding. It deemed the mercury study's reference to this factor "direct evidence that Congress was concerned with environmental effects." 76 Fed. Reg. 24987.
- EPA considered availability of controls relevant to the appropriate-and-necessary finding. It thought that doing so was "consistent with" the mercury study's reference to availability of controls. *Id.*, at 24989.
- EPA concluded that regulation of power plants would be appropriate and necessary even if a single pollutant emitted by them posed a hazard to health or the environment. It believed that "Congress' focus" on a single pollutant in the mercury study "support[ed]" this interpretation. *Ibid.*

EPA has not explained why § 7412(n)(1)(B)'s reference to "environmental effects . . . and . . . costs" provides "direct evidence that Congress was concerned with environmental effects," but not "direct evidence" that it was concerned with cost. *Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.

B

EPA identifies a handful of reasons to interpret § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate. We find those reasons unpersuasive.

EPA points out that other parts of the Clean Air Act expressly mention cost, while § 7412(n)(1)(A) does not. But

this observation shows only that § 7412(n)(1)(A)'s broad reference to appropriateness encompasses *multiple* relevant factors (which include but are not limited to cost); other provisions' specific references to cost encompass just cost. It is unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants. (By way of analogy, the Fourth Amendment's Reasonableness Clause requires searches to be "[r]easonable," while its Warrant Clause requires warrants to be supported by "probable cause." Nobody would argue that, by expressly making level of suspicion relevant to the validity of a warrant, the Fourth Amendment implicitly makes level of suspicion categorically *irrelevant* to the reasonableness of a search. To the contrary, all would agree that the expansive word "reasonable" encompasses degree of suspicion alongside other relevant circumstances.) Other parts of the Clean Air Act also expressly mention environmental effects, while § 7412(n)(1)(A) does not. Yet that did not stop EPA from deeming environmental effects relevant to the appropriateness of regulating power plants.

Along similar lines, EPA seeks support in this Court's decision in *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001). There, the Court addressed a provision of the Clean Air Act requiring EPA to set ambient air quality standards at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U. S. C. § 7409(b). Read naturally, that discrete criterion does not encompass cost; it encompasses health and safety. The Court refused to read that provision as carrying with it an implicit authorization to consider cost, in part because authority to consider cost had "elsewhere, and so often, been expressly granted." 531 U. S., at 467. *American Trucking* thus establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read

as implicitly allowing the Agency to consider cost anyway. That principle has no application here. "Appropriate and necessary" is a far more comprehensive criterion than "requisite to protect the public health"; read fairly and in context, as we have explained, the term plainly subsumes consideration of cost.

Turning to the mechanics of the hazardous-air-pollutants program, EPA argues that it need not consider cost when first deciding *whether* to regulate power plants because it can consider cost later when deciding *how much* to regulate them. The question before us, however, is the meaning of the "appropriate and necessary" standard that governs the initial decision to regulate. And as we have discussed, context establishes that this expansive standard encompasses cost. Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage. In addition, once the Agency decides to regulate power plants, it must promulgate certain minimum or floor standards no matter the cost (here, nearly $10 billion a year); the Agency may consider cost only when imposing regulations *beyond* these minimum standards. By EPA's logic, someone could decide whether it is "appropriate" to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system.

EPA argues that the Clean Air Act makes cost irrelevant to the initial decision to regulate sources other than power plants. The Agency claims that it is reasonable to interpret § 7412(n)(1)(A) in a way that "harmonizes" the program's treatment of power plants with its treatment of other sources. This line of reasoning overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources. Congress crafted narrow standards for EPA to apply when deciding whether to regulate other sources; in general, these standards concern the volume of pollution emitted by the

source, § 7412(c)(1), and the threat posed by the source "to human health or the environment," § 7412(c)(3). But Congress wrote the provision before us more expansively, directing the Agency to regulate power plants if "appropriate and necessary." "That congressional election settles this case. [The Agency's] preference for symmetry cannot trump an asymmetrical statute." *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 296 (2011).

EPA persists that Congress treated power plants differently from other sources because of uncertainty about whether regulation of power plants would still be needed after the application of the rest of the Act's requirements. That is undoubtedly *one* of the reasons Congress treated power plants differently; hence § 7412(n)(1)(A)'s requirement to study hazards posed by power plants' emissions "after imposition of the requirements of [the rest of the Act]." But if uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains "necessary," not whether regulation is "appropriate *and* necessary." In any event, EPA stated when it adopted the rule that "Congress did not limit [the] appropriate and necessary inquiry to [the study mentioned in § 7412(n)(1)(A)]." 77 Fed. Reg. 9325. The Agency instead decided that the appropriate-and-necessary finding should be understood in light of all three studies required by § 7412(n)(1), and as we have discussed, one of those three studies reflects concern about cost.

C

The dissent does not embrace EPA's far-reaching claim that Congress made costs altogether irrelevant to the decision to regulate power plants. Instead, it maintains that EPA need not "explicitly analyze costs" before deeming regulation appropriate, because other features of the regulatory program will on their own ensure the cost-effectiveness

of regulation. *Post*, at 764 (opinion of KAGAN, J.). This line of reasoning contradicts the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943). When it deemed regulation of power plants appropriate, EPA said that cost was *irrelevant* to that determination—not that cost-benefit analysis would be deferred until later. Much *less* did it say (what the dissent now concludes) that the consideration of cost at subsequent stages will ensure that the costs are not disproportionate to the benefits. What it said is that cost is irrelevant to the decision to regulate.

That is enough to decide these cases. But for what it is worth, the dissent vastly overstates the influence of cost at later stages of the regulatory process. For example, the dissent claims that the floor standards—which the Act calibrates to reflect emissions limitations already achieved by the best-performing sources in the industry—reflect cost considerations, because the best-performing power plants "must have considered costs in arriving at their emissions outputs." *Post*, at 772. EPA did not rely on this argument, and it is not obvious that it is correct. Because power plants are regulated under other federal and state laws, the best-performing power plants' emissions limitations might reflect cost-blind regulation rather than cost-conscious decisions. Similarly, the dissent suggests that EPA may consider cost when dividing sources into categories and subcategories. *Post*, at 773–774. Yet according to EPA, "it is *not* appropriate to premise subcategorization on costs." 77 Fed. Reg. 9395 (emphasis added). That statement presumably explains the dissent's carefully worded observation that EPA considered "technological, geographic, and other factors" when drawing categories, *post*, at 775, n. 4, which factors were in turn "related to costs" in some way, *post*, at 773. Attenuated connections such as these hardly support the assertion that EPA's

regulatory process featured "exhaustive consideration of costs," *post*, at 764.

All in all, the dissent has at most shown that some elements of the regulatory scheme mitigate cost in limited ways; it has not shown that these elements ensure cost-effectiveness. If (to take a hypothetical example) regulating power plants would yield $5 million in benefits, the prospect of mitigating cost from $11 billion to $10 billion at later stages of the program would not by itself make regulation appropriate. In all events, we need not pursue these points, because EPA did not say that the parts of the regulatory program mentioned by the dissent prevent the imposition of costs far in excess of benefits. "[EPA's] action must be measured by what [it] did, not by what it might have done." *Chenery*, *supra*, at 93–94.

D

Our reasoning so far establishes that it was unreasonable for EPA to read § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants. The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary. We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.

Some of the respondents supporting EPA ask us to uphold EPA's action because the accompanying regulatory impact analysis shows that, once the rule's ancillary benefits are considered, benefits plainly outweigh costs. The dissent similarly relies on these ancillary benefits when insisting that "the outcome here [was] a rule whose benefits exceed its costs." *Post*, at 777. As we have just explained, however,

we may uphold agency action only upon the grounds on which the agency acted. Even if the Agency *could* have considered ancillary benefits when deciding whether regulation is appropriate and necessary—a point we need not address—it plainly did not do so here. In the Agency's own words, the administrative record "utterly refutes [the] assertion that [ancillary benefits] form the basis for the appropriate and necessary finding." 77 Fed. Reg. 9323. The Government concedes, moreover, that "EPA did not rely on the [regulatory impact analysis] when deciding to regulate power plants," and that "[e]ven if EPA had considered costs, it would not necessarily have adopted . . . the approach set forth in [that analysis]." Brief for Federal Respondents 53–54.

* * *

We hold that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants. We reverse the judgment of the Court of Appeals for the D. C. Circuit and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Environmental Protection Agency (EPA) asks the Court to defer to its interpretation of the phrase "appropriate and necessary" in § 112(n)(1)(A) of the Clean Air Act, 42 U. S. C. § 7412. JUSTICE SCALIA's opinion for the Court demonstrates why EPA's interpretation deserves no deference under our precedents. I write separately to note that its request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

Chevron deference is premised on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996). We most often describe Congress' supposed choice to leave matters to agency discretion as an allocation of interpretive authority. See, *e. g.*, *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 983 (2005) (referring to the agency as "the authoritative interpreter (within the limits of reason) of [ambiguous] statutes"). But we sometimes treat that discretion as though it were a form of legislative power. See, *e. g.*, *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001) (noting that the agency "speak[s] with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law" even when "'Congress did not actually have an intent' as to a particular result"). Either way, *Chevron* deference raises serious separation-of-powers questions.

As I have explained elsewhere, "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119 (2015) (opinion concurring in judgment). Interpreting federal statutes—including ambiguous ones administered by an agency—"calls for that exercise of independent judgment." *Id.*, at 122. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is "the best reading of an ambiguous statute" in favor of an agency's construction. *Brand X*, *supra*, at 983. It thus wrests from Courts the ultimate interpretative authority to "say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), and hands it over to the Executive. See *Brand*

X, *supra*, at 983 (noting that the judicial construction of an ambiguous statute is "not authoritative"). Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies. U. S. Const., Art. III, § 1.

In reality, as the Court illustrates in the course of dismantling EPA's interpretation of § 112(n)(1)(A), agencies "interpreting" ambiguous statutes typically are not engaged in acts of interpretation at all. See, *e. g.*, *ante*, at 754–755. Instead, as *Chevron* itself acknowledged, they are engaged in the "'formulation of policy.'" 467 U. S., at 843. Statutory ambiguity thus becomes an implicit delegation of rulemaking authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.

Although acknowledging this fact might allow us to escape the jaws of Article III's Vesting Clause, it runs headlong into the teeth of Article I's, which vests "[a]ll legislative Powers herein granted" in Congress. U. S. Const., Art. I, § 1. For if we give the "force of law" to agency pronouncements on matters of private conduct as to which "'Congress did not actually have an intent,'" *Mead*, *supra*, at 229, we permit a body other than Congress to perform a function that requires an exercise of the legislative power. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 88–89 (2015) (THOMAS, J., concurring in judgment).

These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference. What EPA claims for itself here is not the power to make political judgments in implementing Congress' policies, nor even the power to make tradeoffs between competing policy goals set by Congress, *American Railroads*, *supra*, at 87–88 (opinion of THOMAS, J.) (collecting cases involving statutes that dele-

gated this legislative authority). It is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue. Should EPA wield its vast powers over electric utilities to protect public health? A pristine environment? Economic security? We are told that the breadth of the word "appropriate" authorizes EPA to decide for itself how to answer that question. Compare 77 Fed. Reg. 9327 (2012) ("[N]othing about the definition [of 'appropriate'] *compels* a consideration of costs" (emphasis added)) with Tr. of Oral Arg. 42 ("[T]he phrase appropriate and necessary doesn't, by its terms, *preclude* the EPA from considering cost" (emphasis added)).[1]

Perhaps there is some unique historical justification for deferring to federal agencies, see *Mead*, *supra*, at 243 (SCALIA, J., dissenting), but these cases reveal how paltry an effort we have made to understand it or to confine ourselves to its boundaries. Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here.[2] As in other areas of our jurisprudence concerning administrative agencies, see, *e. g.*, *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 170–174 (2015) (THOMAS, J., dissenting), we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider

---

[1] I can think of no name for such power other than "legislative power." Had we deferred to EPA's interpretation in these cases, then, we might have violated another constitutional command by abdicating our check on the political branches—namely, our duty to enforce the rule of law through an exercise of the judicial power. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 124–126 (2015) (THOMAS, J., concurring in judgment).

[2] This is not the first time an agency has exploited our practice of deferring to agency interpretations of statutes. See, *e. g.*, *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, *ante*, at 550–553 (THOMAS, J., dissenting).

that document before blithely giving the force of law to any other agency "interpretations" of federal statutes.

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

The Environmental Protection Agency placed emissions limits on coal and oil power plants following a lengthy regulatory process during which the Agency carefully considered costs. At the outset, EPA determined that regulating plants' emissions of hazardous air pollutants is "appropriate and necessary" given the harm they cause, and explained that it would take costs into account in developing suitable emissions standards. Next, EPA divided power plants into groups based on technological and other characteristics bearing significantly on their cost structures. It required plants in each group to match the emissions levels already achieved by the best-performing members of the same group—benchmarks necessarily reflecting those plants' own cost analyses. EPA then adopted a host of measures designed to make compliance with its proposed emissions limits less costly for plants that needed to catch up with their cleaner peers. And with only one narrow exception, EPA decided not to impose any more stringent standards (beyond what some plants had already achieved on their own) because it found that doing so would not be cost-effective. After all that, EPA conducted a formal cost-benefit study which found that the quantifiable benefits of its regulation would exceed the costs up to nine times over—by as much as $80 billion each year. Those benefits include as many as 11,000 fewer premature deaths annually, along with a far greater number of avoided illnesses.

Despite that exhaustive consideration of costs, the Court strikes down EPA's rule on the ground that the Agency "unreasonably . . . deemed cost irrelevant." *Ante*, at 760. On the majority's theory, the rule is invalid because EPA did not explicitly analyze costs at the very first stage of the reg-

ulatory process, when making its "appropriate and necessary" finding. And that is so even though EPA later took costs into account again and again and . . . so on. The majority thinks entirely immaterial, and so entirely ignores, all the subsequent times and ways EPA considered costs in deciding what any regulation would look like.

That is a peculiarly blinkered way for a court to assess the lawfulness of an agency's rulemaking. I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if "[t]he Agency gave cost no thought *at all*." *Ante*, at 750–751 (emphasis in original). But that is just not what happened here. Over more than a decade, EPA took costs into account at multiple stages and through multiple means as it set emissions limits for power plants. And when making its initial "appropriate and necessary" finding, EPA knew it would do exactly that—knew it would thoroughly consider the cost-effectiveness of emissions standards later on. That context matters. The Agency acted well within its authority in declining to consider costs at the opening bell of the regulatory process given that it would do so in every round thereafter—and given that the emissions limits finally issued would depend crucially on those accountings. Indeed, EPA could not have measured costs at the process's initial stage with any accuracy. And the regulatory path EPA chose parallels the one it has trod in setting emissions limits, at Congress's explicit direction, for every other source of hazardous air pollutants over two decades. The majority's decision that EPA cannot take the same approach here—its micromanagement of EPA's rulemaking, based on little more than the word "appropriate"—runs counter to Congress's allocation of authority between the Agency and the courts. Because EPA reasonably found that it was "appropriate" to decline to analyze costs at a single stage of a regulatory proceeding otherwise imbued with cost concerns, I respectfully dissent.

I

A

The Clean Air Act Amendments of 1990, as the majority describes, obligate EPA to regulate emissions of mercury and other hazardous air pollutants from stationary sources discharging those substances in large quantities. See *ante*, at 747–748. For most industries, the statute prescribes the same multi-step regulatory process. At the initial stage, EPA must decide whether to regulate a source, based solely on the quantity of pollutants it emits and their health and environmental effects. See 42 U. S. C. §§ 7412(a)(1), (a)(2), (c)(1), (c)(3); *ante*, at 747–748. Costs enter the equation after that, affecting the emissions limits that the eventual regulation will require. Under the statute, EPA must divide sources into categories and subcategories and then set "floor standards" that reflect the average emissions level already achieved by the best-performing 12% of sources within each group. See § 7412(d)(3); *ante*, at 748. Every 12% floor has cost concerns built right into it because the top sources, as successful actors in a market economy, have had to consider costs in choosing their own emissions levels. Moreover, in establishing categories and subcategories at this first stage, EPA can (significantly) raise or lower the costs of regulation for each source, because different classification schemes will alter the group—and so the emissions level—that the source has to match.[1] Once the floor is set, EPA has to decide whether to impose any stricter ("beyond-the-floor") standards, "taking into consideration," among other things, "the cost of achieving such emissions reduction." § 7412(d)(2); see

[1] Consider it this way: Floor standards equal the top 12% of something, but until you know the something, you can't know what it will take to attain that level. To take a prosaic example, the strongest 12% of NFL players can lift a lot more weight than the strongest 12% of human beings generally. To match the former, you will have to spend many more hours in the gym than to match the latter—and you will probably still come up short. So everything depends on the comparison group.

ante, at 749. Finally, by virtue of a longstanding Executive Order applying to significant rules issued under the Clean Air Act (as well as other statutes), the Agency must systematically assess the regulation's costs and benefits. See Exec. Order No. 12866, 58 Fed. Reg. 51735, 51738, 51741 (1993) (applying to all rules with an annual economic effect of at least $100 million).

Congress modified that regulatory scheme for power plants. It did so because the 1990 amendments established a separate program to control power plant emissions contributing to acid rain, and many thought that just by complying with those requirements, plants might reduce their emissions of hazardous air pollutants to acceptable levels. See *ante*, at 748. That prospect counseled a "wait and see" approach, under which EPA would give the Act's acid rain provisions a chance to achieve that side benefit before imposing any further regulation. Accordingly, Congress instructed EPA to "perform a study of the hazards to public health reasonably anticipated" to result from power plants' emissions after the 1990 amendments had taken effect. § 7412(n)(1)(A). And Congress provided that EPA "shall regulate" those emissions only if the Agency "finds such regulation is appropriate and necessary after considering the results of the [public health] study." *Ibid.* Upon making such a finding, however, EPA is to regulate power plants as it does every other stationary source: first, by categorizing plants and setting floor standards for the different groups; then by deciding whether to regulate beyond the floors; and finally, by conducting the cost-benefit analysis required by Executive Order.

EPA completed the mandated health study in 1998, and the results gave much cause for concern. The Agency concluded that implementation of the acid rain provisions had failed to curb power plants' emissions of hazardous air pollutants. Indeed, EPA found, coal plants were on track to increase those emissions by as much as 30% over the next dec-

ade. See 1 EPA, Study of Hazardous Air Pollutant Emissions From Electric Utility Steam Generating Units—Final Report to Congress, p. ES–25 (1998). And EPA determined, focusing especially on mercury, that the substances released from power plants cause substantial health harms. Noting that those plants are "the largest [non-natural] source of mercury emissions," *id.*, § 1.2.5.1, at 1–7, EPA found that children of mothers exposed to high doses of mercury during pregnancy "have exhibited a variety of developmental neurological abnormalities," including delayed walking and talking, altered muscles, and cerebral palsy. *Id.*, § 7.2.2, at 7–17 to 7–18; see also 7 EPA, Mercury Study Report to Congress, p. 6–31 (1997) (Mercury Study) (estimating that 7% of women of childbearing age are exposed to mercury in amounts exceeding a safe level).

Informed by its public health study and additional data, EPA found in 2000 that it is "appropriate and necessary" to regulate power plants' emissions of mercury and other hazardous air pollutants. 65 Fed. Reg. 79830.[2] Pulling apart those two adjectives, the Agency first stated that such regulation is "appropriate" because those pollutants "present[ ] significant hazards to public health and the environment" and because "a number of control options" can "effectively reduce" their emission. *Ibid.* EPA then determined that regulation is "necessary" because other parts of the 1990 amendments—most notably, the acid rain provisions—"will not adequately address" those hazards. *Ibid.* In less bureaucratic terms, EPA decided that it made sense to kick off the regulatory process given that power plants' emissions pose a serious health problem, that solutions to the problem are available, and that the problem will remain unless action is taken.

---

[2] EPA reaffirmed its "appropriate and necessary" finding in 2011 and 2012 when it issued a proposed rule and a final rule. See 76 Fed. Reg. 24980 (2011) ("The Agency's appropriate and necessary finding was correct in 2000, and it remains correct today"); accord, 77 Fed. Reg. 9310–9311 (2012).

B

If the regulatory process ended as well as started there, I would agree with the majority's conclusion that EPA failed to adequately consider costs. Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing "a standard-setting process that ignore[s] economic considerations." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 670 (1980) (Powell, J., concurring in part and concurring in judgment). At a minimum, that is because such a process would "threaten[ ] to impose massive costs far in excess of any benefit." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 234 (2009) (BREYER, J., concurring in part and dissenting in part). And accounting for costs is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Id.*, at 233; see *ante*, at 753. As the Court notes, that does not require an agency to conduct a formal cost-benefit analysis of every administrative action. See *ante*, at 759. But (absent contrary indication from Congress) an agency must take costs into account in some manner before imposing significant regulatory burdens.

That proposition, however, does not decide the issue before us because the "appropriate and necessary" finding was only the beginning. At that stage, EPA knew that a lengthy rulemaking process lay ahead of it; the determination of emissions limits was still years away. And the Agency, in making its kick-off finding, explicitly noted that consideration of costs would follow: "As a part of developing a regulation" that would impose those limits, "the effectiveness and costs of controls will be examined." 65 Fed. Reg. 79830. Likewise, EPA explained that, in the course of writing its regulation, it would explore regulatory approaches "allowing for least-cost solutions." *Id.*, at 79830–79831. That means

the Agency, when making its "appropriate and necessary" finding, did not decline to consider costs as part of the regulatory process. Rather, it declined to consider costs at a single stage of that process, knowing that they would come in later on.

The only issue in these cases, then, is whether EPA acted reasonably in structuring its regulatory process in that way—in making its "appropriate and necessary finding" based on pollution's harmful effects and channeling cost considerations to phases of the rulemaking in which emission levels are actually set. Said otherwise, the question is not whether EPA can reasonably find it "appropriate" to regulate without thinking about costs, full stop. It cannot, and it did not. Rather, the question is whether EPA can reasonably find it "appropriate" to trigger the regulatory process based on harms (and technological feasibility) alone, given that costs will come into play, in multiple ways and at multiple stages, before any emission limit goes into effect.

In considering that question, the very nature of the word "appropriate" matters. "[T]he word 'appropriate,' " this Court has recognized, "is inherently context dependent": Giving it content requires paying attention to the surrounding circumstances. *Sossamon* v. *Texas*, 563 U. S. 277, 286 (2011). (That is true, too, of the word "necessary," although the majority spends less time on it. See *Armour & Co.* v. *Wantock*, 323 U. S. 126, 129–130 (1944) ("[T]he word 'necessary' . . . has always been recognized as a word to be harmonized with its context").) And here that means considering the place of the "appropriate and necessary" finding in the broader regulatory scheme—as a triggering mechanism that gets a complex rulemaking going. The interpretive task is thus at odds with the majority's insistence on staring fixedly "at *this* stage." *Ante*, at 756 (emphasis in original). The task instead demands taking account of the entire regulatory process in thinking about what is "appropriate" in its first phase. The statutory language, in other words, is a direc-

tive to remove one's blinders and view things whole—to consider what it is fitting to do at the threshold stage given what will happen at every other.

And that instruction is primarily given to EPA, not to courts: Judges may interfere only if the Agency's way of ordering its regulatory process is unreasonable—*i. e.*, something Congress would never have allowed. The question here, as in our seminal case directing courts to defer to agency interpretations of their own statutes, arises "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 863 (1984). EPA's experience and expertise in that arena—and courts' lack of those attributes—demand that judicial review proceed with caution and care. The majority actually phrases this principle well, though honors it only in the breach: Within wide bounds, it is "up to the Agency to decide . . . how to account for cost." *Ante*, at 759. That judges might have made different regulatory choices—might have considered costs in different ways at different times—will not suffice to overturn EPA's action where Congress, as here, chose not to speak directly to those matters, but to leave them to the Agency to decide.

All of that means our decision here properly rests on something the majority thinks irrelevant: an understanding of the full regulatory process relating to power plants and of EPA's reasons for considering costs only after making its initial "appropriate and necessary" finding. I therefore turn to those issues, to demonstrate the simple point that should resolve these cases: that EPA, in regulating power plants' emissions of hazardous air pollutants, accounted for costs in a reasonable way.

II

A

In the years after its "appropriate and necessary" finding, EPA made good on its promise to account for costs "[a]s a

part of developing a regulation." 65 Fed. Reg. 79830; see *supra*, at 769. For more than a decade, as EPA deliberated on and then set emissions limits, costs came into the calculus at nearly every turn. Reflecting that consideration, EPA's final rule noted that steps taken during the regulatory process had focused on "flexib[ility] and cost-effective[ness]" and had succeeded in making "the rule less costly and compliance more readily manageable." 77 Fed. Reg. 9306, 9376. And the regulation concluded that "the benefits of th[e] rule" to public health and the environment "far outweigh the costs." *Id.*, at 9306.

Consistent with the statutory framework, EPA initially calculated floor standards: emissions levels of the best-performing 12% of power plants in a given category or subcategory. The majority misperceives this part of the rulemaking process. It insists that EPA "must promulgate certain . . . floor standards no matter the cost." *Ante*, at 756. But that ignores two crucial features of the top-12% limits: first, the way in which any such standard intrinsically accounts for costs, and second, the way in which the Agency's categorization decisions yield different standards for plants with different cost structures.

The initial point is a fact of life in a market economy: Costs necessarily play a role in any standard that uses power plants' existing emissions levels as a benchmark. After all, the best-performing 12% of power plants must have considered costs in arriving at their emissions outputs; that is how profit-seeking enterprises make decisions. And in doing so, they must have selected achievable levels; else, they would have gone out of business. (The same would be true even if other regulations influenced some of those choices, as the majority casually speculates. See *ante*, at 758.) Indeed, this automatic accounting for costs is why Congress adopted a market-leader-based standard. As the Senate Report accompanying the 1990 amendments explained: "Cost considerations are reflected in the selection of emissions limitations

which have been achieved in practice (rather than those which are merely theoretical) by sources of a similar type or character." S. Rep. No. 101–228, pp. 168–169 (1989). Of course, such a standard remains technology-forcing: It requires laggards in the industry to catch up with frontrunners, sometimes at significant expense. But the benchmark is, by definition, one that some power plants have achieved economically. And when EPA made its "appropriate and necessary" finding, it knew that fact—knew that the consequence of doing so was to generate floor standards with cost considerations baked right in.

Still more, EPA recognized that in making categorization decisions, it could take account of multiple factors related to costs of compliance—and so avoid impracticable regulatory burdens. Suppose, to use a simple example, that curbing emissions is more technologically difficult—and therefore more costly—for plants burning coal than for plants burning oil. EPA can then place those two types of plants in different categories, so that coal plants need only match other coal plants rather than having to incur the added costs of meeting the top oil plants' levels. Now multiply and complexify that example many times over. As the Agency noted when making its "appropriate and necessary" finding, EPA "build[s] flexibility" into the regulatory regime by "bas[ing] subcategorization on . . . the size of a facility; the type of fuel used at the facility; and the plant type," and also "may consider other relevant factors such as geographic conditions." 65 Fed. Reg. 79830; see S. Rep. No. 101–228, at 166 (listing similar factors and noting that "[t]he proper definition of categories . . . will assure maximum protection of public health and the environment while minimizing costs imposed on the regulated community"). Using that classification tool, EPA can ensure that plants have to attain only the emissions levels previously achieved by peers facing comparable cost constraints, so as to further protect plants from unrealistic floor standards.

And that is exactly what EPA did over the course of its rulemaking process, insisting on apples-to-apples comparisons that bring floor standards within reach of diverse kinds of power plants. Even in making its "appropriate and necessary" finding, the Agency announced it would divide plants into the two categories mentioned above: "coal-fired" and "oil-fired." 65 Fed. Reg. 79830.[3] Then, as the rulemaking progressed, EPA went further. Noting that different technologies significantly affect the ease of attaining a given emissions level, the Agency's proposed rule subdivided those two classes into five: plants designed to burn high-rank coal; plants designed to burn low-rank virgin coal; plants that run on a technology termed integrated gasification combined cycle; liquid oil units; and solid oil units. See 76 Fed. Reg. 25036–25037. EPA explained that by subcategorizing in that way, it had spared many plants the need to "retrofit[ ]," "redesign[ ]," or make other "extensive changes" to their facilities. *Id.*, at 25036. And in its final rule, EPA further refined its groupings in ways that eased compliance. Most notably, the Agency established a separate subcategory, and attendant (less stringent) floor, for plants in Hawaii, Puerto Rico, Guam, and the Virgin Islands on the ground that plants in those places have "minimal control over the quality of available fuel[ ] and disproportionately high operational and maintenance costs." 77 Fed. Reg. 9401.[4]

---

[3] EPA also determined at that stage that it is "not appropriate or necessary" to regulate natural gas plants' emissions of hazardous air pollutants because they have only "negligible" impacts. 65 Fed. Reg. 79831. That decision meant that other plants would not have to match their cleaner natural gas counterparts, thus making the floor standards EPA established that much less costly to achieve.

[4] The majority insists on disregarding how EPA's categorization decisions made floor standards less costly for various power plants to achieve, citing the Agency's statement that "it is not appropriate to premise subcategorization on costs." 77 Fed. Reg. 9395 (quoted *ante*, at 758). But that misunderstands EPA's point. It is quite true that EPA did not consider costs separate and apart from all other factors in crafting categories and subcategories. See S. Rep. No. 101–228, p. 166 (1989) (noting that

Even after establishing multiple floor standards that factored in costs, EPA adopted additional "compliance options" to "minimize costs" associated with attaining a given floor—just as its "appropriate and necessary" finding explicitly contemplated. *Id.*, at 9306; 76 Fed. Reg. 25057; see 65 Fed. Reg. 79830. For example, the Agency calculated each floor as both an "input-based" standard (based on emissions per unit of energy *used*) and an "output-based" standard (based on emissions per unit of useful energy *produced*), and allowed plants to choose which standard they would meet. That option, EPA explained, can "result in . . . reduced compliance costs." 76 Fed. Reg. 25063. Similarly, EPA allowed plants to meet a given 12% floor by averaging emissions across all units at the same site, instead of having to meet the floor at each unit. Some plants, EPA understood, would find such averaging a "less costly alternative." 77 Fed. Reg. 9385. Yet again: EPA permitted "limited use" plants—those primarily burning natural gas but sometimes switching to oil—to comply with the final rule by meeting qualitative "work practice standards" rather than numeric emissions limits. *Id.*, at 9400–9401. EPA explained that it would be "econom-

---

EPA may not make classifications decisions "based wholly on economic grounds"); 77 Fed. Reg. 9395 (citing Senate Report). That approach could have subverted the statutory scheme: To use an extreme example, it would have allowed EPA, citing costs of compliance, to place the top few plants in one category, the next few in another category, the third in a third, and all the way down the line, thereby insulating every plant from having to make an appreciable effort to catch up with cleaner facilities. But in setting up categories and subcategories, EPA did consider technological, geographic, and other factors directly relevant to the costs that diverse power plants would bear in trying to attain a given emissions level. (For some reason, the majority calls this a "carefully worded observation," *ante*, at 758, but it is nothing other than the fact of the matter.) The Agency's categorization decisions (among several other measures, see *supra*, at 772–773; *infra* this page and 776) thus refute the majority's suggestion, see *ante*, at 756, that the "appropriate and necessary" finding automatically generates floor standards with no relation to cost. To the contrary, the Agency used its categorization authority to establish different floor standards for different types of plants with different cost structures.

ically impracticable" for those plants to demonstrate compliance through emissions testing, and that an alternative standard, focused on their adoption of pollution control techniques, would allow them to both reduce emissions and avoid "extra cost." *Id.*, at 9401. And the list goes on. See, *e. g.*, *id.*, at 9409–9410 (allowing extra year for plants to comply with emissions limits where "source-specific construction, permitting, or labor, procurement or resource challenges" arise); *id.*, at 9417 (describing additional "compliance options").

With all that cost-consideration under its belt, EPA next assessed whether to set beyond-the-floor standards, and here too, as it knew it would, the Agency took costs into account. For the vast majority of coal and oil plants, EPA decided that beyond-the-floor standards would not be "reasonable after considering costs." *Id.*, at 9331. The Agency set such a standard for only a single kind of plant, and only after determining that the technology needed to meet the more lenient limit would also achieve the more stringent one. See *id.*, at 9393; 76 Fed. Reg. 25046–25047. Otherwise, EPA determined, the market-leader-based standards were enough.

Finally, as required by Executive Order and as anticipated at the time of the "appropriate and necessary" finding, EPA conducted a formal cost-benefit analysis of its new emissions standards and incorporated those findings into its proposed and final rules. See *id.*, at 25072–25078; 77 Fed. Reg. 9305–9306, 9424–9432. That analysis estimated that the regulation's yearly costs would come in at under $10 billion, while its annual measureable benefits would total many times more—between $37 and $90 billion. See *id.*, at 9305–9306; *ante*, at 749–750. On the costs side, EPA acknowledged that plants' compliance with the rule would likely cause electricity prices to rise by about 3%, but projected that those prices would remain lower than they had been as recently as 2010. See 77 Fed. Reg. 9413–9414. EPA also thought the rule's impact on jobs would be about a wash, with jobs lost at some

high-emitting plants but gained both at cleaner plants and in the pollution control industry. See *ibid.* On the benefits side, EPA noted that it could not quantify many of the health gains that would result from reduced mercury exposure. See *id.*, at 9306. But even putting those aside, the rule's annual benefits would include between 4,200 and 11,000 fewer premature deaths from respiratory and cardiovascular causes, 3,100 fewer emergency room visits for asthmatic children, 4,700 fewer non-fatal heart attacks, and 540,000 fewer days of lost work. See *id.*, at 9429.

Those concrete findings matter to these cases—which, after all, turn on whether EPA reasonably took costs into account in regulating plants' emissions of hazardous air pollutants. The majority insists that it may ignore EPA's cost-benefit analysis because "EPA did not rely on" it when issuing the initial "appropriate and necessary" finding. *Ante*, at 760 (quoting Solicitor General); see also *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87, 93–94 (1943). At one level, that description is true—indeed, a simple function of chronology: The kick-off finding preceded the cost-benefit analysis by years and so could not have taken its conclusions into account. But more fundamentally, the majority's account is off, because EPA knew when it made that finding that it would consider costs at every subsequent stage, culminating in a formal cost-benefit study. And EPA knew that, absent unusual circumstances, the rule would need to pass that cost-benefit review in order to issue. See Exec. Order No. 12866, 58 Fed. Reg. 51736 ("Each agency shall . . . adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"). The reasonableness of the Agency's decision to consider only the harms of emissions at the threshold stage must be evaluated in that broader context. And in thinking about that issue, it is well to remember the outcome here: a rule whose benefits exceed its costs by three to nine times. In making its "appropriate and necessary" finding, EPA had committed to assessing and

mitigating costs throughout the rest of its rulemaking; if nothing else, the findings of the Agency's cost-benefit analysis—making clear that the final emissions standards were cost-effective—show that EPA did just that.

B

Suppose you were in charge of designing a regulatory process. The subject matter—an industry's emissions of hazardous material—was highly complex, involving multivarious factors demanding years of study. Would you necessarily try to do everything at once? Or might you try to break down this lengthy and complicated process into discrete stages? And might you consider different factors, in different ways, at each of those junctures? I think you might. You know that everything must get done in the end—every relevant factor considered. But you tend to think that "in the end" does not mean "in the beginning." And you structure your rulemaking process accordingly, starting with a threshold determination that does not mirror your end-stage analysis. Would that be at least (which is all it must be) a "reasonable policy choice"? *Chevron*, 467 U. S., at 845.

That is the question presented here, and it nearly answers itself. Setting emissions levels for hazardous air pollutants is necessarily a lengthy and complicated process, demanding analysis of many considerations over many years. Costs are a key factor in that process: As I have said, sensible regulation requires careful scrutiny of the burdens that potential rules impose. See *supra*, at 769. But in ordering its regulatory process, EPA knew it would have the opportunity to consider costs in one after another of that rulemaking's stages—in setting the level of floor standards, in providing a range of options for plants to meet them, in deciding whether or where to require limits beyond the floor, and in finally completing a formal cost-benefit analysis. See 65 Fed. Reg. 79830–79831; *supra*, at 771–777. Given that context, EPA rea-

sonably decided that it was "appropriate"—once again, the only statutory requirement relevant here—to trigger the regulatory process based on the twin findings that the emissions in question cause profound health and environmental harms and that available pollution control technologies can reduce those emissions. By making that decision, EPA did no more than commit itself to developing a realistic and cost-effective regulation—a rule that would take account of every relevant factor, costs and benefits alike. And indeed, particular features of the statutory scheme here indicate that EPA's policy choice was not just a minimally reasonable option but an eminently reasonable one.

To start, that decision brought EPA's regulation of power plants into sync with its regulation of every other significant source of hazardous pollutants under the Clean Air Act. For all those types of sources (totaling over 100), the Act instructs EPA to make the threshold decision to regulate based solely on the quantity and effects of pollutants discharged; costs enter the picture afterward, when the Agency takes up the task of actually establishing emissions limits. See *supra*, at 766–767. Industry after industry, year after year, EPA has followed that approach to standard-setting, just as Congress contemplated. See, *e. g.*, 58 Fed. Reg. 49354 (1993) (dry cleaning facilities); 59 Fed. Reg. 64303 (1994) (gasoline distributors); 60 Fed. Reg. 45948 (1995) (aerospace manufacturers). And apparently with considerable success. At any rate, neither those challenging this rule nor the Court remotely suggests that these regulatory regimes have done "significantly more harm than good." *Ante*, at 752. So when making its "appropriate and necessary" finding for power plants, EPA had good reason to continue in the same vein. See, *e. g.*, *Entergy*, 556 U. S., at 236 (opinion of BREYER, J.) (noting that the reasonableness of an agency's approach to considering costs rests in part on whether that tack has met "with apparent success in the past"). And that is exactly how EPA explained its choice.

Stating that it would consider the "costs of controls" when "developing a regulation," the Agency noted that such an "approach has helped build flexibility in meeting environmental objectives in the past," thereby preventing the imposition of disproportionate costs. 65 Fed. Reg. 79830. Indeed, as EPA further commented in issuing its rule, it would seem "inequitable to impose a regulatory regime on every industry in America and then to exempt one category" after finding it represented "a significant part of the air toxics problem." 77 Fed. Reg. 9322 (quoting 136 Cong. Rec. 36062 (1990) (statement of Sen. Durenberger)).

The majority's attempt to answer this point founders on even its own statement of facts. The majority objects that "the whole point of having a separate provision about power plants" is to "treat[ ] power plants *differently* from other stationary sources." *Ante*, at 756 (emphasis in original). But turn back about 10 pages, and read what the majority says about *why* Congress treated power plants differently: because, as all parties agree, separate regulatory requirements involving acid rain "were expected to have the collateral effect of reducing power plants' emissions of hazardous air pollutants, although the extent of the reduction was unclear." *Ante*, at 748; see *supra*, at 767. For that reason alone (the majority does not offer any other), Congress diverted EPA from its usual regulatory path, instructing the Agency, as a preliminary matter, to complete and consider a study about the residual harms to public health arising from those emissions. See *ante*, at 748; *supra*, at 767. But once EPA found in its study that the acid rain provisions would not significantly affect power plants' emissions of hazardous pollutants, any rationale for treating power plants differently from other sources discharging the same substances went up in smoke. See 65 Fed. Reg. 79830. At that point, the Agency would have had far more explaining to do if, rather than following a well-tested model, it had devised a new scheme of regulation for power plants only.

Still more, EPA could not have accurately assessed costs at the time of its "appropriate and necessary" finding. See 8 Mercury Study, at 6–2 (noting the "many uncertainties" in any early-stage analysis of pollution control costs). Under the statutory scheme, that finding comes before—years before—the Agency designs emissions standards. And until EPA knows what standards it will establish, it cannot know what costs they will impose. Nor can those standards even be reasonably guesstimated at such an early stage. Consider what it takes to set floor standards alone. First, EPA must divide power plants into categories and subcategories; as explained earlier, those classification decisions significantly affect what floors are established. See *supra*, at 766, and n. 1, 773–774. And then, EPA must figure out the average emissions level already achieved by the top 12% in each class so as to set the new standards. None of that can realistically be accomplished in advance of the Agency's regulatory process: Indeed, those steps are the very stuff of the rulemaking. Similarly, until EPA knows what "compliance options" it will develop, it cannot know how they will mitigate the costs plants must incur to meet the floor standards. See *supra*, at 775–776. And again, deciding on those options takes substantial time. So there is good reason for different considerations to go into the threshold finding than into the final rule. Simply put, calculating costs before starting to write a regulation would put the cart before the horse.

III

The central flaw of the majority opinion is that it ignores everything but one thing EPA did. It forgets that EPA's "appropriate and necessary" finding was only a first step which got the rest of the regulatory process rolling. It narrows its field of vision to that finding in isolation, with barely a glance at all the ways in which EPA later took costs into account. See *supra*, at 772–773 (in establishing floor standards); *supra*, at 775–776 (in adopting compliance options);

supra, at 776 (in deciding whether to regulate beyond the floor); *supra*, at 776–777 (in conducting a formal cost-benefit analysis as a final check). In sum, the majority disregards how consideration of costs infused the regulatory process, resulting not only in EPA's adoption of mitigation measures, *ante*, at 759, but also in EPA's crafting of emissions standards that succeed in producing benefits many times their price.

That mistake accounts for the majority's primary argument that the word "appropriate," as used in § 7412(n)(1)(A), demands consideration of costs. See *ante*, at 751–752. As I have noted, that would be true if the "appropriate and necessary" finding were the only step before imposing regulations on power plants. See *supra*, at 769–770. But, as should be more than clear by now, it was just the first of many: Under the Clean Air Act, a long road lay ahead in which the Agency would have more—and far better—opportunities to evaluate the costs of diverse emissions standards on power plants, just as it did on all other sources. See *supra*, at 766–767, 769–770, 771–777. EPA well understood that fact: "We evaluate the terms 'appropriate' and 'necessary,' " it explained, in light of their "statutory context." 76 Fed. Reg. 24986. And EPA structured its regulatory process accordingly, with consideration of costs coming (multiple times) after the threshold finding. The only way the majority can cast that choice as unreasonable, given the deference this Court owes to such agency decisions, is to blind itself to the broader rulemaking scheme.

The same fault inheres in the majority's secondary argument that EPA engaged in an "interpretive gerrymander[ ]" by considering environmental effects but not costs in making its "appropriate and necessary" finding. *Ante*, at 753–754. The majority notes—quite rightly—that Congress called for EPA to examine both subjects in a study of mercury emissions from all sources (separate from the study relating to power plants' emissions alone). See *ante*, at 753. And the majority states—again, rightly—that Congress's demand for that

study "provides direct evidence that Congress was concerned with [both] environmental effects [and] cost." *Ante*, at 754 (internal quotation marks omitted). But nothing follows from that fact, because EPA too was concerned with both. True enough, EPA assessed the two at different times: environmental harms (along with health harms) at the threshold, costs afterward. But that was for the very reasons earlier described: because EPA wanted to treat power plants like other sources and because it thought harms, but not costs, could be accurately measured at that early stage. See *supra*, at 779–781. Congress's simple request for a study of mercury emissions in no way conflicts with that choice of when and how to consider both harms and costs. Once more, the majority perceives a conflict only because it takes so partial a view of the regulatory process.

And the identical blind spot causes the majority's sports-car metaphor to run off the road. The majority likens EPA to a hypothetical driver who decides that "it is 'appropriate' to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system." *Ante*, at 756. The comparison is witty but wholly inapt. To begin with, emissions limits are not a luxury good: They are a safety measure, designed to curtail the significant health and environmental harms caused by power plants spewing hazardous pollutants. And more: EPA knows from past experience and expertise alike that it will have the opportunity to purchase that good in a cost-effective way. A better analogy might be to a car owner who decides without first checking prices that it is "appropriate and necessary" to replace her worn-out brake-pads, aware from prior experience that she has ample time to comparison-shop and bring that purchase within her budget. Faced with a serious hazard and an available remedy, EPA moved forward like that sensible car owner, with a promise that it would, and well-grounded confidence that it could, take costs into account down the line.

That about does it for the majority's opinion, save for its final appeal to *Chenery*—and *Chenery* cannot save its holding. See *ante*, at 759. Of course a court may not uphold agency action on grounds different from those the agency gave. See *Chenery*, 318 U. S., at 87. But equally, a court may not strike down agency action without considering the reasons the agency gave. *Id.*, at 95. And that is what the majority does. Indeed, it is difficult to know what agency document the majority is reading. It denies that "EPA said . . . that cost-benefit analysis would be deferred until later." *Ante*, at 758. But EPA said exactly that: The "costs of controls," the Agency promised, "will be examined" as "a part of developing a regulation." 65 Fed. Reg. 79830. Tellingly, these words appear nowhere in the majority's opinion. But what are they other than a statement that cost concerns, contra the majority, are *not* "irrelevant," *ante*, at 758 (without citation)—that they are simply going to come in later?

And for good measure, EPA added still extra explanation. In its "appropriate and necessary" finding, the Agency committed to exploring "least-cost solutions" in "developing a standard for utilities." 65 Fed. Reg. 79830. The Agency explained that such an approach—particularly mentioning the use of averaging and subcategorization—had offered "opportunit[ies] for lower cost solutions" and "helped build flexibility in meeting environmental objectives in the past." *Ibid.*; see *supra*, at 769–770, 779. Then, in issuing its proposed and final rules, EPA affirmed that it had done just what it said. EPA recognized that standard-setting must "allow the industry to make practical investment decisions that minimize costs." 76 Fed. Reg. 25057. Accordingly, the Agency said, it had "provid[ed] flexibility and compliance options" so as to make the rule "less costly" for regulated parties. 77 Fed. Reg. 9306. EPA added that it had rejected beyond-the-floor standards for almost all power plants because they would not be "reasonable after considering costs." *Id.*, at 9331. And it showed the results of a formal analysis finding that

the rule's costs paled in comparison to its benefits. In sum, EPA concluded, it had made the final standards "cost-efficient." *Id.*, at 9434. What more would the majority have EPA say?

IV

Costs matter in regulation. But when Congress does not say how to take costs into account, agencies have broad discretion to make that judgment. Accord, *ante*, at 759 (noting that it is "up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost"). Far more than courts, agencies have the expertise and experience necessary to design regulatory processes suited to "a technical and complex arena." *Chevron*, 467 U. S., at 863. And in any event, Congress has entrusted such matters to them, not to us.

EPA exercised that authority reasonably and responsibly in setting emissions standards for power plants. The Agency treated those plants just as it had more than 100 other industrial sources of hazardous air pollutants, at Congress's direction and with significant success. It made a threshold finding that regulation was "appropriate and necessary" based on the harm caused by power plants' emissions and the availability of technology to reduce them. In making that finding, EPA knew that when it decided what a regulation would look like—what emissions standards the rule would actually set—the Agency would consider costs. Indeed, EPA expressly promised to do so. And it fulfilled that promise. The Agency took account of costs in setting floor standards as well as in thinking about beyond-the-floor standards. It used its full kit of tools to minimize the expense of complying with its proposed emissions limits. It capped the regulatory process with a formal analysis demonstrating that the benefits of its rule would exceed the costs many times over. In sum, EPA considered costs all over the regulatory process, except in making its threshold finding—when it could not have measured them accurately anyway.

That approach is wholly consonant with the statutory scheme. Its adoption was "up to the Agency to decide." *Ante*, at 759.

The majority arrives at a different conclusion only by disregarding most of EPA's regulatory process. It insists that EPA must consider costs—when EPA did just that, over and over and over again. It concedes the importance of "context" in determining what the "appropriate and necessary" standard means, see *ante*, at 752, 756—and then ignores every aspect of the rulemaking context in which that standard plays a part. The result is a decision that deprives the Agency of the latitude Congress gave it to design an emissions-setting process sensibly accounting for costs and benefits alike. And the result is a decision that deprives the American public of the pollution control measures that the responsible Agency, acting well within its delegated authority, found would save many, many lives. I respectfully dissent.

Syllabus

ARIZONA STATE LEGISLATURE *v.* ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 13–1314. Argued March 2, 2015—Decided June 29, 2015

Under Arizona's Constitution, the electorate shares lawmaking authority on equal footing with the Arizona Legislature. The voters may adopt laws and constitutional amendments by ballot initiative, and they may approve or disapprove, by referendum, measures passed by the Legislature. Ariz. Const., Art. IV, pt. 1, § 1. "Any law which may be enacted by the Legislature . . . may be enacted by the people under the Initiative." Art. XXII, § 14.

In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona's Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map the AIRC adopted in 2012 for congressional districts, arguing that the AIRC and its map violated the "Elections Clause" of the U. S. Constitution, which provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Because "Legislature" means the State's representative assembly, the Arizona Legislature contended, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. A three-judge District Court held that the Arizona Legislature had standing to sue, but rejected its complaint on the merits.

Held:

1. The Arizona Legislature has standing to bring this suit. In claiming that Proposition 106 stripped it of its alleged constitutional prerogative to engage in redistricting and that its injury would be remedied by a court order enjoining the proposition's enforcement, the Legislature has shown injury "that is 'concrete and particularized' and 'actual or imminent,'" *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64, "fairly traceable to the challenged action," and "redressable by a favorable ruling," *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409. Spe-

cifically, Proposition 106, together with the Arizona Constitution's ban on efforts by the Arizona Legislature to undermine the purposes of an initiative, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan. *Raines* v. *Byrd*, 521 U. S. 811, 823–824. Pp. 799–804.

2. The Elections Clause and 2 U. S. C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts. Pp. 804–824.

(a) Redistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum, *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 567, and the Governor's veto, *Smiley* v. *Holm*, 285 U. S. 355, 369. While exercise of the initiative was not at issue in this Court's prior decisions, there is no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking. Pp. 805–809.

(b) Title 2 U. S. C. § 2a(c)—which provides that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," it must follow federally prescribed redistricting procedures—permits redistricting in accord with Arizona's initiative. From 1862 through 1901, apportionment Acts required a State to follow federal procedures unless "the [state] legislature" drew district lines. In 1911, Congress, recognizing that States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, replaced the reference to redistricting by the state "legislature" with a reference to redistricting of a State "in the manner provided by the laws thereof." § 4, 37 Stat. 14. The Act's legislative history "leaves no . . . doubt," *Hildebrant*, 241 U. S., at 568, that the change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437. "If they include [the] initiative, it is included." *Id.*, at 3508. Congress used virtually identical language in enacting § 2a(c) in 1941. This provision also accords full respect to the redistricting procedures adopted by the States. Thus, so long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure in its Constitution—the resulting redistricting plan becomes the presumptively governing map.

Though four of § 2a(c)'s five default redistricting procedures—operative only when a State is not "redistricted in the manner provided by [state] law"—have become obsolete as a result of this Court's decisions embracing the one-person, one-vote principle, this infirmity does not bear on the question whether a State has been "redistricted in the manner provided by [state] law." Pp. 809–813.

Syllabus

(c) The Elections Clause permits the people of Arizona to provide for redistricting by independent commission. The history and purpose of the Clause weigh heavily against precluding the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such preclusion would also run up against the Constitution's animating principle that the people themselves are the originating source of all the powers of government. Pp. 813–823.

(1) The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. See *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 8. Ratification arguments in support of congressional oversight focused on potential abuses by state politicians, but the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. Pp. 814–816.

(2) There is no suggestion that the Election Clause, by specifying "the Legislature thereof," required assignment of congressional-redistricting authority to the State's representative body. It is characteristic of the federal system that States retain autonomy to establish their own governmental processes free from incursion by the Federal Government. See, *e. g.*, *Alden* v. *Maine*, 527 U. S. 706, 752. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460. Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority, Ariz. Const., Art. IV. The Elections Clause should not be read to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. And reading the Clause to permit the use of the initiative to control state and local elections but not federal elections would "deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, p. 376 (Hamilton). Pp. 816–819.

(3) The Framers may not have imagined the modern initiative process in which the people's legislative power is coextensive with the state legislature's authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. It would thus be perverse to interpret "Legislature" in the Elections Clause to exclude lawmaking by the people, particularly when such lawmaking is intended to advance the pros-

pect that Members of Congress will in fact be "chosen . . . by the People of the several States." Art. I, § 2. Pp. 819–821.

(4) Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would not just stymie attempts to curb gerrymandering. It would also cast doubt on numerous other time, place, and manner regulations governing federal elections that States have adopted by the initiative method. As well, it could endanger election provisions in state constitutions adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." Pp. 822–823.

997 F. Supp. 2d 1047, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 824. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined., *post*, p. 854. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 859.

Paul D. Clement argued the cause for appellant. With him on the briefs were *George W. Hicks, Jr.*, *Peter A. Gentala*, *Lesli M. H. Sorensen*, *Gregrey G. Jernigan*, and *Joshua W. Carden.*

Eric J. Feigin argued the cause for the United States as *amicus curiae* urging vacatur and remand. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorneys General Branda* and *Gupta*, *Deputy Solicitor General Gershengorn*, *Michael S. Raab*, *Tovah R. Calderon*, *Daniel Tenny*, and *Bonnie I. Robin-Vergeer.*

Seth P. Waxman argued the cause for appellees. With him on the brief were *Paul R. Q. Wolfson*, *Jason D. Hirsch*, *Mary O'Grady*, *Joseph N. Roth*, *Joseph A. Kanefield*, and *Brunn W. Roysden III.**

---

*Briefs of *amici curiae* urging reversal were filed for the Coolidge-Reagan Foundation by *Michael T. Morley* and *Dan Backer*; and for the National Conference of State Legislatures by *Mark A. Packman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Noah G. Purcell*, Solicitor General, and *Rebecca Ripoli Glasgow* and *Jay D. Geck*, Deputy Solicitors General, and by the Attorneys General for

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.[1] "[P]artisan gerrymanders," this Court has recognized, "[are incompatible] with democratic principles." *Vieth* v. *Jubelirer*, 541 U. S. 267, 292 (2004) (plurality opinion); *id.*, at 316 (KENNEDY, J., concurring in judgment). Even so, the Court in *Vieth* did not grant relief on the plaintiffs' partisan gerrymander claim.

---

their respective States as follows: *Kamala D. Harris* of California, *Cynthia H. Coffman* of Colorado, *George Jepson* of Connecticut, *Russell A. Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *Maura Healey* of Massachusetts, *Jim Hood* of Mississippi, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, and *Mark R. Herring* of Virginia; for the Brennan Center for Justice at N. Y. U. School of Law by *Wendy Weiser*, *Michael Li*, and *Brent Ferguson*; for the California Citizens Redistricting Commission by *Marian M. Johnston*; for the Campaign Legal Center et al. by *Paul M. Smith*, *Jessica Ring Amunson*, *J. Gerald Hebert*, *Sean J. Young*, *Steven R. Shapiro*, *Matthew Coles*, *Dale E. Ho*, *Julie Ebenstein*, *Arthur N. Eisenberg*, and *Lloyd Leonard*; for former California Governor George Deukmejian et al. by *Theodore B. Olson*, *Amir C. Tayrani*, *Scott G. Stewart*, *Steven A. Merksamer*, *Marguerite Mary Leoni*, and *Christopher E. Skinnell*; for former Governor Jim Edgar et al. by *Tacy F. Flint*, *Carter G. Phillips*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*; for the League of Women Voters of Arizona et al. by *Joseph R. Palmore*, *Deanne E. Maynard*, *Timothy M. Hogan*, and *Andrew S. Gordon*; for Members of Congress by *John P. Elwood* and *Jeremy C. Marwell*; for Scholars and Historians of Congressional Redistricting by *Justin Levitt* and *Andrew J. Ehrlich*; for State and Local Elected Officials by *H. Rodgin Cohen* and *Richard C. Pepperman II*; for Thomas Mann et al. by *Ira M. Feinberg* and *Jaclyn L. DiLauro*; for Nathaniel Persily et al. by *Mr. Persily, pro se*; and for Jack N. Rakove et al. by *Charles A. Rothfeld*.

[1] The term "gerrymander" is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander. See E. Griffith, The Rise and Development of the Gerrymander 16–19 (Arno ed. 1974).

The plurality held the matter nonjusticiable. *Id.*, at 281. JUSTICE KENNEDY found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation. *Id.*, at 317.

In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections." App. 50. Proposition 106 amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission, the Arizona Independent Redistricting Commission (AIRC or Commission). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts.

The Arizona Legislature challenged the map the Commission adopted in January 2012 for congressional districts. Recognizing that the voters could control redistricting for state legislators, Brief for Appellant 42, 47; Tr. of Oral Arg. 3–4, the Arizona Legislature sued the AIRC in federal court seeking a declaration that the Commission and its map for congressional districts violated the "Elections Clause" of the U. S. Constitution. That Clause, critical to the resolution of this case, provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." Art. I, § 4, cl. 1.

The Arizona Legislature's complaint alleged that "[t]he word 'Legislature' in the Elections Clause means [specifically and only] the representative body which makes the laws of the people," App. 21, ¶37; so read, the Legislature urges, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. The AIRC responded that, for Elections Clause purposes, "the Legisla-

ture" is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.

A three-judge District Court held, unanimously, that the Arizona Legislature had standing to sue; dividing two to one, the Court rejected the Legislature's complaint on the merits. We postponed jurisdiction and instructed the parties to address two questions: (1) Does the Arizona Legislature have standing to bring this suit? (2) Do the Elections Clause of the United States Constitution and 2 U. S. C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? 573 U. S. 990 (2014).

We now affirm the District Court's judgment. We hold, first, that the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106. Next, we hold that lawmaking power in Arizona includes the initiative process, and that both §2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature.

I

A

Direct lawmaking by the people was "virtually unknown when the Constitution of 1787 was drafted." Donovan & Bowler, An Overview of Direct Democracy in the American States, in Citizens as Legislators 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998). There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England's townhall meetings and the submission of early state constitutions to the people for ratification. See Lowell, The Referendum in the United States, in The Initiative, Referendum and Recall 126, 127 (W. Munro ed. 1912) (hereinafter IRR); W. Dodd, The Revision and

Amendment of State Constitutions 64–67 (1910).[2] But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States. See generally Persily, The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11 (1997).

The two main "agencies of direct legislation" are the initiative and the referendum. Munro, Introductory, in IRR 8. The initiative operates entirely outside the States' representative assemblies; it allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." D. Magleby, Direct Legislation 1 (1984). While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls." *Ibid.* "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission." Johnson, Direct Legislation as an Ally of Representative Government, in IRR 139, 142.

In 1898, South Dakota took the pathmarking step of affirming in its Constitution the people's power "directly [to] control the making of all ordinary laws" by initiative and referendum. Introductory, *id.*, at 9. In 1902, Oregon became the first State to adopt the initiative as a means, not only to enact ordinary laws, but also to amend the State's Constitution. J. Dinan, The American State Constitutional

---

[2] The Massachusetts Constitution of 1780 is illustrative of the understanding that the people's authority could trump the state legislature's. Framed by a separate convention, it was submitted to the people for ratification. That occurred after the legislature attempted to promulgate a Constitution it had written, an endeavor that drew opposition from many Massachusetts towns. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 96–101 (1996); G. Wood, The Creation of the American Republic, 1776–1787, pp. 339–341 (1969).

Tradition 62 (2006). By 1920, the people in 19 States had reserved for themselves the power to initiate ordinary lawmaking, and, in 13 States, the power to initiate amendments to the State's Constitution. *Id.*, at 62, and n. 132, 94, and n. 151. Those numbers increased to 21 and 18, respectively, by the close of the 20th century. *Ibid.*[3]

B

For the delegates to Arizona's constitutional convention, direct lawmaking was a "principal issu[e]." J. Leshy, The Arizona State Constitution 8–9 (2d ed. 2013) (hereinafter Leshy). By a margin of more than three to one, the people of Arizona ratified the State's Constitution, which included, among lawmaking means, initiative and referendum provisions. *Id.*, at 14–16, 22. In the runup to Arizona's admission to the Union in 1912, those provisions generated no controversy. *Id.*, at 22.

In particular, the Arizona Constitution "establishes the electorate [of Arizona] as a coordinate source of legislation" on equal footing with the representative legislative body. *Queen Creek Land & Cattle Corp.* v. *Yavapai Cty. Bd. of Supervisors*, 108 Ariz. 449, 451, 501 P. 2d 391, 393 (1972); *Cave Creek Unified School Dist.* v. *Ducey*, 233 Ariz. 1, 4, 308 P. 3d 1152, 1155 (2013) ("The legislature and electorate share lawmaking power under Arizona's system of government." (internal quotation marks omitted)). The initiative, housed under the article of the Arizona Constitution concerning the

[3] The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, 137, 151 (1912) (rejecting challenge to referendum mounted under Article IV, § 4's undertaking by the United States to "guarantee to every State in th[e] Union a Republican Form of Government"). But see *New York* v. *United States*, 505 U. S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

"Legislative Department" and the section defining the State's "legislative authority," reserves for the people "the power to propose laws and amendments to the constitution." Art. IV, pt. 1, § 1. The Arizona Constitution further states that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Art. XXII, § 14. Accordingly, "[g]eneral references to the power of the 'legislature'" in the Arizona Constitution "include the people's right (specified in Article IV, part 1) to bypass their elected representatives and make laws directly through the initiative." Leshy xxii.

C

Proposition 106, vesting redistricting authority in the AIRC, was adopted by citizen initiative in 2000 against a "background of recurring redistricting turmoil" in Arizona. Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1831 (2012). Redistricting plans adopted by the Arizona Legislature sparked controversy in every redistricting cycle since the 1970's, and several of those plans were rejected by a federal court or refused preclearance by the Department of Justice under the Voting Rights Act of 1965. See *id.*, at 1830–1832.[4]

Aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections," App. 50, Proposition 106 amended the Arizona Constitution to remove congressional-redistricting authority from the State

[4] From Arizona's admission to the Union in 1912 to 1940, no congressional districting occurred because Arizona had only one Member of Congress. K. Martis, The Historical Atlas of United States Congressional Districts, 1789–1983, p. 3 (1982) (Table 1). Court-ordered congressional districting plans were in place from 1966 to 1970, and from 1982 through 2000. See *Klahr* v. *Williams*, 313 F. Supp. 148 (Ariz. 1970); *Goddard* v. *Babbitt*, 536 F. Supp. 538 (Ariz. 1982); *Arizonans for Fair Representation* v. *Symington*, 828 F. Supp. 684 (Ariz. 1992); Norrander & Wendland, Redistricting in Arizona, in Reapportionment and Redistricting in the West 177, 178–179 (G. Moncrief ed. 2011).

Legislature, lodging that authority, instead, in a new entity, the AIRC. Ariz. Const., Art. IV, pt. 2, §1, ¶¶3–23. The AIRC convenes after each census, establishes final district boundaries, and certifies the new districts to the Arizona Secretary of State. ¶¶16–17. The Legislature may submit nonbinding recommendations to the AIRC, ¶16, and is required to make necessary appropriations for its operation, ¶18. The highest ranking officer and minority leader of each chamber of the Legislature each select one member of the AIRC from a list compiled by Arizona's Commission on Appellate Court Appointments. ¶¶4–7. The four appointed members of the AIRC then choose, from the same list, the fifth member, who chairs the Commission. ¶8. A Commission's tenure is confined to one redistricting cycle; each member's time in office "expire[s] upon the appointment of the first member of the next redistricting commission." ¶23.

Holders of, or candidates for, public office may not serve on the AIRC, except candidates for or members of a school board. ¶3. No more than two members of the Commission may be members of the same political party, *ibid.*, and the presiding fifth member cannot be registered with any party already represented on the Commission, ¶8. Subject to the concurrence of two-thirds of the Arizona Senate, AIRC members may be removed by the Arizona Governor for gross misconduct, substantial neglect of duty, or inability to discharge the duties of office. ¶10.[5]

[5] In the current climate of heightened partisanship, the AIRC has encountered interference with its operations. In particular, its dependence on the Arizona Legislature for funding, and the removal provision have proved problematic. In 2011, when the AIRC proposed boundaries the majority party did not like, the Governor of Arizona attempted to remove the Commission's independent chair. Her attempt was stopped by the Arizona Supreme Court. See Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1835–1836 (2012) (citing *Mathis* v. *Brewer*, No. CV–11–0313–SA (Ariz. 2011)); *Arizona Independent Redistricting Comm'n* v. *Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012).

Several other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting. Some States, in common with Arizona, have given nonpartisan or bipartisan commissions binding authority over redistricting.[6] The California Redistricting Commission, established by popular initiative, develops redistricting plans which can be halted by public referendum.[7] Still other States have given commissions an auxiliary role, advising the legislatures on redistricting,[8] or serving as a "backup" in the event the State's representative body fails to complete redistricting.[9] Studies report that nonpartisan and bipartisan commissions generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge. See Miller & Grofman, Redistricting Commissions in the Western United States, 3 U. C. Irvine L. Rev. 637, 661, 663–664, 666 (2013).

D

On January 17, 2012, the AIRC approved final congressional and state legislative maps based on the 2010 census. See Arizona Independent Redistricting, Final Maps, http://azredistricting.org/Maps/Final-Maps/default.asp (all Internet materials as visited June 25, 2015, and included in Clerk of Court's case file). Less than five months later, on June 6, 2012, the Arizona Legislature filed suit in the United States District Court for the District of Arizona, naming as defendants the AIRC, its five members, and the Arizona Secretary of State. The Legislature sought both a declaration

---

[6] See Haw. Const., Art. IV, § 2, and Haw. Rev. Stat. §§ 25–1 to 25–9 (2009 and 2013 Cum. Supp.); Idaho Const., Art. III, § 2; Mont. Const., Art. V, § 14; N. J. Const., Art. II, § 2; Wash. Const., Art. II, § 43.

[7] See Cal. Const., Art. XXI, § 2; Cal. Govt. Code Ann. §§ 8251–8253.6 (West Supp. 2015).

[8] See Iowa Code §§ 42.1–42.6 (2013); Ohio Rev. Code Ann. § 103.51 (Lexis 2014); Me. Const., Art. IV, pt. 3, § 1–A.

[9] See Conn. Const., Art. III, § 6; Ind. Code § 3–3–2–2 (2014).

that Proposition 106 and congressional maps adopted by the AIRC are unconstitutional, and, as affirmative relief, an injunction against use of AIRC maps for any congressional election after the 2012 general election.

A three-judge District Court, convened pursuant to 28 U. S. C. § 2284(a), unanimously denied a motion by the AIRC to dismiss the suit for lack of standing. The Arizona Legislature, the court determined, had "demonstrated that its loss of redistricting power constitute[d] a [sufficiently] concrete injury." 997 F. Supp. 2d 1047, 1050 (2014). On the merits, dividing two to one, the District Court granted the AIRC's motion to dismiss the complaint for failure to state a claim. Decisions of this Court, the majority concluded, "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws." *Id.*, at 1054. As the "lawmaking power" in Arizona "plainly includes the power to enact laws through initiative," the District Court held, the "Elections Clause permits [Arizona's] establishment and use" of the Commission. *Id.*, at 1056. Judge Rosenblatt dissented in part. Proposition 106, in his view, unconstitutionally denied "the Legislature" of Arizona the "ability to have any outcome-defining effect on the congressional redistricting process." *Id.*, at 1058.

We postponed jurisdiction, and now affirm.

II

We turn first to the threshold question: Does the Arizona Legislature have standing to bring this suit? Trained on "whether the plaintiff is [a] proper party to bring [a particular lawsuit,]" standing is "[o]ne element" of the Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution. *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997). "To qualify as a party with standing to litigate," the Arizona Legislature "must show, first and foremost," injury in the form of " 'invasion of a le-

gally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992)). The Legislature's injury also must be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409 (2013) (internal quotation marks omitted).

The Arizona Legislature maintains that the Elections Clause vests in it "primary responsibility" for redistricting. Brief for Appellant 51, 53. To exercise that responsibility, the Legislature urges, it must have at least the opportunity to engage (or decline to engage) in redistricting before the State may involve other actors in the redistricting process. See *id.*, at 51–53. Proposition 106, which gives the AIRC binding authority over redistricting, regardless of the Legislature's action or inaction, strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106. Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, see *infra*, at 813–824, one must not "confus[e] weakness on the merits with absence of Article III standing." *Davis* v. *United States*, 564 U. S. 229, 249, n. 10 (2011); see *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975) (standing "often turns on the nature and source of the claim asserted," but it "in no way depends on the merits" of the claim).

The AIRC argues that the Legislature's alleged injury is insufficiently concrete to meet the standing requirement absent some "specific legislative act that would have taken effect but for Proposition 106." Brief for Appellees 20. The United States, as *amicus curiae*, urges that even more is needed: The Legislature's injury will remain speculative, the United States contends, unless and until the Arizona Secretary of State refuses to implement a competing redistricting

plan passed by the Legislature. Brief for United States 14–17. In our view, the Arizona Legislature's suit is not premature, nor is its alleged injury too "conjectural" or "hypothetical" to establish standing. *Defenders of Wildlife*, 504 U. S., at 560 (internal quotation marks omitted).

Two prescriptions of Arizona's Constitution would render the Legislature's passage of a competing plan and submission of that plan to the Secretary of State unavailing. Indeed, those actions would directly and immediately conflict with the regime Arizona's Constitution establishes. Cf. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 944, n. 2 (1982) (failure to apply for permit which "would not have been granted" under existing law did not deprive plaintiffs of standing to challenge permitting regime). First, the Arizona Constitution instructs that the Legislature "shall not have the power to adopt any measure that supersedes [an initiative], in whole or in part, . . . unless the superseding measure furthers the purposes" of the initiative. Art. IV, pt. 1, § 1(14). Any redistricting map passed by the Legislature in an effort to supersede the AIRC's map surely would not "furthe[r] the purposes" of Proposition 106. Second, once the AIRC certifies its redistricting plan to the Secretary of State, Arizona's Constitution requires the Secretary to implement that plan and no other. See Art. IV, pt. 2, § 1(17); *Arizona Minority Coalition for Fair Redistricting* v. *Arizona Independent Redistricting Comm'n*, 211 Ariz. 337, 351, 121 P. 3d 843, 857 (App. 2005) (*per curiam*) ("Once the Commission certifies [its] maps, the secretary of state must use them in conducting the next election."). To establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government.

Raines v. *Byrd*, 521 U. S. 811 (1997), does not aid AIRC's argument that there is no standing here. In *Raines*, this Court held that six *individual Members* of Congress lacked

standing to challenge the Line Item Veto Act. *Id.*, at 813–814, 829–830 (holding specifically and only that "individual members of Congress [lack] Article III standing"). The Act, which gave the President authority to cancel certain spending and tax benefit measures after signing them into law, allegedly diluted the efficacy of the Congressmembers' votes. *Id.*, at 815–817. The "institutional injury" at issue, we reasoned, scarcely zeroed in on any individual Member. *Id.*, at 821. "[W]idely dispersed," the alleged injury "necessarily [impacted] all Members of Congress and both Houses . . . equally." *Id.*, at 829, 821. None of the plaintiffs, therefore, could tenably claim a "personal stake" in the suit. *Id.*, at 830.

In concluding that the individual Members lacked standing, the Court "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress." *Id.*, at 829. "[I]ndeed," the Court observed, "both houses actively oppose[d] their suit." *Ibid.* Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain. The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers, App. 26–27, 46. That "different . . . circumstanc[e]," 521 U. S., at 830, was not *sub judice* in *Raines*.[10]

---

[10] *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), featured in JUSTICE SCALIA's dissent, *post*, at 856–857, bears little resemblance to this case. There, the Court unanimously found that Massachusetts lacked standing to sue the Secretary of the Treasury on a claim that a federal grant program exceeded Congress' Article I powers and thus violated the Tenth Amendment. 262 U. S., at 480. If suing on its own behalf, the Court reasoned, Massachusetts' claim involved no "quasi-sovereign rights actually invaded or threatened." *Id.*, at 485. As *parens patriae*, the Court stated: "[I]t is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.*, at 485–486. As astutely observed, moreover: "The cases on the standing of states to sue the federal government seem to depend

Closer to the mark is this Court's decision in *Coleman* v. *Miller*, 307 U. S. 433 (1939). There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." *Id.*, at 446.[11] We held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment. *Ibid.* *Coleman*, as we later explained in *Raines*, stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U. S., at 823.[12] Our conclusion that the Arizona Legislature has standing fits that bill.

---

on the kind of claim that the state advances. The decisions . . . are hard to reconcile." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263–266 (6th ed. 2009) (comparing *Mellon* with *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966) (rejecting on the merits the claim that the Voting Rights Act of 1965 invaded reserved powers of the States to determine voter qualifications and regulate elections), *Nebraska* v. *Wyoming*, 515 U. S. 1, 20 (1995) (recognizing that Wyoming could bring suit to vindicate the State's "quasi-sovereign" interests in the physical environment within its domain (emphasis deleted; internal quotation marks omitted)), and *Massachusetts* v. *EPA*, 549 U. S. 497, 520 (2007) (maintaining that Massachusetts "is entitled to special solicitude in our standing analysis")).

[11] *Coleman* concerned the proposed Child Labor Amendment, which provided that "Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age." 307 U. S., at 435, n. 1 (internal quotation marks omitted).

[12] The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U. S. 811, 819–820 (1997).

Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, see *supra*, at 801, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan, *Raines*, 521 U. S., at 823–824.[13]

This dispute, in short, "will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982).[14] Accordingly, we proceed to the merits.[15]

III

On the merits, we instructed the parties to address this question: Do the Elections Clause of the United States Constitution and 2 U. S. C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts? The Elections Clause is set out at the start of this opinion, *supra*, at 792. Section 2a(c) provides:

> "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Repre-

[13] In an endeavor to wish away *Coleman*, JUSTICE SCALIA, in dissent, suggests the case may have been "a 4-to-4 standoff." *Post*, at 858. He overlooks that Chief Justice Hughes' opinion, announced by Justice Stone, was styled "Opinion of the Court." 307 U. S., at 435. Describing *Coleman*, the Court wrote in *Raines*: "By a vote of 5–4, we held that [the 20 Kansas Senators who voted against ratification of a proposed federal constitutional amendment] had standing." 521 U. S., at 822. For opinions recognizing the precedential weight of *Coleman*, see *Baker* v. *Carr*, 369 U. S. 186, 208 (1962); *United States* v. *Windsor*, 570 U. S. 744, 805–806 (2013) (ALITO, J., dissenting).

[14] Curiously, JUSTICE SCALIA, dissenting on standing, berates the Court for "treading upon the powers of state legislatures." *Post*, at 859. He forgets that the party invoking federal-court jurisdiction in this case, and inviting our review, is the Arizona State Legislature.

[15] JUSTICE THOMAS, on the way to deciding that the Arizona Legislature lacks standing, first addresses the merits. In so doing, he overlooks that, in the cases he features, it was entirely immaterial whether the law involved was adopted by a representative body or by the people, through exercise of the initiative.

> sentatives to which such State is entitled under such apportionment shall be elected in the following manner: [setting out five federally prescribed redistricting procedures]."

Before focusing directly on the statute and constitutional prescriptions in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. Three decisions compose the relevant case law: *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565 (1916); *Hawke* v. *Smith (No. 1)*, 253 U. S. 221 (1920); and *Smiley* v. *Holm*, 285 U. S. 355 (1932).

A

Davis v. *Hildebrant* involved an amendment to the Constitution of Ohio vesting in the people the right, exercisable by referendum, to approve or disapprove by popular vote any law enacted by the State's legislature. A 1915 Act redistricting the State for the purpose of congressional elections had been submitted to a popular vote, resulting in disapproval of the legislature's measure. State election officials asked the State's Supreme Court to declare the referendum void. That court rejected the request, holding that the referendum authorized by Ohio's Constitution "was a part of the legislative power of the State," and "nothing in [federal statutory law] or in [the Elections Clause] operated to the contrary." 241 U. S., at 567. This Court affirmed the Ohio Supreme Court's judgment. In upholding the state court's decision, we recognized that the referendum was "part of the legislative power" in Ohio, *ibid.*, legitimately exercised by the people to disapprove the legislation creating congressional districts. For redistricting purposes, *Hildebrant* thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people. See *id.*, at 569 (Elections Clause does not bar "treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws").

Hawke v. *Smith* involved the Eighteenth Amendment to the Federal Constitution. Ohio's Legislature had ratified the Amendment, and a referendum on that ratification was at issue. Reversing the Ohio Supreme Court's decision upholding the referendum, we held that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." 253 U. S., at 229. Instead, Article V governing ratification had lodged in "the legislatures of three-fourths of the several States" sole authority to assent to a proposed amendment. *Id.,* at 226. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Id.,* at 229. *Davis* v. *Hildebrant*, the Court explained, involved the enactment of legislation, *i. e.*, a redistricting plan, and properly held that "the referendum [was] part of the legislative authority of the State for [that] purpose." 253 U. S., at 230.

Smiley v. *Holm* raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor's veto. The Minnesota Supreme Court had held that the Elections Clause placed redistricting authority exclusively in the hands of the State's legislature, leaving no role for the Governor. We reversed that determination and held, for the purpose at hand, Minnesota's legislative authority includes not just the two Houses of the legislature; it includes, in addition, a make-or-break role for the Governor. In holding that the Governor's veto counted, we distinguished instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking. State legislatures, we pointed out, performed an "electoral" function "in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment,"[16] a "ratifying" function for "proposed amendments to the Constitution under Article V,"

[16] The Seventeenth Amendment provided for election of Senators "by the people" of each State.

as explained in *Hawke* v. *Smith*, and a "consenting" function "in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17." 285 U. S., at 365–366.

In contrast to those other functions, we observed, redistricting "involves lawmaking in its essential features and most important aspect." *Id.*, at 366. Lawmaking, we further noted, ordinarily "must be in accordance with the method which the State has prescribed for legislative enactments." *Id.*, at 367. In Minnesota, the State's Constitution had made the Governor "part of the legislative process." *Id.*, at 369. And the Elections Clause, we explained, respected the State's choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to "the Legislature" a ratifying, electoral, or consenting function. Nothing in the Elections Clause, we said, "attempt[ed] to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted." *Id.*, at 368.

THE CHIEF JUSTICE, in dissent, features, indeed trumpets repeatedly, the pre-Seventeenth Amendment regime in which Senators were "chosen [in each State] by the Legislature thereof." Art. I, § 3; see *post*, at 824–825, 831–832, 842. If we are right, he asks, why did popular election proponents resort to the amending process instead of simply interpreting "the Legislature" to mean "the people"? *Post*, at 824. *Smiley*, as just indicated, answers that question. Article I, § 3, gave state legislatures "a function different from that of lawgiver," 285 U. S., at 365; it made each of them "an electoral body" charged to perform that function to the exclusion of other participants, *ibid.* So too, of the ratifying function. As we explained in *Hawke*, "the power to legislate in the enactment of the laws of a State is derived from the people of the State." 253 U. S., at 230. Ratification, however, "has its source in the Federal Constitution" and is not "an act

of legislation within the proper sense of the word." *Id.*, at 229–230.

Constantly resisted by THE CHIEF JUSTICE, but well understood in opinions that speak for the Court: "[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434 (1932) (citing *Smiley*, 285 U. S. 355). Thus "the Legislature" comprises the referendum and the Governor's veto in the context of regulating congressional elections. *Hildebrant*, see *supra*, at 805; *Smiley*, see *supra*, at 806–807. In the context of ratifying constitutional amendments, in contrast, "the Legislature" has a different identity, one that excludes the referendum and the Governor's veto. *Hawke*, see *supra*, at 806.[17]

In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto. The exercise of the initiative, we acknowledge, was not at issue in our prior decisions. But as developed below, we see no constitutional bar-

[17] The list of constitutional provisions in which the word "legislature" appears, appended to THE CHIEF JUSTICE's opinion, *post*, at 850–854, is illustrative of the variety of functions state legislatures can be called upon to exercise. For example, Article I, § 2, cl. 1, superseded by the Seventeenth Amendment, assigned an "electoral" function. See *Smiley* v. *Holm*, 285 U. S. 355, 365 (1932). Article I, § 3, cl. 2, assigns an "appointive" function. Article I, § 8, cl. 17, assigns a "consenting" function, see *Smiley*, 285 U. S., at 366, as does Article IV, § 3, cl. 1. "[R]atifying" functions are assigned in Article V, Amdt. 18, § 3, Amdt. 20, § 6, and Amdt. 22, § 2. See *Hawke* v. *Smith (No. 1)*, 253 U. S. 221, 229 (1920). But Article I, § 4, cl. 1, unquestionably calls for the exercise of lawmaking authority. That authority can be carried out by a representative body, but if a State so chooses, legislative authority can also be lodged in the people themselves. See *infra*, at 813–824.

rier to a State's empowerment of its people by embracing that form of lawmaking.

B

We take up next the statute the Court asked the parties to address, 2 U. S. C. § 2a(c), a measure modeled on the Reapportionment Act Congress passed in 1911, Act of Aug. 8 (1911 Act), ch. 5, § 4, 37 Stat. 14. Section 2a(c), we hold, permits use of a commission to adopt Arizona's congressional districts. See *supra*, at 804.[18]

From 1862 through 1901, the decennial congressional apportionment Acts provided that a State would be required to follow federally prescribed procedures for redistricting unless "the legislature" of the State drew district lines. *E. g.*, Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734. In drafting the 1911 Act, Congress focused on the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate). 47 Cong. Rec. 3508 (statement of Sen. Burton); see *supra*, at 793–795. To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the Act's default procedures for redistricting "until such State shall be redistricted *in the manner provided by the laws thereof*." Ch. 5, § 4, 37 Stat. 14 (emphasis added).[19]

---

[18] The AIRC referenced § 2a(c) in briefing below, see Motion to Dismiss 8–9, and Response to Plaintiff's Motion for Preliminary Injunction 12–14, in No. 12–1211 (D Ariz.), and in its motion to dismiss or affirm in this Court, see Motion to Dismiss or Affirm 28–31.

[19] The 1911 Act also required States to comply with certain federally prescribed districting rules—namely, that Representatives be elected "by districts composed of a contiguous and compact territory, and containing

Some Members of Congress questioned whether the language change was needed. In their view, existing apportionment legislation (referring to redistricting by a State's "legislature") "suffic[ed] to allow, whatever the law of the State may be, the people of that State to control [redistricting]." 47 Cong. Rec. 3507 (statement of Sen. Shively); cf. *Shiel* v. *Thayer*, Bartlett Contested Election Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 351 (1861) (view of House Committee of Elections Member Dawes that Article I, § 4's reference to "the Legislature" meant simply the "constituted authorities, through whom [the State] choose[s] to speak," prime among them, the State's Constitution, "which rises above . . . all legislative action"). Others anticipated that retaining the reference to "the legislature" would "condem[n] . . . any [redistricting] legislation by referendum or by initiative." 47 Cong. Rec. 3436 (statement of Sen. Burton). In any event, proponents of the change maintained, "[i]n view of the very serious evils arising from gerrymanders," Congress should not "take any chances in [the] matter." *Id.*, at 3508 (same). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States," they urged, required Congress "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.*, at 3436; see *id.*, at 3508 (statement of Sen. Works).

As this Court observed in *Hildebrant*, "the legislative history of th[e] [1911 Act] leaves no room for doubt [about why]

---

as nearly as practicable an equal number of inhabitants," and that the districts "be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative." Act of Aug. 8, 1911, ch. 5, §§ 3–4, 37 Stat. 14. When a State's apportionment of Representatives remained constant, the Act directed the State to continue using its pre-existing districts "until [the] State shall be redistricted as herein prescribed." See § 4, *ibid.* The 1911 Act did not address redistricting in the event a State's apportionment of Representatives decreased, likely because no State faced a decrease following the 1910 census.

the prior words were stricken out and the new words inserted." 241 U. S., at 568. The change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437 (statement of Sen. Burton). The 1911 Act, in short, left the question of redistricting "to the laws and methods of the States. If they include initiative, it is included." *Id.*, at 3508.

While the 1911 Act applied only to reapportionment following the 1910 census, see *Wood* v. *Broom*, 287 U. S. 1, 6–7 (1932), Congress used virtually identical language when it enacted § 2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761–762. Section 2a(c) sets forth congressional-redistricting procedures operative only if the State, "after any apportionment," had not redistricted "in the manner provided by the law thereof." The 1941 provision, like the 1911 Act, thus accorded full respect to the redistricting procedures adopted by the States. So long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map.[20]

The Arizona Legislature characterizes § 2a(c) as an "obscure provision, narrowed by subsequent developments to the brink of irrelevance." Brief for Appellant 56. True, four of the five default redistricting procedures—operative only when a State is *not* "redistricted in the manner provided by [state] law"—had "become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch* v. *Smith*, 538 U. S. 254, 273–274 (2003) (plurality opinion). Concretely, the default

[20] Because a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map, nothing in § 2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.

procedures specified in § 2a(c)(1)–(4) contemplate that a State would continue to use pre-existing districts following a new census. The one-person, one-vote principle announced in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), however, would bar those procedures, except in the "unlikely" event that "the decennial census makes no districting change constitutionally necessary," *Branch*, 538 U. S., at 273 (plurality opinion).

Constitutional infirmity in § 2a(c)(1)–(4)'s default procedures, however, does not bear on the question whether a State has been "redistricted in the manner provided by [state] law."[21] As just observed, Congress expressly directed that when a State has been "redistricted in the manner provided by [state] law"—whether by the legislature, court decree (see *id.*, at 274), or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives.[22]

There can be no dispute that Congress itself may draw a State's congressional-district boundaries. See *Vieth*, 541 U. S., at 275 (plurality opinion) (stating that the Elections Clause "permit[s] Congress to 'make or alter' " the "districts for federal elections"). The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State "Legislature[s]," precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting plan under

[21] The plurality in *Branch* v. *Smith*, 538 U. S. 254, 273 (2003), considered the question whether § 2a(c) had been repealed by implication and stated, "where what it prescribes is constitutional," the provision "continues to apply."

[22] THE CHIEF JUSTICE, in dissent, insists that § 2a(c) and its precursor, the 1911 Act, have nothing to do with this case. *Post*, at 842–844, 846. Undeniably, however, it was the very purpose of the measures to recognize the legislative authority each State has to determine its own redistricting regime.

its plenary authority to "make or alter" the State's plan. See Brief for Appellant 56–57; Reply Brief 17. In other words, the Arizona Legislature regards § 2a(c) as a futile exercise. The Congresses that passed § 2a(c) and its forerunner, the 1911 Act, did not share that wooden interpretation of the Clause, nor do we. Any uncertainty about the import of § 2a(c), however, is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative, see *infra* this page and 814–824, leaving no arguable conflict between § 2a(c) and the first part of the Clause.

C

In accord with the District Court, see *supra*, at 799, we hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.

We note, preliminarily, that dictionaries, even those in circulation during the founding era, capaciously define the word "legislature." Samuel Johnson defined "legislature" simply as "[t]he power that makes laws." 2 A Dictionary of the English Language (1st ed. 1755); *ibid.* (6th ed. 1785); *ibid.* (10th ed. 1792); *ibid.* (12th ed. 1802). Thomas Sheridan's dictionary defined "legislature" exactly as Dr. Johnson did: "The power that makes laws." 2 A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. Compendious Dictionary of the English Language 174 (1806). And Nathan Bailey

similarly defined "legislature" as "the Authority of making Laws, or Power which makes them." An Universal Etymological English Dictionary (20th ed. 1763).[23]

As to the "power that makes laws" in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do. See Ariz. Const., Art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."). See also *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 672 (1976) ("In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."). As well in Arizona, the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do. See Tr. of Oral Arg. 15–16 (answering the Court's question, may the Arizona Legislature itself establish a commission to attend to redistricting, counsel for appellant responded yes, state legislatures may delegate their authority to a commission, subject to their prerogative to reclaim the authority for themselves).

1

The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override

---

[23] Illustrative of an embracive comprehension of the word "legislature," Charles Pinckney explained at South Carolina's ratifying convention that America is "[a] republic, where the people at large, either collectively or by representation, form the legislature." 4 Debates on the Federal Constitution 328 (J. Elliot 2d ed. 1863). Participants in the debates over the Elections Clause used the word "legislature" interchangeably with "state" and "state government." See Brief for Brennan Center for Justice at N. Y. U. School of Law as *Amicus Curiae* 6–7.

state election rules, not to restrict the way States enact legislation. As this Court explained in *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1 (2013), the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Id.*, at 8 (citing The Federalist No. 59, pp. 362–363 (C. Rossiter ed. 1961) (A. Hamilton)).

The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. As Madison urged, without the Elections Clause, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention 241 (M. Farrand rev. 1966). Madison spoke in response to a motion by South Carolina's delegates to strike out the federal power. Those delegates so moved because South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 223–224 (1996). The problem Madison identified has hardly lessened over time. Conflict of interest is inherent when "legislators dra[w] district lines that they ultimately have to run in." Cain, 121 Yale L. J., at 1817.

Arguments in support of congressional control under the Elections Clause were reiterated in the public debate over ratification. Theophilus Parsons, a delegate at the Massachusetts ratifying convention, warned that "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the states into districts for the election of representatives." Debate in Massachusetts Ratifying Convention (16–17, 21 Jan. 1788), in 2 The Founders' Constitution 256 (P. Kurland & R. Lerner eds. 1987). Timothy Pickering of Massachusetts similarly urged that the Clause was necessary because "the State gov-

ernments *may* abuse their power, and regulate . . . elections in such manner as would be highly inconvenient to the people." Letter to Charles Tillinghast (24 Dec. 1787), in *id.*, at 253. He described the Clause as a way to "ensure to the *people* their rights of election." *Ibid.*

While attention focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. That is hardly surprising. Recall that when the Constitution was composed in Philadelphia and later ratified, the people's legislative prerogatives—the initiative and the referendum—were not yet in our democracy's arsenal. See *supra*, at 793–795. The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands.[24]

2

The Arizona Legislature maintains that, by specifying "the Legislature thereof," the Elections Clause renders the State's representative body the sole "component of state government authorized to prescribe . . . regulations . . . for congressional redistricting." Brief for Appellant 30. THE CHIEF JUSTICE, in dissent, agrees. But it is characteristic of our federal system that States retain autonomy to establish their own governmental processes. See *Alden* v.

[24] THE CHIEF JUSTICE, in dissent, cites *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995), as an important precedent we overlook. *Post*, at 847. There, we held that state-imposed term limits on candidates for the House and Senate violated the Clauses of the Constitution setting forth qualifications for membership in Congress, Art. I, § 2, cl. 2, and Art. I, § 3, cl. 3. We did so for a reason entirely harmonious with today's decision. Adding state-imposed limits to the qualifications set forth in the Constitution, the Court wrote, would be "contrary to the 'fundamental principle of our representative democracy,' . . . that 'the people should choose whom they please to govern them.'" 514 U. S., at 783 (quoting *Powell* v. *McCormack*, 395 U. S. 486, 547 (1969)).

Maine, 527 U. S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance."); The Federalist No. 43, at 275 (J. Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do so."). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991). Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority. See Ariz. Const., Art. IV; *supra*, at 795–796.

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U. S. 160, 171 (2009); see *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Deference to state lawmaking "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " *Bond* v. *United States*, 564 U. S. 211, 221 (2011) (quoting *Gregory*, 501 U. S., at 458).

We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on

the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution. See *Shiel*, H. R. Misc. Doc. No. 57, at 349–352 (concluding that Oregon's Constitution prevailed over any conflicting legislative measure setting the date for a congressional election).

THE CHIEF JUSTICE, in dissent, maintains that, under the Elections Clause, the state legislature can trump any initiative-introduced constitutional provision regulating federal elections. He extracts support for this position from *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). See *post*, at 837–839. There, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in other locations. One candidate would win if the State Constitution's requirement controlled; his opponent would prevail under the Michigan Legislature's prescription. The House Elections Committee, in a divided vote, ruled that, under the Elections Clause, the Michigan Legislature had the paramount power.

As the minority report in *Baldwin* pointed out, however, the Supreme Court of Michigan had reached the opposite conclusion, holding, as courts generally do, that state legislation in direct conflict with the State's Constitution is void. *Baldwin*, H. R. Misc. Doc. No. 152, at 50. The *Baldwin* majority's ruling, furthermore, appears in tension with the Election Committee's unanimous decision in *Shiel* just five years earlier. (The Committee, we repeat, "ha[d] no doubt that the constitution of the State ha[d] fixed, beyond the control of the legislature, the time for holding [a congressional] election." *Shiel*, H. R. Misc. Doc. No. 57, at 351.) Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision. See U. S. House of

Representatives Congress Profiles: 39th Congress (1865-1867), http://history.house.gov/Congressional-Overview/Profiles/39th/; Biographical Directory of the United States Congress: Trowbridge, Rowland Ebenezer (1821–1881). Cf. Cain, 121 Yale L. J., at 1817 (identifying legislative conflict of interest as the problem independent redistricting commissions aimed to check). In short, *Baldwin* is not a disposition that should attract this Court's reliance.

We add, furthermore, that the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections. In considering whether Article I, § 4, really says "No" to similar control of federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: "[I]t would have been hardly advisable . . . to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, at 376. The Elections Clause is not sensibly read to subject States to that deprivation.[25]

3

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *Id.*, No. 37, at 227.

[25] A State may choose to regulate state and national elections differently, which is its prerogative under the Clause. *E. g.*, Ind. Code § 3–3–2–2 (creating backup commission for congressional but not state legislative districts).

The people's ultimate sovereignty had been expressed by John Locke in 1690, a near century before the Constitution's formation:

> "[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security." Two Treatises of Government § 149, p. 385 (P. Laslett ed. 1964).

Our Declaration of Independence, ¶2, drew from Locke in stating: "Governments are instituted among Men, deriving their just powers from the consent of the governed." And our fundamental instrument of government derives its authority from "We the People." U. S. Const., Preamble. As this Court stated, quoting Hamilton: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell* v. *McCormack*, 395 U. S. 486, 540–541 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). In this light, it would be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be "chosen . . . by the People of the several States," Art. I, § 2. See Cain, 121 Yale L. J., at 1817.

THE CHIEF JUSTICE, in dissent, suggests that independent commissions established by initiative are a high-minded experiment that has failed. *Post*, at 848–849. For this assessment, THE CHIEF JUSTICE cites a three-judge Federal

District Court opinion, *Harris* v. *Arizona Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). That opinion, he asserts, "detail[s] the partisanship that has affected the Commission." *Post*, at 848. No careful reader could so conclude.

The report of the decision in *Harris* comprises a *per curiam* opinion, an opinion concurring in the judgment by Judge Silver, and a dissenting opinion by Judge Wake. The *per curiam* opinion found "in favor of the Commission." 993 F. Supp. 2d, at 1080. Deviations from the one-person, one-vote principle, the *per curiam* opinion explained at length, were "small" and, in the main, could not be attributed to partisanship. *Ibid.* While partisanship "may have played some role," the *per curiam* opinion stated, deviations were "predominantly a result of the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act." *Id.*, at 1060. Judge Silver, although she joined the *per curiam* opinion, made clear at the very outset of that opinion her finding that "partisanship did not play a role." *Id.*, at 1046, n. 1. In her concurring opinion, she repeated her finding that the evidence did not show partisanship at work, *id.*, at 1087; instead, she found, the evidence "[was] overwhelming [that] the final map was a product of the commissioners's consideration of appropriate redistricting criteria." *Id.*, at 1088. To describe *Harris* as a decision criticizing the Commission for pervasive partisanship, *post*, at 848–849, THE CHIEF JUSTICE could rely only upon the dissenting opinion, which expressed views the majority roundly rejected.

Independent redistricting commissions, it is true, "have not eliminated the inevitable partisan suspicions associated with political line-drawing." Cain, 121 Yale L. J., at 1808. But "they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." *Ibid.* They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives.

4

Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

The people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the "Times, Places and Manner" of holding federal elections. Art. I, § 4. For example, the people of California provided for permanent voter registration, specifying that "no amendment by the Legislature shall provide for a general biennial or other periodic reregistration of voters." Cal. Elec. Code Ann. § 2123 (West 2003). The people of Ohio banned ballots providing for straight-ticket voting along party lines. Ohio Const., Art. V, § 2a. The people of Oregon shortened the deadline for voter registration to 20 days prior to an election. Ore. Const., Art. II, § 2. None of those measures permit the state legislatures to override the people's prescriptions. The Arizona Legislature's theory—that the lead role in regulating federal elections cannot be wrested from "the Legislature," and vested in commissions initiated by the people—would endanger all of them.

The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature."[26]

[26] See App. to Brief for Appellees 11a–29a (collecting state constitutional provisions governing elections). States' constitutional conventions are not simply past history predating the first election of state legislatures. Louisiana, for example, held the most recent of its 12 constitutional conventions in 1992. J. Dinan, The American State Constitutional Tradition

Core aspects of the electoral process regulated by state constitutions include voting by "ballot" or "secret ballot,"[27] voter registration,[28] absentee voting,[29] vote counting,[30] and victory thresholds.[31] Again, the States' legislatures had no hand in making these laws and may not alter or amend them.

The importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people rather than the States' legislatures. The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures. See Persily & Anderson, Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1006–1008 (2005) (describing cases in which "indirect pressure of the initiative process . . . was sufficient to spur [state] legislature[s] to action"). Turning the coin, the legislature's responsiveness to the people its members represent is hardly heightened when the representative body can be confident that what it does will not be overturned or modified by the voters themselves.

8–9 (2006) (Table 1–1). The State's provision for voting by "secret ballot" may be traced to the constitutional convention held by the State in 1812, see La. Const., Art. VI, § 13, but was most recently reenacted at the State's 1974 constitutional convention, see Art. XI, § 2.

[27] Madison called the decision "[w]hether the electors should vote by ballot or vivâ voce" a quintessential subject of regulation under the Elections Clause. 2 Records of the Federal Convention 240–241 (M. Farrand rev. 1966).

[28] Miss. Const., Art. XII, § 249; N. C. Const., Art. VI, § 3; Va. Const., Art. II, § 2; W. Va. Const., Art. IV, § 12; Wash. Const., Art. VI, § 7.

[29] *E. g.*, Haw. Const., Art. II, § 4; La. Const., Art XI, § 2; N. D. Const., Art. II, § 1; Pa. Const., Art. VII, § 14.

[30] *E. g.*, Ark. Const., Art. III, § 11 (ballots unlawfully not counted in the first instance must be counted after election); La. Const., Art XI, § 2 (all ballots must be counted publicly).

[31] *E. g.*, Ariz. Const., Art. VII, § 7 (setting plurality of votes as the standard for victory in all elections, excluding runoffs); Mont. Const., Art. IV, § 5 (same); Ore. Const., Art. II, § 16 (same).

* * *

Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State's voters from serving as the legislative power for redistricting purposes. But the Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes. Article I, § 4, stems from a different view. Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch* v. *Maryland*, 4 Wheat. 316, 404–405 (1819). So comprehended, the Clause doubly empowers the people. They may control the State's lawmaking processes in the first instance, as Arizona voters have done, and they may seek Congress' correction of regulations prescribed by state legislatures.

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." The Federalist No. 57, at 352 (J. Madison). In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around." Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005). The Elections Clause does not hinder that endeavor.

For the reasons stated, the judgment of the United States District Court for the District of Arizona is

Affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, § 3, to "the people thereof." The Amendment resulted from an arduous, decades-long campaign in which reformers across the coun-

try worked hard to garner approval from Congress and three-quarters of the States.

What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, § 4. That Clause vests congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

The Court's position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court. The Constitution contains seventeen provisions referring to the "Legislature" of a State, many of which cannot possibly be read to mean "the people." See Appendix, *infra*. Indeed, several provisions expressly distinguish "the Legislature" from "the People." See Art. I, § 2; Amdt. 17. This Court has accordingly defined "the Legislature" in the Elections Clause as "*the representative body* which ma[kes] the laws of the people." *Smiley* v. *Holm*, 285 U. S. 355, 365 (1932) (quoting *Hawke* v. *Smith (No. 1)*, 253 U. S. 221, 227 (1920); emphasis added).

The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting. Arizona's Commission might be a noble endeavor—although it does not seem so "independent" in practice—but the "fact that a given law or procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution." *INS* v.

Chadha, 462 U. S. 919, 944 (1983). No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution. I respectfully dissent.

I

The majority begins by discussing policy. I begin with the Constitution. The Elections Clause provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1.

The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives. And that duty "shall" be carried out "in each State by the Legislature thereof."

In Arizona, however, redistricting is not carried out by the legislature. Instead, as the result of a ballot initiative, an unelected body called the Independent Redistricting Commission draws the lines. See *ante*, at 796–797. The key question in the case is whether the Commission can conduct congressional districting consistent with the directive that such authority be exercised "by the Legislature."

The majority concedes that the unelected Commission is not "the Legislature" of Arizona. The Court contends instead that the people of Arizona as a whole constitute "the Legislature" for purposes of the Elections Clause, and that they may delegate the congressional districting authority conferred by that Clause to the Commission. *Ante*, at 814. The majority provides no support for the delegation part of its theory, and I am not sure whether the majority's analysis is correct on that issue. But even giving the Court the ben-

efit of the doubt in that regard, the Commission is still unconstitutional. Both the Constitution and our cases make clear that "the Legislature" in the Elections Clause is the representative body which makes the laws of the people.

A

The majority devotes much of its analysis to establishing that the people of Arizona may exercise lawmaking power under their State Constitution. See *ante*, at 795–796, 814, 816–817. Nobody doubts that. This case is governed, however, by the Federal Constitution. The States do not, in the majority's words, "retain autonomy to establish their own governmental processes," *ante*, at 816, if those "processes" violate the United States Constitution. In a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way. Art. VI, cl. 2; *Cook* v. *Gralike*, 531 U. S. 510, 523 (2001). The majority opinion therefore largely misses the point.

The relevant question in this case is how to define "the Legislature" under the Elections Clause. The majority opinion does not seriously turn to that question until page 813, and even then it fails to provide a coherent answer. The Court seems to conclude, based largely on its understanding of the "history and purpose" of the Elections Clause, *ante*, at 813, that "the Legislature" encompasses any entity in a State that exercises legislative power. That circular definition lacks any basis in the text of the Constitution or any other relevant legal source.

The majority's textual analysis consists, in its entirety, of one paragraph citing founding era dictionaries. The majority points to various dictionaries that follow Samuel Johnson's definition of "legislature" as the "power that makes laws." *Ibid.* (internal quotation marks omitted). The notion that this definition corresponds to the entire population of a State is strained to begin with, and largely discredited by the majority's own admission that "[d]irect lawmaking by

the people was virtually unknown when the Constitution of 1787 was drafted." *Ante*, at 793 (internal quotation marks omitted); see *ante*, at 816. Moreover, Dr. Johnson's first example of the usage of "legislature" is this: "Without the concurrent consent of all three parts of the legislature, no law is or can be made." 2 A Dictionary of the English Language (1st ed. 1755) (emphasis deleted). Johnson borrowed that sentence from Matthew Hale, who defined the "Three Parts of the Legislature" of England as the King and the two houses of Parliament. History of the Common Law of England 2 (1713). (The contrary notion that the people as a whole make the laws would have cost you your head in England in 1713.) Thus, even under the majority's preferred definition, "the Legislature" referred to an institutional body of representatives, not the people at large.

Any ambiguity about the meaning of "the Legislature" is removed by other founding era sources. "[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." Morley, The Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. Online 131, 147, and n. 101 (2015) (citing eleven State Constitutions). The Federalist Papers are replete with references to "legislatures" that can only be understood as referring to representative institutions. *E. g.*, The Federalist No. 27, pp. 174–175 (C. Rossiter ed. 1961) (A. Hamilton) (describing "the State legislatures" as "select bodies of men"); *id.*, No. 60, at 368 (contrasting "the State legislatures" with "the people"). Noah Webster's heralded American Dictionary of the English Language defines "legislature" as "[t]he body of men in a state or kingdom, invested with power to make and repeal laws." 2 An American Dictionary of the English Language (1828). It continues, "The legislatures of most of the states in America . . . consist of two houses or branches." *Ibid.* (emphasis deleted).

I could go on, but the Court has said this before. As we put it nearly a century ago, "Legislature" was "not a term of uncertain meaning when incorporated into the Constitution." *Hawke*, 253 U. S., at 227. "What it meant when adopted it still means for the purpose of interpretation." *Ibid.* "A Legislature" is "the representative body which ma[kes] the laws of the people." *Ibid.*; see *Smiley*, 285 U. S., at 365 (relying on this definition); *Colorado Gen. Assembly* v. *Salazar*, 541 U. S. 1093, 1095 (2004) (Rehnquist, C. J., dissenting from denial of certiorari) (same).

B

The unambiguous meaning of "the Legislature" in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way. When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself. Our precedents new and old have employed this structural method of interpretation to read the Constitution in the manner it was drafted and ratified—as a unified, coherent whole. See, *e. g.*, *NLRB* v. *Noel Canning*, 573 U. S. 513, 536–537 (2014); *id.*, at 599 (SCALIA, J., concurring in judgment); *McCulloch* v. *Maryland*, 4 Wheat. 316, 414–415 (1819); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 328–330 (1816); Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999).

The Constitution includes seventeen provisions referring to a State's "Legislature." See Appendix, *infra*. Every one of those references is consistent with the understanding of a legislature as a representative body. More importantly, many of them are only consistent with an institutional legislature—and flatly incompatible with the majority's reading of "the Legislature" to refer to the people as a whole.

Start with the Constitution's first use of the term: "The House of Representatives shall be composed of Members

chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Art. I, § 2, cl. 1. This reference to a "Branch of the State Legislature" can only be referring to an institutional body, and the explicit juxtaposition of "the State Legislature" with "the People of the several States" forecloses the majority's proposed reading.

The next Section of Article I describes how to fill vacancies in the United States Senate: "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." § 3, cl. 2.[1] The references to "the Recess of the Legislature of any State" and "the next Meeting of the Legislature" are only consistent with an institutional legislature, and make no sense under the majority's reading. The people as a whole (schoolchildren and a few unnamed others excepted) do not take a "Recess."

The list goes on. Article IV provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." § 4. It is perhaps conceivable that all the people of a State could be "convened"—although this would seem difficult during an "Invasion" or outbreak of "domestic Violence"—but the only natural reading of the Clause is that "the Executive" may submit a federal application when "the Legislature" as a representative body cannot be convened.

Article VI provides that the "Senators and Representatives before mentioned, and the Members of the several

[1] This provision was modified by the Seventeenth Amendment.

State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Cl. 3. Unless the majority is prepared to make all the people of every State swear an "Oath or Affirmation, to support this Constitution," this provision can only refer to the "several State Legislatures" in their institutional capacity.

Each of these provisions offers strong structural indications about what "the Legislature" must mean. But the most powerful evidence of all comes from the Seventeenth Amendment. Under the original Constitution, Senators were "chosen by the Legislature" of each State, Art. I, §3, cl. 1, while Members of the House of Representatives were chosen "by the People," Art. I, §2, cl. 1. That distinction was critical to the Framers. As James Madison explained, the Senate would "derive its powers from the States," while the House would "derive its powers from the people of America." The Federalist No. 39, at 244. George Mason believed that the power of state legislatures to select Senators would "be a reasonable guard" against "the Danger . . . that the national, will swallow up the State Legislatures." 1 Records of the Federal Convention of 1787, p. 160 (M. Farrand ed. 1911). Not everyone agreed. James Wilson proposed allowing the people to elect Senators directly. His proposal was rejected ten to one. Debates in the Federal Convention of 1787, S. Doc. No. 404, 57th Cong., 1st Sess., 8 (1902).

Before long, reformers took up Wilson's mantle and launched a protracted campaign to amend the Constitution. That effort began in 1826, when Representative Henry Storrs of New York proposed—but then set aside—a constitutional amendment transferring the power to elect Senators from the state legislatures to the people. 2 Cong. Deb. 1348–1349. Over the next three-quarters of a century, no fewer than 188 joint resolutions proposing similar reforms were introduced in both Houses of Congress. 1 W. Hall, The

History and Effect of the Seventeenth Amendment 183–184 (1936).

At no point in this process did anyone suggest that a constitutional amendment was unnecessary because "Legislature" could simply be interpreted to mean "people." See *Hawke*, 253 U. S., at 228 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."). In fact, as the decades rolled by without an amendment, 28 of the 45 States settled for the next best thing by holding a popular vote on candidates for Senate, then pressuring state legislators into choosing the winner. See, *e. g.*, Abstract of Laws Relating to the Election of United States Senators, S. Doc. No. 393, 59th Cong., 2d Sess. (1907). All agreed that cutting the state legislature out of senatorial selection entirely would require nothing less than to "Strike out" the original words in the Constitution and "insert, 'elected by the people'" in its place. Cong. Globe, 31st Cong., 1st Sess., 88 (1849) (proposal of Sen. Jeremiah Clemens).

Yet that is precisely what the majority does to the Elections Clause today—amending the text not through the process provided by Article V, but by judicial decision. The majority's revision renders the Seventeenth Amendment an 86-year waste of time, and singles out the Elections Clause as the only one of the Constitution's seventeen provisions referring to "the Legislature" that departs from the ordinary meaning of the term.

The Commission had no answer to this point. See Tr. of Oral Arg. 42 (JUSTICE ALITO: "Is there any other provision where legislature means anything other than the conventional meaning?" Appellee: "I don't know the answer to that question.").

The Court's response is not much better. The majority observes that "the Legislature" of a State may perform dif-

ferent functions under different provisions of the Constitution. Under Article I, § 3, for example, "the Legislature" performed an "electoral" function by choosing Senators. The "Legislature" plays a "consenting" function under Article I, § 8, and Article IV, § 3; a "ratifying" function under Article V; and a "lawmaking" function under the Elections Clause. *Ante*, at 808–809, and n. 17. All true. The majority, however, leaps from the premise that "the Legislature" performs different *functions* under different provisions to the conclusion that "the Legislature" assumes different *identities* under different provisions.

As a matter of ordinary language and common sense, however, a difference in function does not imply a difference in meaning. A car, for example, generally serves a transportation function. But it can also fulfill a storage function. At a tailgate party or a drive-in movie, it may play an entertainment function. In the absence of vacancies at the roadside motel, it could provide a lodging function. To a neighbor with a dead battery, it offers an electricity generation function. And yet, a person describing a "car" engaged in any of these varied functions would undoubtedly be referring to the same thing.

The Constitution itself confirms this point. Articles I and II assign many different functions to the Senate: a lawmaking function, an impeachment trial function, a treaty ratification function, an appointee confirmation function, an officer selection function, a qualification judging function, and a recordkeeping function. Art. I, § 1; § 3, cls. 5, 6; § 5, cls. 1, 3; § 7, cl. 2; Art. II, § 2, cl. 2. Yet the identity of the Senate remains the same as it discharges these various functions.

Similarly, the House of Representatives performs different functions, including lawmaking, impeachment, and resolving Presidential elections in which no candidate wins a majority in the Electoral College. Art. I, § 1; § 2, cl. 5; § 7, cl. 2; Amdt. 12. The President is assigned not only executive functions, Art. II, but also legislative functions, such as approving or vetoing bills, convening both Houses of Congress, and recom-

mending measures for their consideration, Art. I, § 7, cl. 2; Art. II, § 3. Courts not only exercise a judicial function, Art. III, § 1, but may also perform an appointment function, Art. II, § 2, cl. 2. And so on. Neither the majority nor the Commission points to a single instance in which the identity of these actors changes as they exercise different functions.

The majority attempts to draw support from precedent, but our cases only further undermine its position. In *Hawke*, this Court considered the meaning of "the Legislatur[e]" in Article V, which outlines the process for ratifying constitutional amendments. The Court concluded that "Legislature" meant "the representative body which ma[kes] the laws of the people." 253 U. S., at 227. The Court then explained that "[t]he term is often used in the Constitution *with this evident meaning.*" *Ibid.* (emphasis added). The Court proceeded to list other constitutional provisions that assign different functions to the "Legislature," just as the majority does today. *Id.*, at 227–228; see *ante*, at 808, n. 17.

Unlike the majority today, however, the Court in *Hawke* never hinted that the meaning of "Legislature" varied across those different provisions because they assigned different functions. To the contrary, the Court drew inferences from the Seventeenth Amendment and its predecessor, Article I, § 3—in which "the Legislature" played an *electoral* function—to define the "Legislature" in Article V, which assigned it a *ratification* function. See 253 U. S., at 228. The Court concluded that "Legislature" refers to a representative body, whatever its function. As the Court put it, "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose." *Ibid.* (citing Art. I, § 2).

Smiley, the leading precedent on the meaning of "the Legislature" in the Elections Clause, reaffirmed the definition announced in *Hawke*. In *Smiley*, the petitioner argued—as the Commission does here—that "the Legislature" referred not just to "the two houses of the legislature" but to "the entire legislative power of the state . . . however exercised." Brief for Petitioner, O. T. 1931, No. 617, p. 22 (internal quotation marks omitted). The Court did not respond by holding, as the majority today suggests, that "'the Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections," or that "'the Legislature' has a different identity" in the Elections Clause than it does in Article V. *Ante*, at 808. Instead, the Court in *Smiley* said this:

> "Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in *Hawke* . . . the term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.'" 285 U. S., at 365 (quoting *Hawke*, 253 U. S., at 227).

Remarkably, the majority refuses to even acknowledge the definition of "the Legislature" adopted in both *Smiley* and *Hawke*, and instead embraces the interpretation that this Court unanimously rejected more than 80 years ago.[2]

C

The history of the Elections Clause further supports the conclusion that "the Legislature" is a representative body.

[2] The only hint of support the majority can glean from precedent is a passing reference in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434 (1932), a case about how to interpret "trade or commerce" in the Sherman Act. See *ante*, at 808. And even that selected snippet describes the "legislature" as a "body." 286 U. S., at 434.

The first known draft of the Clause to appear at the Constitutional Convention provided that "Each state shall prescribe the time and manner of holding elections." 1 Debates on the Federal Constitution 146 (J. Elliot ed. 1836). After revision by the Committee of Detail, the Clause included the important limitation at issue here: "The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed *by the legislature of each state*; but their provisions concerning them may, at any time, be altered *by the legislature of the United States*." *Id.*, at 225 (emphasis added). The insertion of "the legislature" indicates that the Framers thought carefully about which entity within the State was to perform congressional districting. And the parallel between "the legislature of each state" and "the legislature of the United States" further suggests that they meant "the legislature" as a representative body.

As the majority explains, the debate over the ratification of the Elections Clause centered on its second part, which empowers Congress to "make or alter" regulations prescribed by "the Legislature" of a State. See *ante*, at 814–816. Importantly for our purposes, however, both sides in this debate "recognized the distinction between the state legislature and the people themselves." *Brown* v. *Secretary of State of Florida*, 668 F. 3d 1271, 1275–1276, n. 4 (CA11 2012).

The Anti-Federalists, for example, supported vesting election regulation power solely in state legislatures because state "legislatures were more numerous *bodies*, usually *elected annually*, and thus more likely to be in sympathy with the interests *of the people*." Natelson, The Original Scope of the Congressional Power To Regulate Elections, 13 U. Pa. J. Const. L. 1, 31 (2010) (citing sources from ratification debates; emphasis added). Alexander Hamilton and others responded by raising the specter of state legislatures—which he described as "local administrations"—deciding to "annihilate" the Federal Government by "neglecting to provide for

the choice of persons to administer its affairs." The Federalist No. 59, at 363. As the majority acknowledges, the distinction between "the Legislature" and the people "occasioned no debate." *Ante*, at 816. That is because everybody understood what "the Legislature" meant.

The majority contends that its counterintuitive reading of "the Legislature" is necessary to advance the "animating principle" of popular sovereignty. *Ante*, at 813. But the ratification of the Constitution was the ultimate act of popular sovereignty, and the people who ratified the Elections Clause did so knowing that it assigned authority to "the Legislature" as a representative body. The Elections Clause was not, as the majority suggests, an all-purpose "safeguard against manipulation of electoral rules by politicians." *Ante*, at 815. Like most provisions of the Constitution, the Elections Clause reflected a compromise—a pragmatic recognition that the grand project of forging a Union required everyone to accept some things they did not like. See The Federalist No. 59, at 364 (describing the power allocated to state legislatures as "an evil which could not have been avoided"). This Court has no power to upset such a compromise simply because we now think that it should have been struck differently. As we explained almost a century ago, "[t]he framers of the Constitution might have adopted a different method," but it "is not the function of courts . . . to alter the method which the Constitution has fixed." *Hawke*, 253 U. S., at 227.

D

In addition to text, structure, and history, several precedents interpreting the Elections Clause further reinforce that "the Legislature" refers to a representative body.

The first precedent comes not from this Court, but from Congress. Acting under its authority to serve as "the Judge of the Elections, Returns and Qualifications of its own Members," Art. I, § 5, cl. 1, the House of Representatives in 1866 confronted a dispute about who should be seated as the Con-

gressman from the Fifth District of Michigan. At a popular convention, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in alternative locations. If only the local votes counted, one candidate (Baldwin) would win; if the outside votes were included, the other candidate (Trowbridge) would be entitled to the seat. See *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866).

The House Elections Committee explained that the Elections Clause conferred power on "the Legislature" of Michigan to prescribe election regulations. "But," the Committee asked, "what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country?" *Id.*, at 47. The Committee decided, and the full House agreed, that "the Legislature" in the Elections Clause was the "legislature *eo nomine*"—the legislature *by that name*, a representative body. *Ibid.* That conclusion followed both from the known meaning of "the Legislature" at the time of the framing and the many other uses of the word in the Constitution that would not be compatible with a popular convention. Thus, "[w]here there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount." *Id.*, at 46; see *California Democratic Party* v. *Jones*, 530 U. S. 567, 603, and n. 11 (2000) (Stevens, J., dissenting) (relying on *Baldwin* for its conclusion that "the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State' ").

The majority draws attention to the minority report in *Baldwin*. *Ante*, at 818. Under the present circumstances, I take some comfort in the Court's willingness to consider

dissenting views. Still, the minority report does not diminish the force of *Baldwin*. The report cites a Michigan Supreme Court precedent that allegedly reached a contrary result, but that case turned entirely on state constitutional questions arising from a state election—not federal constitutional questions arising from a federal election. See *People ex rel. Twitchell* v. *Blodgett*, 13 Mich. 127 (1865). The majority also contends that *Baldwin* "appears in tension with" an earlier House Elections Committee precedent. *Ante*, at 818. By its own terms, however, that earlier precedent did not involve a conflict between a state legislative act and a state constitutional provision. See *Shiel* v. *Thayer*, 1 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 350 (1861) ("the two branches of the legislature differed upon the question . . . and so the bill never became a law"). In any event, to the degree that the two precedents are inconsistent, the later decision in *Baldwin* should govern.[3]

The next relevant precedent is this Court's decision in *McPherson* v. *Blacker*, 146 U. S. 1 (1892). That case involved a constitutional provision with considerable similarity to the Elections Clause, the Presidential Electors Clause of Article II: "Each State shall appoint, in such Manner *as the Legislature thereof* may direct, a Number of Electors . . . ." § 1, cl. 2 (emphasis added). The question was whether the state legislature, as a body of representatives, could divide authority to appoint electors across each of the State's congressional districts. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in "the Legislature" of the State. That power, the Court explained,

---

[3] The majority's suggestion that *Baldwin* should be dismissed as an act of partisanship appears to have no basis, unless one is willing to regard as tainted every decision in favor of a candidate from the same party as a majority of the Elections Committee. *Ante*, at 818–819.

"*can neither be taken away nor abdicated.*" 146 U. S., at 35 (emphasis added; internal quotation marks omitted).

Against that backdrop, the Court decided two cases regarding the meaning of "the Legislature" in the Elections Clause. In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565 (1916), the Ohio Legislature passed a congressional redistricting law. Under the Ohio Constitution, voters held a referendum on the law and rejected it. A supporter of the law sued on behalf of the State, contending that the referendum "was not and could not be a part of the legislative authority of the State and therefore could have no influence on . . . the law creating congressional districts" under the Elections Clause. *Id.*, at 567.

This Court rejected the challenger's constitutional argument as a nonjusticiable claim that the referendum "causes a State . . . to be not republican" in violation of the Guarantee Clause of the Constitution. *Id.*, at 569 (citing Art. IV, § 4). The Court also rejected an argument that Ohio's use of the referendum violated a federal statute, and held that Congress had the power to pass that statute under the Elections Clause. *Id.*, at 568–569. *Hildebrant* in no way suggested that the state legislature could be displaced from the redistricting process, and *Hildebrant* certainly did not hold—as the majority today contends—that "the word ['Legislature' in the Elections Clause] encompassed a veto power lodged in the people." *Ante*, at 805. *Hildebrant* simply approved a State's decision to employ a referendum *in addition to* redistricting by the legislature. See 241 U. S., at 569. The result of the decision was to send *the Ohio Legislature* back to the drawing board to do the redistricting.

In *Smiley*, the Minnesota Legislature passed a law adopting new congressional districts, and the Governor exercised his veto power under the State Constitution. As noted above, the Minnesota secretary of state defended the veto on the ground that "the Legislature" in the Elections Clause referred not just to "the two houses of the legislature" but

to "the entire legislative power of the state . . . however exercised." This Court rejected that argument, reiterating that the term "Legislature" meant "the representative body which made the laws of the people." 285 U. S., at 365 (quoting *Hawke*, 253 U. S., at 227). The Court nevertheless went on to hold that the Elections Clause did not prevent a State from applying the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature. 285 U. S., at 373. As in *Hildebrant*, the legislature was not displaced, nor was it redefined; it just had to start on a new redistricting plan.

The majority initially describes *Hildebrant* and *Smiley* as holding that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." *Ante*, at 808. That description is true, so far as it goes. But it hardly supports the result the majority reaches here. There is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether. See *Salazar*, 541 U. S., at 1095 (Rehnquist, C. J., dissenting from denial of certiorari) ("to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself"). Nothing in *Hildebrant*, *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely.

* * *

The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be

exclusive in congressional districting, but neither may it be excluded.

The majority's contrary understanding requires it to accept a definition of "the Legislature" that contradicts the term's plain meaning, creates discord with the Seventeenth Amendment and the Constitution's many other uses of the term, makes nonsense of the drafting and ratification of the Elections Clause, and breaks with the relevant precedents. In short, the effect of the majority's decision is to erase the words "by the Legislature thereof" from the Elections Clause. That is a judicial error of the most basic order. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803).

II

The Court also issues an alternative holding that a federal statute, 2 U. S. C. § 2a(c), permits Arizona to vest redistricting authority in the Commission. *Ante*, at 809–813. The majority does not contend that this statutory holding resolves the constitutional question presented, see *ante*, at 813, so its reading of Section 2a(c) is largely beside the point. With respect, its statutory argument is also hard to take seriously. Section 2a(c) does not apply to this case. And even if it did, it would likely be unconstitutional.[4]

A

Section 2a(c) establishes a number of default rules that govern the States' manner of electing representatives "[u]ntil a State is redistricted in the manner provided by the law thereof." Section 2a(c) is therefore "inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict" the State. *Branch* v. *Smith*, 538 U. S.

[4] Not surprisingly, Section 2a(c) was barely raised below and was not addressed by the District Court. See *ante*, at 809, n. 18.

254, 275 (2003) (plurality opinion); see *id.*, at 298–300 (O'Connor, J., concurring in part and dissenting in part). Here, the Commission *has* redistricted the State "in the manner provided by the law thereof." So by its terms, Section 2a(c) does not come into play in this case.

The majority spends several pages discussing Section 2a(c), but it conspicuously declines to say that the statute actually applies to this case.[5] The majority notes that the pre-1911 versions of Section 2a(c) applied only until "the legislature" redistricted the State, while the post-1911 versions applied only until the State is redistricted "in the manner provided by the law thereof." The majority also describes in detail the legislative history that accompanied the 1911 amendment. But if Section 2a(c) does not apply, its legislative history is doubly irrelevant.

The majority seems to suggest that Section 2a(c) somehow indicates federal approval for the district lines that the Commission has drawn. See *ante*, at 812. But the statute does nothing of the sort. Section 2a(c) explains what rules apply "[u]ntil a State is redistricted"; it says nothing about what rules apply *after* a State is redistricted. And it certainly does not say that the State's redistricting plan will by some alchemy become federal law. No legislative drafter remotely familiar with the English language would say that a State had to follow default rules "[u]ntil [it] is redistricted in the manner provided by the law thereof," when what he meant was "any redistricting plan that the State adopts shall become federal law." And if the drafter was doing something as significant as transforming state law into federal law, he presumably would have taken care to make that dramatic step "unmistakably clear." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) (internal quotation marks omitted). Tellingly, our most recent case on the meaning of Section

[5] The majority is prepared to say that Section 2a(c) has more than "nothing to do with this case." *Ante*, at 812, n. 22. Not exactly a ringing endorsement.

2a(c) seems not to have even considered the majority's position. See *Branch*, 538 U. S. 254.

Indeed, the majority does not even seem persuaded by its own argument. The majority quickly cautions, in discussing Section 2a(c), that "a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map." *Ante*, at 811, n. 20. The majority therefore concludes that "nothing in § 2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements." *Ibid.* But here the Arizona Legislature has challenged "a state district map on the ground that it violates one . . . of those federal requirements"—the Elections Clause. If we take the majority at its word, nothing in Section 2a(c) should affect that challenge.

B

Not only is the majority's reading of Section 2a(c) implausible as a matter of statutory interpretation, it would also likely violate the Constitution in multiple ways.

First, the majority's reading of Section 2a(c) as a statute approving the lines drawn by the Commission would seemingly authorize Congress to alter the Elections Clause. The first part of the Elections Clause gives state legislatures the power to prescribe regulations regarding the times, places, and manner of elections; the second part of the Clause gives Congress the power to "make or alter such Regulations." There is a difference between making or altering election regulations prescribed by the state legislature and authorizing an entity *other than the state legislature* to prescribe election regulations. In essence, the majority's proposed reading permits Congress to use the second part of the Elections Clause to nullify the first. Yet this Court has expressly held that "Congress ha[s] no power to alter Article I, section 4 [the Elections Clause]." *Smiley*, 285 U. S., at 372; see also *Clinton* v. *City of New York*, 524 U. S. 417

(1998) (Congress may not circumvent Article I constraints on its lawmaking power); *Chadha*, 462 U. S. 919 (same).

Second, the majority's interpretation of Section 2a(c) would create a serious delegation problem. As a general matter, Congress may pass statutes that delegate some discretion to those who administer the laws. It is a well-accepted principle, however, that Congress may not delegate authority to one actor when the Constitution vests that authority in another actor. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001). The majority's reading of Section 2a(c) contradicts that rule by allowing Congress to delegate federal redistricting authority to a state entity other than the one in which the Elections Clause vests that authority: "the Legislature."

Third, the majority's interpretation conflicts with our most recent Elections Clause precedent, *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1 (2013). There we explained that when Congress legislates under the Elections Clause, it "*necessarily* displaces some element of a pre-existing legal regime erected by the States." *Id.*, at 14. That is so because "the power the Elections Clause confers [on Congress] is none other than the power to pre-empt." *Ibid.* Put differently, "*all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that." *Ibid.*, n. 6. Under the majority's interpretation of Section 2a(c), however, Congress has done the opposite of preempting or displacing state law—it has *adopted* state law.

Normally, when "a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). The multiple serious constitutional doubts raised by the majority's interpretation of Section 2a(c)—in addition to the sheer weakness of its

reading as a textual matter—provide more than enough reason to reject the majority's construction. Section 2a(c) does not apply to this case.

III

Justice Jackson once wrote that the Constitution speaks in "majestic generalities." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 639 (1943). In many places it does, and so we have cases expounding on "freedom of speech" and "unreasonable searches and seizures." Amdts. 1, 4. Yet the Constitution also speaks in some places with elegant specificity. A Member of the House of Representatives must be 25 years old. Art. I, § 2, cl. 2. Every State gets two Senators. Art. I, § 3, cl. 1. And the times, places, and manner of holding elections for those federal representatives "shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1.

For the reasons I have explained, there is no real doubt about what "the Legislature" means. The Framers of the Constitution were "practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina* v. *United States*, 199 U. S. 437, 449 (1905). We ought to give effect to the words they used.

The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004); *ante*, at 791. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law's virtues as a policy innovation cannot redeem its inconsistency with the Constitution. "Failure of political will does not justify unconstitutional remedies." *Clinton*, 524 U. S., at 449 (KENNEDY, J., concurring); see *Stern* v. *Marshall*, 564

U. S. 462 (2011); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010); *Bowsher* v. *Synar*, 478 U. S. 714 (1986); *Chadha*, 462 U. S. 919; *Myers* v. *United States*, 272 U. S. 52 (1926).

Indeed, the Court has enforced the text of the Constitution to invalidate state laws with policy objectives reminiscent of this one. Two of our precedents held that States could not use their constitutions to impose term limits on their federal representatives in violation of the United States Constitution. *Cook*, 531 U S. 510; *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995). The people of the States that enacted these reforms surely viewed them as measures that would "place the lead rein in the people's hands." *Ante*, at 816. Yet the Court refused to accept "that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Term Limits*, 514 U. S., at 831. The majority approves just such an evasion of the Constitution today.[6]

The Court also overstates the effects of enforcing the plain meaning of the Constitution in this case. There is no dispute that Arizona may continue to use its Commission to draw lines for state legislative elections. The representatives chosen in those elections will then be responsible for congressional redistricting as members of the state legislature, so the work of the Commission will continue to influence Arizona's federal representation.

Moreover, reading the Elections Clause to require the involvement of the legislature will not affect most other re-

---

[6] *Term Limits* was of course not decided on the abstract principle that "the people should choose whom they please to govern them." *Ante*, at 816, n. 24 (quoting 514 U. S., at 783). If that were the rule, the people could choose a 20-year-old Congressman, a 25-year-old Senator, or a foreign President. But see Art. I, § 2, cl. 2; § 3, cl. 3; Art. II, § 1, cl. 5. *Term Limits* instead relied on analysis of the text, structure, and history of the Constitution—all factors that cut strongly against the majority's position today.

districting commissions. As the majority notes, many States have commissions that play an "auxiliary role" in congressional redistricting. *Ante*, at 798, and nn. 8–9. But in these States, unlike in Arizona, the legislature retains primary authority over congressional redistricting. See Brief for National Conference of State Legislatures as *Amicus Curiae* 3–17.

The majority also points to a scattered array of election-related laws and constitutional provisions enacted via popular lawmaking that it claims would be "endangered" by interpreting the Elections Clause to mean what it says. *Ante*, at 822. Reviewing the constitutionality of these farflung provisions is well outside the scope of this case. Suffice it to say that none of them purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process. "[T]his wolf comes as a wolf." *Morrison* v. *Olson*, 487 U. S. 654, 699 (1988) (SCALIA, J., dissenting).

Absent from the majority's portrayal of the high motives that inspired the Arizona Commission is any discussion of how it has actually functioned. The facts described in a recent opinion by a three-judge District Court detail the partisanship that has affected the Commission on issues ranging from staffing decisions to drawing the district lines. See *Harris* v. *Arizona Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). The *per curiam* opinion explained that "partisanship played some role in the design of the map," that "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts," and that the Commission retained a mapping consultant that "had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns." *Id.*, at 1046, 1047, 1053. The hiring of the mapping consultant provoked sufficient controversy that the Governor of Arizona, sup-

ported by two-thirds of the Arizona Senate, attempted to remove the chairwoman of the Commission for "substantial neglect of duty and gross misconduct in office." *Id.*, at 1057; see *Arizona Independent Redistricting Comm'n* v. *Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012) (explaining the removal and concluding that the Governor exceeded her authority under the Arizona Constitution).

Judge Silver's separate opinion noted that "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." 993 F. Supp. 2d, at 1083. Judge Wake's separate opinion described the Commission's "systematic overpopulation of Republican plurality districts and underpopulation of Democratic plurality districts" as "old-fashioned partisan malapportionment." *Id.*, at 1091, 1108. In his words, the "Commission has been coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason." *Id.*, at 1092.

The District Court concluded by a two-to-one margin that this partisanship did not rise to the level of a constitutional violation. The case is pending on appeal before this Court, and I take no position on the merits question. But a finding that the partisanship in the redistricting plan did not violate the Constitution hardly proves that the Commission is operating free of partisan influence—and certainly not that it complies with the Elections Clause.

* * *

The people of Arizona have concerns about the process of congressional redistricting in their State. For better or worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature. But it does allow them to seek relief from Congress, which can make or alter the regulations prescribed by the legislature. And the Constitution gives them another means of change. They can follow the lead of the reformers

who won passage of the Seventeenth Amendment. Indeed, several constitutional amendments over the past century have involved modifications of the electoral process. Amdts. 19, 22, 24, 26. Unfortunately, today's decision will only discourage this democratic method of change. Why go through the hassle of writing a new provision into the Constitution when it is so much easier to write an old one out?

I respectfully dissent.

APPENDIX

"LEGISLATURE" IN THE CONSTITUTION

Art. I, § 2, cl. 1: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Art. I, § 3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." (Modified by Amdt. 17.)

Art. I, § 3, cl. 2: "Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." (Modified by Amdt. 17.)

Art. I, § 4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be pre-

scribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Art. I, § 8, cl. 17: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

Art. II, § 1, cl. 2: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Art. IV, § 3, cl. 1: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

Art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

Art. V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for

proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Art. VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amdt. 14, § 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Modified by Amdts. 19, 26.)

Amdt. 14, § 3: "No person shall be a Senator or Representative in Congress, or elector of President and Vice President,

or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

Amdt. 17, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Amdt. 17, cl. 2: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Amdt. 18, § 3: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." (Superseded by Amdt. 21.)

Amdt. 20, § 6: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

Amdt. 22, § 2: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution

by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I do not believe that the question the Court answers is properly before us. Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute "cases" or "controversies" committed to our resolution by Art. III, §2, of the Constitution.

What those who framed and ratified the Constitution had in mind when they entrusted the "judicial Power" to a separate and coequal branch of the Federal Government was the judicial power they were familiar with—that traditionally exercised by English and American courts. The "cases" and "controversies" that those courts entertained did not include suits between units of government regarding their legitimate powers. The job of the courts was, in Chief Justice Marshall's words, "solely, to decide on the rights of individuals," *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803). Tocqueville considered this one reason the new democracy could safely confer upon courts the immense power to hold legislation unconstitutional:

> "[B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. . . .
>
> "I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could only attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. . . . But

> the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice." 1 A. de Tocqueville, Democracy in America 102–103 (P. Bradley ed. 1948).

That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable "realistic appreciation of the consequences of judicial action," *ante*, at 804. To the contrary. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U. S. 737, 752 (1984). It keeps us minding our own business.

We consult history and judicial tradition to determine whether a given "'disput[e is] appropriately resolved through the judicial process.'" *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (internal quotation marks omitted). What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers. Nearly every separation-of-powers case presents questions like the ones in this case. But we have *never* passed on a separation-of-powers question raised directly by a governmental subunit's complaint. We have *always* resolved those questions in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm. That is why, for example, it took this Court over 50 years to rule upon the constitutionality of the Tenure of Office Act, passed in 1867. If the law of standing had been otherwise, "presumably President Wilson, or Presidents Grant and Cleveland before him, would . . .

have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress." *Raines* v. *Byrd*, 521 U. S. 811, 828 (1997).

We do not have to look far back in the United States Reports to find other separation-of-powers cases which, if the Arizona Legislature's theory of standing is correct, took an awfully circuitous route to get here. In *Zivotofsky* v. *Kerry*, *ante*, p. 1, the President could have sued for an injunction against Congress's attempted "direct usurpation" of his constitutionally-conferred authority to pronounce on foreign relations. Or in *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665 (2015), a Federal District Judge could have sought a declaratory judgment that a bankruptcy court's adjudicating a *Stern* claim improperly usurped his constitutionally-conferred authority to decide cases and controversies. Or in *NLRB* v. *Noel Canning*, 573 U. S. 513 (2014), the Senate could have sued the President, claiming a direct usurpation of its prerogative to advise on and consent to Presidential appointments. Each of these cases involved the allocation of power to one or more branches of a government; and we surely would have dismissed suits arising in the hypothesized fashions.

We have affirmatively rejected arguments for jurisdiction in cases like this one. For example, in *Raines*, 521 U. S., at 829–830, we refused to allow Members of Congress to challenge the Line Item Veto Act, which they claimed " 'unconstitutionally expand[ed] the President's power' " and " 'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches.' " *Id.*, at 816. In *Massachusetts* v. *Mellon*, 262 U. S. 447, 479–480 (1923), we refused to allow a State to pursue its claim that a conditional congressional appropriation "constitute[d] an effective means of inducing the States to yield a portion of their sovereign rights." (And *Mellon* involved a contention that *one* government infringed upon *another* government's power—far closer to the

traditional party-versus-party lawsuit than is an intragovernmental dispute.) We put it plainly: "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States," *id.*, at 483—and because the State could not show a discrete harm except the alleged usurpation of its powers, we refused to allow the State's appeal.

The sole precedent the Court relies upon is *Coleman* v. *Miller*, 307 U. S. 433 (1939). *Coleman* can be distinguished from the present case as readily as it was distinguished in *Raines*. In *Raines*, the accurate-in-fact (but inconsequential-in-principle) distinction was that the Senators in *Coleman* had their votes nullified, whereas the Members of Congress claimed that their votes could merely be rendered ineffective by a Presidential line-item veto. *Raines*, *supra*, at 823–824. In the present case we could make the accurate-in-fact distinction that in *Coleman* individual legislators were found to have standing, whereas here it is the governmental body, the Arizona Legislature, that seeks to bring suit. But the reality is that the supposed holding of *Coleman* stands out like a sore thumb from the rest of our jurisprudence, which denies standing for intragovernmental disputes.

Coleman was a peculiar case that may well stand for nothing. The opinion discussing and finding standing, and going on to affirm the Kansas Supreme Court, was written by Chief Justice Hughes and announced by Justice Stone. Justice Frankfurter, joined by three other Justices, held there was no standing, and would have dismissed the petition (leaving the judgment of the Kansas Supreme Court in place). Justice Butler, joined by Justice McReynolds, dissented (neither joining Hughes's opinion nor separately discussing standing) and would have reversed the Kansas Supreme Court.

That adds up to two votes to affirm on the merits, two to reverse on the merits (without discussing standing) and four

to dismiss for lack of standing. Justice Stanley Reed, who was on the Court and apparently participated in the case, is not mentioned in any of the opinions recorded in the United States Reports. So, in order to find *Coleman* a binding precedent on standing, rather than a 4-to-4 standoff, one must assume that Justice Reed voted with Hughes. There is some reason to make that assumption: The four Justices rejecting standing went on to discuss the merits, because "the ruling of the Court just announced removes from the case the question of petitioners' standing to sue." 307 U. S., at 456 (Black, J., concurring). But then again, if nine Justices participated, how could it be that on one of the two issues in the case the Court was "equally divided and therefore . . . expresse[d] no opinion"? *Id.*, at 447.

A pretty shaky foundation for a significant precedential ruling. Besides that, the two dissenters' mere assumption of standing—neither saying anything about the subject nor joining Hughes's opinion on the point—produces (if you assume Reed joined Hughes) a majority for standing but no majority opinion explaining why. And even under the most generous assumptions, since the Court's judgment on the issue it resolved rested on the ground that that issue presented a political question—which is itself a rejection of jurisdiction, *Zivotofsky* v. *Clinton*, 566 U. S. 189, 194 (2012)—*Coleman*'s discussion of the additional jurisdictional issue of standing was quite superfluous and arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored.

The Court asserts, quoting *Raines*, 521 U. S., at 819–820, that the Court's standing analysis has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Ante*, at 803, n. 12. The cases cited to support this dictum fail to do so; they are merely cases where a determination of unconstitutionality is avoided by applying what there is no reason to believe is anything other than *normal*

standing requirements. It seems to me utterly implausible that the Framers wanted federal courts limited to traditional judicial cases only when they were pronouncing upon the rights of Congress and the President, and not when they were treading upon the powers of state legislatures and executives. Quite to the contrary, I think they would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments.

I would dismiss this case for want of jurisdiction.

* * *

Normally, having arrived at that conclusion, I would express no opinion on the merits unless my vote was necessary to enable the Court to produce a judgment. In the present case, however, the majority's resolution of the merits question ("legislature" means "the people") is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislatures, that I cannot avoid adding my vote to the devastating dissent of the Chief Justice.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Reading today's opinion, one would think the Court is a great defender of direct democracy in the States. As it reads "the Legislature" out of the Times, Places and Manner Clause, U. S. Const., Art. I, § 4, the majority offers a paean to the ballot initiative. It speaks in glowing terms of the "characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Ante*, at 816. And it urges "[d]eference to state lawmaking" so that States may perform their vital function as "'laboratories'" of democracy. *Ante*, at 817.

These sentiments are difficult to accept. The conduct of the Court in so many other cases reveals a different attitude toward the States in general and ballot initiatives in particu-

lar. Just last week, in the antithesis of deference to state lawmaking through direct democracy, the Court cast aside state laws across the country—many of which were enacted through ballot initiative—that reflected the traditional definition of marriage. See *Obergefell* v. *Hodges*, *ante*, p. 644.

This Court's tradition of disdain for state ballot initiatives goes back quite a while. Two decades ago, it held unconstitutional an Arkansas ballot initiative imposing term limits on that State's Members of Congress, finding "little significance" in the fact that such term limits were adopted by popular referendum. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 822, n. 32 (1995). One year later, it held unconstitutional a ballot initiative that would have prevented the enactment of laws under which "'homosexual, lesbian or bisexual orientation, conduct, practices or relationships [would] constitute or otherwise be the basis of . . . any minority status, quota preferences, protected status or claim of discrimination.'" *Romer* v. *Evans*, 517 U. S. 620, 624 (1996). The Court neither gave deference to state lawmaking nor said anything about the virtues of direct democracy. It instead declared that the result of the ballot initiative was an aberration—that "[i]t is not within our constitutional tradition to enact laws of this sort." *Id.*, at 633. But if "constitutional tradition" is the measuring stick, then it is hard to understand how the Court condones a redistricting practice that was unheard of for nearly 200 years after the ratification of the Constitution and that conflicts with the express constitutional command that election laws "be prescribed in each State by the Legislature thereof," Art. I, § 4.

The Court's lack of respect for ballot initiatives is evident not only in what it has done, but in what it has failed to do. Just this Term, the Court repeatedly refused to review cases in which the Courts of Appeals had set aside state laws passed through ballot initiative. See, *e. g.*, *County of Maricopa* v. *Lopez-Valenzuela*, 575 U. S. 1044 (2015) (THOMAS, J., dissenting from denial of certiorari) (state constitutional

amendment denying bail for illegal aliens arrested in certain circumstances); *Herbert* v. *Kitchen*, 574 U. S. 874 (2014) (state constitutional amendment retaining traditional definition of marriage); *Smith* v. *Bishop*, 574 U. S. 875 (2014) (same); *Rainey* v. *Bostic*, 574 U. S. 875 (2014) (same); *Walker* v. *Wolf*, 574 U. S. 876 (2014) (same). It did so despite warnings that its indifference to such cases would "only embolden the lower courts to reject state laws on questionable constitutional grounds." *Lopez-Valenzuela*, *supra*, at 1045. And it refused to grant a stay pending appeal of a decision purporting to require the State of Alabama to issue marriage licenses to same-sex couples, even though Alabama's licensing laws had not been challenged in that case. See *Strange* v. *Searcy*, 574 U. S. 1145 (2015) (THOMAS, J., dissenting from denial of application for stay). In each decision, the cheers for direct democracy were conspicuously absent.

Sometimes disapproval of ballot initiatives has been even more blatant. Just last Term, one dissenting opinion castigated the product of a state ballot initiative as "stymieing the right of racial minorities to participate in the political process." *Schuette* v. *BAMN*, 572 U. S. 291, 337–338 (2014) (SOTOMAYOR, J., joined by GINSBURG, J., dissenting). It did not hail the ballot initiative as the result of a "State's empowerment of its people," *ante*, at 809, nor offer any deference to state lawmaking. Instead, it complained that "the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process . . . ." *Schuette*, 572 U. S., at 340. And it criticized state ballot initiatives as biased against racial minorities because such minorities "face an especially uphill battle" in seeking the passage of such initiatives. *Id.*, at 356. How quickly the tune has changed.

And how striking that it changed here. The ballot initiative in this case, unlike those that the Court has previously treated so dismissively, was unusually democracy reducing. It did not ask the people to approve a particular redistricting

plan through direct democracy, but instead to take districting away from the people's representatives and give it to an unelected committee, thereby reducing democratic control over the process in the future. The Court's characterization of this as direct democracy at its best is rather like praising a plebiscite in a "banana republic" that installs a strongman as President for Life. And wrapping the analysis in a cloak of federalism does little to conceal the flaws in the Court's reasoning.

I would dispense with the faux federalism and would instead treat the States in an evenhanded manner. That means applying the Constitution as written. Although the straightforward text of Article I, § 4, prohibits redistricting by an unelected, independent commission, Article III limits our power to deciding cases or controversies. Because I agree with JUSTICE SCALIA that the Arizona Legislature lacks Article III standing to assert an institutional injury against another entity of state government, I would dismiss its suit. I respectfully dissent.

Syllabus

GLOSSIP ET AL. *v.* GROSS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 14–7955. Argued April 29, 2015—Decided June 29, 2015

Because capital punishment is constitutional, there must be a constitutional means of carrying it out. After Oklahoma adopted lethal injection as its method of execution, it settled on a three-drug protocol of (1) sodium thiopental (a barbiturate) to induce a state of unconsciousness, (2) a paralytic agent to inhibit all muscular-skeletal movements, and (3) potassium chloride to induce cardiac arrest. In *Baze* v. *Rees*, 553 U. S. 35, the Court held that this protocol does not violate the Eighth Amendment's prohibition against cruel and unusual punishments. Anti-death-penalty advocates then pressured pharmaceutical companies to prevent sodium thiopental (and, later, another barbiturate called pentobarbital) from being used in executions. Unable to obtain either sodium thiopental or pentobarbital, Oklahoma decided to use a 500-milligram dose of midazolam, a sedative, as the first drug in its three-drug protocol.

Oklahoma death row inmates filed a 42 U. S. C. § 1983 action claiming that the use of midazolam violates the Eighth Amendment. Four of those inmates filed a motion for a preliminary injunction and argued that a 500-milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs. After a 3-day evidentiary hearing, the District Court denied the motion. It held that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the prisoners failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain. The Tenth Circuit affirmed.

Held: Petitioners have failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment. Pp. 876–893.

(a) To obtain a preliminary injunction, petitioners must establish, among other things, a likelihood of success on the merits of their claim. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20. To succeed on an Eighth Amendment method-of-execution claim, a prisoner must establish that the method creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known

and available alternatives. *Baze*, *supra*, at 61 (plurality opinion). Pp. 876–878.

(b) Petitioners failed to establish that any risk of harm was substantial when compared to a known and available alternative method of execution. Petitioners have suggested that Oklahoma could execute them using sodium thiopental or pentobarbital, but the District Court did not commit a clear error when it found that those drugs are unavailable to the State. Petitioners argue that the Eighth Amendment does not require them to identify such an alternative, but their argument is inconsistent with the controlling opinion in *Baze*, which imposed a requirement that the Court now follows. Petitioners also argue that the requirement to identify an alternative is inconsistent with the Court's pre-*Baze* decision in *Hill* v. *McDonough*, 547 U. S. 573, but they misread that decision. *Hill* concerned a question of civil procedure, not a substantive Eighth Amendment question. That case held that § 1983 alone does not require an inmate asserting a method-of-execution claim to plead an acceptable alternative. *Baze*, on the other hand, made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative. Pp. 878–881.

(c) The District Court did not commit clear error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the paralytic agent and potassium chloride. Pp. 881–893.

(1) Several initial considerations bear emphasis. First, the District Court's factual findings are reviewed under the deferential "clear error" standard. Second, petitioners have the burden of persuasion on the question whether midazolam is effective. Third, the fact that numerous courts have concluded that midazolam is likely to render an inmate insensate to pain during execution heightens the deference owed to the District Court's findings. Finally, challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts, which should not embroil themselves in ongoing scientific controversies beyond their expertise. *Baze*, *supra*, at 51. Pp. 881–882.

(2) The State's expert presented persuasive testimony that a 500-milligram dose of midazolam would make it a virtual certainty that an inmate will not feel pain associated with the second and third drugs, and petitioners' experts acknowledged that they had no contrary scientific proof. Expert testimony presented by both sides lends support to the District Court's conclusion. Evidence suggested that a 500-milligram dose of midazolam will induce a coma, and even one of petitioners' experts agreed that as the dose of midazolam increases, it is expected to produce a lack of response to pain. It is not dispositive that midazolam is not recommended or approved for use as the sole

anesthetic during painful surgery. First, the 500-milligram dose at issue here is many times higher than a normal therapeutic dose. Second, the fact that a low dose of midazolam is not the best drug for maintaining unconsciousness says little about whether a 500-milligram dose is constitutionally adequate to conduct an execution. Finally, the District Court did not err in concluding that the safeguards adopted by Oklahoma to ensure proper administration of midazolam serve to minimize any risk that the drug will not operate as intended. Pp. 882–886.

(3) Petitioners' speculative evidence regarding midazolam's "ceiling effect" does not establish that the District Court's findings were clearly erroneous. The mere fact that midazolam has a ceiling above which an increase in dosage produces no effect cannot be dispositive, and petitioners provided little probative evidence on the relevant question, *i. e.*, whether midazolam's ceiling effect occurs below the level of a 500-milligram dose and at a point at which the drug does not have the effect of rendering a person insensate to pain caused by the second and third drugs. Petitioners attempt to deflect attention from their failure of proof on this point by criticizing the testimony of the State's expert. They emphasize an apparent conflict between the State's expert and their own expert regarding the biological process that produces midazolam's ceiling effect. But even if petitioners' expert is correct regarding that biological process, it is largely beside the point. What matters for present purposes is the dosage at which the ceiling effect kicks in, not the biological process that produces the effect. Pp. 887–890.

(4) Petitioners' remaining arguments—that an expert report presented in the District Court should have been rejected because it referenced unreliable sources and contained an alleged mathematical error, that only four States have used midazolam in an execution, and that difficulties during two recent executions suggest that midazolam is ineffective—all lack merit. Pp. 890–893.

776 F. 3d 721, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 893. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 899. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 908. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 949.

Robin C. Konrad argued the cause for petitioners. With her on the briefs were *Jon M. Sands*, *Dale A. Baich*, *Peter*

Counsel

D. Keisler, *Jeffrey T. Green*, *Jacqueline G. Cooper*, *Susan Otto*, *Patti Palmer Ghezzi*, *Randy A. Bauman*, *Mark E. Haddad*, *Alycia A. Degen*, *Amanda V. Lopez*, and *Collin P. Wendel*.

Patrick R. Wyrick, Solicitor General of Oklahoma, argued the cause for respondents. With him on the brief were *E. Scott Pruitt*, Attorney General, *Mithun Mansinghani*, Deputy Solicitor General, *John D. Hadden*, *Jeb Joseph*, and *Aaron Stewart*, Assistant Attorneys General, *Jared Haines*, Assistant Solicitor General, and *David B. Rivkin, Jr.**

---

*Briefs of *amici curiae* urging reversal were filed for the Advocates for Human Rights by *Amy Bergquist* and *Nicole M. Moen*; for former State Attorneys General by *Matthew S. Hellman*, *Erica L. Ross*, and *Virginia E. Sloan*; for the Innocence Project by *James C. Dugan* and *Barry C. Scheck*; for the Louis Stein Center for Law and Ethics at Fordham University School of Law by *Faith E. Gay*, *Marc L. Greenwald*, and *Bruce A. Green*; for the National Association of Criminal Defense Lawyers by *Gia L. Cincone* and *Barbara E. Bergman*; and for the National Catholic Reporter by *Robert P. LoBue*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Luther Strange*, Attorney General of Alabama, *Andrew L. Brasher*, Solicitor General, and *Megan A. Kirkpatrick*, Deputy Solicitor General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia Coffman* of Colorado, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *James D. "Buddy" Caldwell* of Louisiana, *Adam Paul Laxalt* of Nevada, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; for the State of Florida by *Pamela Jo Bondi*, Attorney General of Florida, *Allen Winsor*, Solicitor General, *Osvaldo Vazquez*, Deputy Solicitor General, *Carolyn M. Snurkowski*, Associate Deputy Attorney General, *Scott Browne*, Assistant Attorney General, and *Candance M. Sabella*, Chief Assistant Attorney General; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* were filed for the National Consensus Project et al. by *G. Ben Cohen* and *Cecelia Trenticosta*; for The Rutherford Institute by *Anand Agneshwar* and *John W. Whitehead*; and for Sixteen Professors of Pharmacology by *James K. Stronski*, *Harry P. Cohen*, and *Chiemi D. Suzuki*.

JUSTICE ALITO delivered the opinion of the Court.

Prisoners sentenced to death in the State of Oklahoma filed an action in federal court under Rev. Stat. § 1979, 42 U. S. C. § 1983, contending that the method of execution now used by the State violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argue that midazolam, the first drug employed in the State's current three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the District Court denied four prisoners' application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Court of Appeals for the Tenth Circuit affirmed and accepted the District Court's finding of fact regarding midazolam's efficacy.

For two independent reasons, we also affirm. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. See *Baze* v. *Rees*, 553 U. S. 35, 61 (2008) (plurality opinion). Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

I

A

The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights. In that era, death sentences were usually carried out by hanging. The Death Penalty in America: Current Controversies 4 (H. Bedau ed. 1997). Hanging remained the standard method of execution through much of the 19th century, but that began to change in the century's later years. See *Baze*, *supra*, at 41–42. In the 1880's, the Legislature of the State of New York appointed a commission to find " 'the most humane and practical method known to modern science of

carrying into effect the sentence of death in capital cases.'" *In re Kemmler*, 136 U. S. 436, 444 (1890). The commission recommended electrocution, and in 1888, the legislature enacted a law providing for this method of execution. *Id.*, at 444–445. In subsequent years, other States followed New York's lead in the "'belief that electrocution is less painful and more humane than hanging.'" *Baze*, *supra*, at 42 (quoting *Malloy* v. *South Carolina*, 237 U. S. 180, 185 (1915)).

In 1921, the Nevada Legislature adopted another new method of execution, lethal gas, after concluding that this was "the most humane manner known to modern science." *State* v. *Jon*, 46 Nev. 418, 437, 211 P. 676, 682 (1923). The Nevada Supreme Court rejected the argument that the use of lethal gas was unconstitutional, *id.*, at 435–437, 211 P., at 681–682, and other States followed Nevada's lead, see, *e. g.*, Ariz. Const., Art. XXII, § 22 (1933); 1937 Cal. Stats. ch. 172, § 1; 1933 Colo. Sess. Laws ch. 61, § 1; 1955 Md. Laws ch. 625, § 1, p. 1017; 1937 Mo. Laws p. 222, § 1. Nevertheless, hanging and the firing squad were retained in some States, see, *e. g.*, 1961 Del. Laws ch. 309, § 2 (hanging); 1935 Kan. Sess. Laws ch. 155, § 1 (hanging); Utah Code Crim. Proc. § 105–37–16 (1933) (hanging or firing squad), and electrocution remained the predominant method of execution until the 9-year hiatus in executions that ended with our judgment in *Gregg* v. *Georgia*, 428 U. S. 153 (1976). See *Baze*, *supra*, at 42.

After *Gregg* reaffirmed that the death penalty does not violate the Constitution, some States once again sought a more humane way to carry out death sentences. They eventually adopted lethal injection, which today is "by far the most prevalent method of execution in the United States." *Baze*, *supra*, at 42. Oklahoma adopted lethal injection in 1977, see 1977 Okla. Sess. Laws p. 89, and it eventually settled on a protocol that called for the use of three drugs: (1) sodium thiopental, "a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection," (2) a paralytic agent, which "inhibits all muscular-skeletal movements and, by par-

alyzing the diaphragm, stops respiration," and (3) potassium chloride, which "interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest." *Baze*, *supra*, at 44; see also Brief for Respondents 9. By 2008, at least 30 of the 36 States that used lethal injection employed that particular three-drug protocol. 553 U. S., at 44.

While methods of execution have changed over the years, "[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Id.*, at 48. In *Wilkerson* v. *Utah*, 99 U. S. 130, 134–135 (1879), the Court upheld a sentence of death by firing squad. In *In re Kemmler*, *supra*, at 447–449, the Court rejected a challenge to the use of the electric chair. And the Court did not retreat from that holding even when presented with a case in which a State's initial attempt to execute a prisoner by electrocution was unsuccessful. *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463–464 (1947) (plurality opinion). Most recently, in *Baze*, *supra*, seven Justices agreed that the three-drug protocol just discussed does not violate the Eighth Amendment.

Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Id.*, at 47. And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. *Ibid.* After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.

B

Baze cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. But a practi-

cal obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. The sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug. After suspending domestic production in 2009, the company planned to resume production in Italy. Koppel, Execution Drug Halt Raises Ire of Doctors, Wall Street Journal, Jan. 25, 2011, p. A6. Activists then pressured both the company and the Italian Government to stop the sale of sodium thiopental for use in lethal injections in this country. Bonner, Letter From Europe: Drug Company in Cross Hairs of Death Penalty Opponents, N. Y. Times, Mar. 30, 2011; Koppel, Drug Halt Hinders Executions in the U. S., Wall Street Journal, Jan. 22, 2011, p. A1. That effort proved successful, and in January 2011, the company announced that it would exit the sodium thiopental market entirely. See Hospira, Press Release, Hospira Statement Regarding Pentothal™ (sodium thiopental) Market Exit (Jan. 21, 2011).

After other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative, and they eventually replaced sodium thiopental with pentobarbital, another barbiturate. In December 2010, Oklahoma became the first State to execute an inmate using pentobarbital. See Reuters, Chicago Tribune, New Drug Mix Used in Oklahoma Execution, Dec. 17, 2010, p. 41. That execution occurred without incident, and States gradually shifted to pentobarbital as their supplies of sodium thiopental ran out. It is reported that pentobarbital was used in all of the 43 executions carried out in 2012. Death Penalty Information Center, Execution List 2012, online at www.deathpenaltyinfo.org/execution-list-2012 (all Internet materials as visited June 26, 2015, and available in Clerk of Court's case file). Petitioners concede that pentobarbital, like sodium thiopental, can "reliably induce and maintain a comalike state that renders a

person insensate to pain" caused by administration of the second and third drugs in the protocol. Brief for Petitioners 2. And courts across the country have held that the use of pentobarbital in executions does not violate the Eighth Amendment. See, *e. g.*, *Jackson* v. *Danberg*, 656 F. 3d 157 (CA3 2011); *Beaty* v. *Brewer*, 649 F. 3d 1071 (CA9 2011); *DeYoung* v. *Owens*, 646 F. 3d 1319 (CA11 2011); *Pavatt* v. *Jones*, 627 F. 3d 1336 (CA10 2010).

Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions. See Bonner, *supra*. That manufacturer opposed the death penalty and took steps to block the shipment of pentobarbital for use in executions in the United States. Stein, New Obstacle to Death Penalty in U. S., Washington Post, July 3, 2011, p. A4. Oklahoma eventually became unable to acquire the drug through any means. The District Court below found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma. App. 67–68.

C

Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs. In October 2013, Florida became the first State to substitute midazolam for pentobarbital as part of a three-drug lethal injection protocol. Fernandez, Executions Stall as States Seek Different Drugs, N. Y. Times, Nov. 9, 2013, p. A1. To date, Florida has conducted 11 executions using that protocol, which calls for midazolam followed by a paralytic agent and potassium chloride. See Brief for State of Florida as *Amicus Curiae* 2–3; *Chavez* v. *Florida SP Warden*, 742 F. 3d 1267, 1269 (CA11 2014). In 2014, Oklahoma also substituted midazolam for pentobarbital as part of its three-drug protocol. Oklahoma has already used this three-drug protocol twice: to execute Clayton Lockett in April 2014 and Charles Warner in Janu-

ary 2015. (Warner was one of the four inmates who moved for a preliminary injunction in this case.)

The Lockett execution caused Oklahoma to implement new safety precautions as part of its lethal injection protocol. When Oklahoma executed Lockett, its protocol called for the administration of 100 milligrams of midazolam, as compared to the 500 milligrams that are currently required. On the morning of his execution, Lockett cut himself twice at "'the bend of the elbow.'" App. 50. That evening, the execution team spent nearly an hour making at least one dozen attempts to establish intravenous (IV) access to Lockett's cardiovascular system, including at his arms and elsewhere on his body. The team eventually believed that it had established intravenous access through Lockett's right femoral vein, and it covered the injection access point with a sheet, in part to preserve Lockett's dignity during the execution. After the team administered the midazolam and a physician determined that Lockett was unconscious, the team next administered the paralytic agent (vecuronium bromide) and most of the potassium chloride. Lockett began to move and speak, at which point the physician lifted the sheet and determined that the IV had "infiltrated," which means that "the IV fluid, rather than entering Lockett's blood stream, had leaked into the tissue surrounding the IV access point." *Warner* v. *Gross*, 776 F. 3d 721, 725 (CA10 2015) (case below). The execution team stopped administering the remaining potassium chloride and terminated the execution about 33 minutes after the midazolam was first injected. About 10 minutes later, Lockett was pronounced dead.

An investigation into the Lockett execution concluded that "the viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs." App. 398. The investigation, which took five months to complete, recommended several changes to Oklahoma's execution protocol, and Oklahoma adopted a new protocol with an effective date of September 30, 2014. That

protocol allows the Oklahoma Department of Corrections to choose among four different drug combinations. The option that Oklahoma plans to use to execute petitioners calls for the administration of 500 milligrams of midazolam followed by a paralytic agent and potassium chloride.[1] The paralytic agent may be pancuronium bromide, vecuronium bromide, or rocuronium bromide, three drugs that, all agree, are functionally equivalent for purposes of this case. The protocol also includes procedural safeguards to help ensure that an inmate remains insensate to any pain caused by the administration of the paralytic agent and potassium chloride. Those safeguards include: (1) the insertion of both a primary and backup IV catheter, (2) procedures to confirm the viability of the IV site, (3) the option to postpone an execution if viable IV sites cannot be established within an hour, (4) a mandatory pause between administration of the first and second drugs, (5) numerous procedures for monitoring the offender's consciousness, including the use of an electrocardiograph and direct observation, and (6) detailed provisions with respect to the training and preparation of the execution team. In January of this year, Oklahoma executed Warner using these revised procedures and the combination of midazolam, a paralytic agent, and potassium chloride.

II

A

In June 2014, after Oklahoma switched from pentobarbital to midazolam and executed Lockett, 21 Oklahoma death row inmates filed an action under 42 U. S. C. §1983 challenging the State's new lethal injection protocol. The complaint alleged that Oklahoma's use of midazolam violates the Eighth Amendment's prohibition of cruel and unusual punishment.

[1] The three other drug combinations that Oklahoma may administer are: (1) a single dose of pentobarbital, (2) a single dose of sodium thiopental, and (3) a dose of midazolam followed by a dose of hydromorphone.

In November 2014, four of those plaintiffs—Richard Glossip, Benjamin Cole, John Grant, and Warner—filed a motion for a preliminary injunction. All four men had been convicted of murder and sentenced to death by Oklahoma juries. Glossip hired Justin Sneed to kill his employer, Barry Van Treese. Sneed entered a room where Van Treese was sleeping and beat him to death with a baseball bat. See *Glossip* v. *State*, 2007 OK CR 12, 157 P. 3d 143, 147–149. Cole murdered his 9-month-old daughter after she would not stop crying. Cole bent her body backwards until he snapped her spine in half. After the child died, Cole played video games. See *Cole* v. *State*, 2007 OK CR 27, 164 P. 3d 1089, 1092–1093. Grant, while serving terms of imprisonment totaling 130 years, killed Gay Carter, a prison food service supervisor, by pulling her into a mop closet and stabbing her numerous times with a shank. See *Grant* v. *State*, 2002 OK CR 36, 58 P. 3d 783, 789. Warner anally raped and murdered an 11-month-old girl. The child's injuries included two skull fractures, internal brain injuries, two fractures to her jaw, a lacerated liver, and a bruised spleen and lungs. See *Warner* v. *State*, 2006 OK CR 40, 144 P. 3d 838, 856–857.

The Oklahoma Court of Criminal Appeals affirmed the murder conviction and death sentence of each offender. Each of the men then unsuccessfully sought both state post-conviction and federal habeas corpus relief. Having exhausted the avenues for challenging their convictions and sentences, they moved for a preliminary injunction against Oklahoma's lethal injection protocol.

B

In December 2014, after discovery, the District Court held a 3-day evidentiary hearing on the preliminary injunction motion. The District Court heard testimony from 17 witnesses and reviewed numerous exhibits. Dr. David Lubarsky, an anesthesiologist, and Dr. Larry Sasich, a doctor of pharmacy, provided expert testimony about midazolam for

petitioners, and Dr. Roswell Evans, a doctor of pharmacy, provided expert testimony for respondents.

After reviewing the evidence, the District Court issued an oral ruling denying the motion for a preliminary injunction. The District Court first rejected petitioners' challenge under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), to the testimony of Dr. Evans. It concluded that Dr. Evans, the Dean of Auburn University's School of Pharmacy, was well qualified to testify about midazolam's properties and that he offered reliable testimony. The District Court then held that petitioners failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment. The court provided two independent reasons for this conclusion. First, the court held that petitioners failed to identify a known and available method of execution that presented a substantially less severe risk of pain than the method that the State proposed to use. Second, the court found that petitioners failed to prove that Oklahoma's protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' amounting to 'an objectively intolerable risk of harm.'" App. 96 (quoting *Baze*, 553 U. S., at 50). The court emphasized that the Oklahoma protocol featured numerous safeguards, including the establishment of two IV access sites, confirmation of the viability of those sites, and monitoring of the offender's level of consciousness throughout the procedure.

The District Court supported its decision with findings of fact about midazolam. It found that a 500-milligram dose of midazolam "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." App. 77. Indeed, it found that a 500-milligram dose alone would likely cause death by respiratory arrest within 30 minutes or an hour.

The Court of Appeals for the Tenth Circuit affirmed. 776 F. 3d 721. The Court of Appeals explained that our decision in *Baze* requires a plaintiff challenging a lethal injection protocol to demonstrate that the risk of severe pain presented by an execution protocol is substantial "'when compared to the known and available alternatives.'" 776 F. 3d, at 732 (quoting *Baze*, *supra*, at 61). And it agreed with the District Court that petitioners had not identified any such alternative. The Court of Appeals added, however, that this holding was "not outcome-determinative in this case" because petitioners additionally failed to establish that the use of midazolam creates a demonstrated risk of severe pain. 776 F. 3d, at 732. The Court of Appeals found that the District Court did not abuse its discretion by relying on Dr. Evans' testimony, and it concluded that the District Court's factual findings about midazolam were not clearly erroneous. It also held that alleged errors in Dr. Evans' testimony did not render his testimony unreliable or the District Court's findings clearly erroneous.

Oklahoma executed Warner on January 15, 2015, but we subsequently voted to grant review and then stayed the executions of Glossip, Cole, and Grant pending the resolution of this case. 574 U. S. 1133 and 1143 (2015).

III

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). The parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits.

The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." The controlling opin-

ion in *Baze* outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim. *Baze* involved a challenge by Kentucky death row inmates to that State's three-drug lethal injection protocol of sodium thiopental, pancuronium bromide, and potassium chloride. The inmates conceded that the protocol, if properly administered, would result in a humane and constitutional execution because sodium thiopental would render an inmate oblivious to any pain caused by the second and third drugs. 553 U. S., at 49. But they argued that there was an unacceptable risk that sodium thiopental would not be properly administered. *Ibid.* The inmates also maintained that a significant risk of harm could be eliminated if Kentucky adopted a one-drug protocol and additional monitoring by trained personnel. *Id.*, at 51.

The controlling opinion in *Baze* first concluded that prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Id.*, at 50 (quoting *Helling* v. *McKinney*, 509 U. S. 25, 33, 34–35 (1993)). To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" 553 U. S., at 50 (quoting *Farmer* v. *Brennan*, 511 U. S. 825, 846, and n. 9 (1994)). The controlling opinion also stated that prisoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." 553 U. S., at 51. Instead, prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.*, at 52.

The controlling opinion summarized the requirements of an Eighth Amendment method-of-execution claim as follows: "A stay of execution may not be granted on grounds such as

those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives." *Id.*, at 61. The preliminary injunction posture of the present case thus requires petitioners to establish a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.

The challenge in *Baze* failed both because the Kentucky inmates did not show that the risks they identified were substantial and imminent, *id.*, at 56, and because they did not establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk, *id.*, at 57–60. Petitioners' arguments here fail for similar reasons. First, petitioners have not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution. Second, they have failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering. We address each reason in turn.

IV

Our first ground for affirmance is based on petitioners' failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution. In their amended complaint, petitioners proffered that the State could use sodium thiopental as part of a single-drug protocol. They have since suggested that it might also be constitutional for Oklahoma to use pentobarbital. But the District Court found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma's Department of Corrections. The Court of Appeals affirmed that finding, and it is not clearly erroneous. On the contrary, the record shows that

Oklahoma has been unable to procure those drugs despite a good-faith effort to do so.

Petitioners do not seriously contest this factual finding, and they have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain. Nor have they shown a risk of pain so great that other acceptable, available methods must be used. Instead, they argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*, 553 U. S., at 61, which imposed a requirement that the Court now follows.[2]

Petitioners contend that the requirement to identify an alternative method of execution contravenes our pre-*Baze* decision in *Hill* v. *McDonough*, 547 U. S. 573 (2006), but they misread that decision. The portion of the opinion in *Hill* on which they rely concerned a question of civil procedure, not a substantive Eighth Amendment question. In *Hill*, the issue was whether a challenge to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under § 1983. *Id.*, at 576. We held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence. *Id.*, at 579–580. The United States as *amicus curiae* argued that we should adopt a special pleading requirement to stop inmates from

---

[2] JUSTICE SOTOMAYOR's dissent (hereinafter principal dissent), *post*, at 970–971, inexplicably refuses to recognize that THE CHIEF JUSTICE's opinion in *Baze* sets out the holding of the case. In *Baze*, the opinion of THE CHIEF JUSTICE was joined by two other Justices. JUSTICES SCALIA and THOMAS took the broader position that a method of execution is consistent with the Eighth Amendment unless it is deliberately designed to inflict pain. 553 U. S., at 94 (THOMAS, J. concurring in judgment). Thus, as explained in *Marks* v. *United States*, 430 U. S. 188, 193 (1977), THE CHIEF JUSTICE's opinion sets out the holding of the case. It is for this reason that petitioners base their argument on the rule set out in that opinion. See Brief for Petitioners 25, 28.

using § 1983 actions to attack, not just a particular means of execution, but the death penalty itself. To achieve this end, the United States proposed that an inmate asserting a method-of-execution claim should be required to plead an acceptable alternative method of execution. *Id.*, at 582. We rejected that argument because "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Ibid.* *Hill* thus held that § 1983 alone does not impose a heightened pleading requirement. *Baze*, on the other hand, addressed the substantive elements of an Eighth Amendment method-of-execution claim, and it made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative. Because petitioners failed to do this, the District Court properly held that they did not establish a likelihood of success on their Eighth Amendment claim.

Readers can judge for themselves how much distance there is between the principal dissent's argument against requiring prisoners to identify an alternative and the view, now announced by JUSTICES BREYER and GINSBURG, that the death penalty is categorically unconstitutional. *Post*, at 909 (BREYER, J., dissenting). The principal dissent goes out of its way to suggest that a State would violate the Eighth Amendment if it used one of the methods of execution employed before the advent of lethal injection. *Post,* at 977. And the principal dissent makes this suggestion even though the Court held in *Wilkerson* that this method (the firing squad) is constitutional and even though, in the words of the principal dissent, "there is some reason to think that it is relatively quick and painless." *Post*, at 977. Tellingly silent about the methods of execution most commonly used before States switched to lethal injection (the electric chair and gas chamber), the principal dissent implies that it would be unconstitutional to use a method that "could be

seen as a devolution to a more primitive era." *Ibid.* If States cannot return to any of the "more primitive" methods used in the past and if no drug that meets with the principal dissent's approval is available for use in carrying out a death sentence, the logical conclusion is clear. But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional. See, *e. g.*, *Baze*, 553 U. S., at 47; *id.*, at 87–88 (SCALIA, J., concurring in judgment); *Gregg*, 428 U. S., at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.); *id.*, at 226 (White, J., concurring in judgment); *Resweber*, 329 U. S., at 464; *In re Kemmler*, 136 U. S., at 447; *Wilkerson*, 99 U. S., at 134–135. We decline to effectively overrule these decisions.

V

We also affirm for a second reason: The District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution. We emphasize four points at the outset of our analysis.

First, we review the District Court's factual findings under the deferential "clear error" standard. This standard does not entitle us to overturn a finding "simply because [we are] convinced that [we] would have decided the case differently." *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985).

Second, petitioners bear the burden of persuasion on this issue. *Baze*, *supra*, at 41. Although petitioners expend great effort attacking peripheral aspects of Dr. Evans' testimony, they make little attempt to prove what is critical, *i. e.*, that the evidence they presented to the District Court establishes that the use of midazolam is sure or very likely to result in needless suffering.

Third, numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from administration of the paralytic agent and potassium chloride.

See, *e. g.*, 776 F. 3d 721 (case below affirming the District Court); *Chavez* v. *Florida SP Warden*, 742 F. 3d 1267 (affirming the District Court); *Banks* v. *State*, 150 So. 3d 797 (Fla. 2014) (affirming the lower court); *Howell* v. *State*, 133 So. 3d 511 (Fla. 2014) (same); *Muhammad* v. *State*, 132 So. 3d 176 (Fla. 2013) (same). (It is noteworthy that one or both of the two key witnesses in this case—Dr. Lubarsky for petitioners and Dr. Evans for respondents—were witnesses in the *Chavez*, *Howell*, and *Muhammad* cases.) "Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easley* v. *Cromartie*, 532 U. S. 234, 242 (2001). Our review is even more deferential where, as here, multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings. Cf. *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 841 (1996) (explaining that this Court " 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error' " (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949))).

Fourth, challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts. Although we must invalidate a lethal injection protocol if it violates the Eighth Amendment, federal courts should not "embroil [themselves] in ongoing scientific controversies beyond their expertise." *Baze*, *supra*, at 51. Accordingly, an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.

A

Petitioners attack the District Court's findings of fact on two main grounds.[3] First, they argue that even if midazo-

[3] Drs. Lubarsky and Sasich, petitioners' key witnesses, both testified that midazolam is inappropriate for a third reason, namely, that it creates a risk of "paradoxical reactions" such as agitation, hyperactivity, and com-

lam is powerful enough to induce unconsciousness, it is too weak to maintain unconsciousness and insensitivity to pain once the second and third drugs are administered. Second, while conceding that the 500-milligram dose of midazolam is much higher than the normal therapeutic dose, they contend that this fact is irrelevant because midazolam has a "ceiling effect"—that is, at a certain point, an increase in the dose administered will not have any greater effect on the inmate. Neither argument succeeds.

The District Court found that midazolam is capable of placing a person "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." App. 77. This conclusion was not clearly erroneous. Respondents' expert, Dr. Evans, testified that the proper administration of a 500-milligram dose of midazolam would make it "a virtual certainty" that any individual would be "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from application of the 2nd and 3rd drugs" used in the Oklahoma protocol. *Id.*, at 302; see also *id.*, at 322. And petitioners' experts acknowledged that they had no contrary scientific proof. See *id.*, at 243–244 (Dr. Sasich stating that the ability of midazolam to render a person insensate to the second and third drugs "has not been subjected to scientific testing"); *id.*, at 176 (Dr. Lubarsky stating that "there is no scientific literature addressing the use of midazolam as a manner to administer lethal injections in humans").

---

bativeness. App. 175 (expert report of Dr. Lubarsky); *id.*, at 242, 244 (expert report of Dr. Sasich). The District Court found, however, that the frequency with which a paradoxical reaction occurs "is speculative" and that the risk "occurs with the highest frequency in low therapeutic doses." *Id.*, at 78. Indeed, Dr. Sasich conceded that the incidence or risk of paradoxical reactions with midazolam "is unknown" and that reports estimate the risk to vary only "from 1% to above 10%." *Id.*, at 244. Moreover, the mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation. "[T]he Constitution does not demand the avoidance of all risk of pain." *Baze*, 553 U. S., at 47 (plurality opinion).

In an effort to explain this dearth of evidence, Dr. Sasich testified that "[i]t's not my responsibility or the [Food and Drug Administration's] responsibility to prove that the drug doesn't work or is not safe." Tr. of Preliminary Injunction Hearing 357 (Tr.). Instead, he stated, "it's the responsibility of the proponent to show that the drug is safe and effective." *Ibid.* Dr. Sasich confused the standard imposed on a drug manufacturer seeking approval of a therapeutic drug with the standard that must be borne by a party challenging a State's lethal injection protocol. When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain. Here, petitioners' own experts effectively conceded that they lacked evidence to prove their case beyond dispute.

Petitioners attempt to avoid this deficiency by criticizing respondents' expert. They argue that the District Court should not have credited Dr. Evans' testimony because he admitted that his findings were based on "'extrapolat[ions]'" from studies done about much lower therapeutic doses of midazolam. See Brief for Petitioners 34 (citing Tr. 667–668; emphasis deleted). But because a 500-milligram dose is never administered for a therapeutic purpose, extrapolation was reasonable. And the conclusions of petitioners' experts were also based on extrapolations and assumptions. For example, Dr. Lubarsky relied on "extrapolation of the ceiling effect data." App. 177.

Based on the evidence that the parties presented to the District Court, we must affirm. Testimony from both sides supports the District Court's conclusion that midazolam can render a person insensate to pain. Dr. Evans testified that although midazolam is not an analgesic, it can nonetheless "render the person unconscious and 'insensate' during the remainder of the procedure." *Id.*, at 294. In his discussion about the ceiling effect, Dr. Sasich agreed that as the dose of midazolam increases, it is "expected to produce sedation,

amnesia, and finally lack of response to stimuli such as pain (unconsciousness)." *Id.*, at 243. Petitioners argue that midazolam is not powerful enough to keep a person insensate to pain after the administration of the second and third drugs, but Dr. Evans presented creditable testimony to the contrary. See, *e. g.*, Tr. 661 (testifying that a 500-milligram dose of midazolam will induce a coma).[4] Indeed, low doses of midazolam are sufficient to induce unconsciousness and are even sometimes used as the sole relevant drug in certain medical procedures. Dr. Sasich conceded, for example, that midazolam might be used for medical procedures like colonoscopies and gastroscopies. App. 267–268; see also Brief for Respondents 6–8.[5]

Petitioners emphasize that midazolam is not recommended or approved for use as the sole anesthetic during painful surgery, but there are two reasons why this is not dispositive. First, as the District Court found, the 500-milligram dose at issue here "is many times higher than a normal therapeutic dose of midazolam." App. 76. The effect of a small dose of midazolam has minimal probative value about the effect of

---

[4] The principal dissent misunderstands the record when it bizarrely suggests that midazolam is about as dangerous as a peanut. *Post*, at 962. Dr. Evans and Dr. Lubarsky agreed that midazolam has caused fatalities in doses as low as 0.04 to 0.07 milligrams per kilogram. App. 217, 294. Even if death from such low doses is a "rare, unfortunate side effec[t]," *post*, at 962, the District Court found that a massive 500-milligram dose—many times higher than the lowest dose reported to have produced death—will likely cause death in under an hour. App. 76–77.

[5] Petitioners' experts also declined to testify that a 500-milligram dose of midazolam is always insufficient to place a person in a coma and render him insensate to pain. Dr. Lubarsky argued only that the 500-milligram dose cannot "reliably" produce a coma. *Id.*, at 228. And when Dr. Sasich was asked whether he could say to a reasonable degree of certainty that a 500-milligram dose of midazolam would not render someone unconscious, he replied that he could not. *Id.*, at 271–272. A product label for midazolam that Dr. Sasich attached to his expert report also acknowledged that an overdose of midazolam can cause a coma. See Expert Report of Larry D. Sasich, in No. 14–6244 (CA10), p. 34.

a 500-milligram dose. Second, the fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is *constitutionally adequate* for purposes of conducting an execution. We recognized this point in *Baze*, where we concluded that although the medical standard of care might require the use of a blood pressure cuff and an electrocardiogram during surgeries, this does not mean those procedures are required for an execution to pass Eighth Amendment scrutiny. 553 U. S., at 60.

Oklahoma has also adopted important safeguards to ensure that midazolam is properly administered. The District Court emphasized three requirements in particular: The execution team must secure both a primary and backup IV access site, it must confirm the viability of the IV sites, and it must continuously monitor the offender's level of consciousness. The District Court did not commit clear error in concluding that these safeguards help to minimize any risk that might occur in the event that midazolam does not operate as intended. Indeed, we concluded in *Baze* that many of the safeguards that Oklahoma employs—including the establishment of a primary and backup IV and the presence of personnel to monitor an inmate—help in significantly reducing the risk that an execution protocol will violate the Eighth Amendment. *Id.*, at 55–56. And many other safeguards that Oklahoma has adopted mirror those that the dissent in *Baze* complained were absent from Kentucky's protocol in that case. For example, the dissent argued that because a consciousness check before injection of the second drug "can reduce a risk of dreadful pain," Kentucky's failure to include that step in its procedure was unconstitutional. *Id.*, at 119 (opinion of GINSBURG, J.). The dissent also complained that Kentucky did not monitor the effectiveness of the first drug or pause between injection of the first and second drugs. *Id.*, at 120–121. Oklahoma has accommodated each of those concerns.

B

Petitioners assert that midazolam's "ceiling effect" undermines the District Court's finding about the effectiveness of the huge dose administered in the Oklahoma protocol. Petitioners argue that midazolam has a "ceiling" above which any increase in dosage produces no effect. As a result, they maintain, it is wrong to assume that a 500-milligram dose has a much greater effect than a therapeutic dose of about 5 milligrams. But the mere fact that midazolam has such a ceiling cannot be dispositive. Dr. Sasich testified that "all drugs essentially have a ceiling effect." Tr. 343. The relevant question here is whether midazolam's ceiling effect occurs below the level of a 500-milligram dose and at a point at which the drug does not have the effect of rendering a person insensate to pain caused by the second and third drugs.

Petitioners provided little probative evidence on this point, and the speculative evidence that they did present to the District Court does not come close to establishing that its factual findings were clearly erroneous. Dr. Sasich stated in his expert report that the literature "indicates" that midazolam has a ceiling effect, but he conceded that he "was unable to determine the midazolam dose for a ceiling effect on unconsciousness because there is no literature in which such testing has been done." App. 243–244. Dr. Lubarsky's report was similar, *id.*, at 171–172, and the testimony of petitioners' experts at the hearing was no more compelling. Dr. Sasich frankly admitted that he did a "search to try and determine at what dose of midazolam you would get a ceiling effect," but concluded: "I could not find one." Tr. 344. The closest petitioners came was Dr. Lubarsky's suggestion that the ceiling effect occurs "[p]robably after about . . . 40 to 50 milligrams," but he added that he had not actually done the relevant calculations, and he admitted: "I can't tell you right now" at what dose the ceiling effect occurs. App. 225. We cannot conclude that the District

Court committed clear error in declining to find, based on such speculative evidence, that the ceiling effect negates midazolam's ability to render an inmate insensate to pain caused by the second and third drugs in the protocol.

The principal dissent discusses the ceiling effect at length, but it studiously avoids suggesting that petitioners presented probative evidence about the dose at which the ceiling effect occurs or about whether the effect occurs before a person becomes insensate to pain. The principal dissent avoids these critical issues by suggesting that such evidence is "irrelevant if there is no dose at which the drug can . . . render a person 'insensate to pain.'" *Post*, at 964. But the District Court heard evidence that the drug can render a person insensate to pain, and not just from Dr. Evans: Dr. Sasich (one of petitioners' own experts) testified that higher doses of midazolam are "expected to produce . . . lack of response to stimuli such as pain." App. 243.[6]

In their brief, petitioners attempt to deflect attention from their failure of proof regarding midazolam's ceiling effect by criticizing Dr. Evans' testimony. But it was *petitioners*' burden to establish that midazolam's ceiling occurred at a dosage below the massive 500-milligram dose employed in the Oklahoma protocol and at a point at which the drug failed to render the recipient insensate to pain. They did not meet that burden, and their criticisms do not undermine Dr. Evans' central point, which the District Court credited, that a properly administered 500-milligram dose of midazolam will render the recipient unable to feel pain.

One of petitioners' criticisms of Dr. Evans' testimony is little more than a quibble about the wording chosen by Dr.

---

[6] The principal dissent emphasizes Dr. Lubarsky's supposedly contrary testimony, but the District Court was entitled to credit Dr. Evans (and Dr. Sasich) instead of Dr. Lubarsky on this point. And the District Court had strong reasons not to credit Dr. Lubarsky, who even argued that a protocol that includes *sodium thiopental* is "constructed to produce egregious harm and suffering." App. 227.

Evans at one point in his oral testimony. Petitioners' expert, Dr. Lubarsky, stated in his report that midazolam "increases effective binding of [gamma-aminobutyric acid (GABA)] to its receptor to induce unconsciousness."[7] *Id.*, at 172. Dr. Evans' report provided a similar explanation of the way in which midazolam works, see *id.*, at 293–294, and Dr. Lubarsky did not dispute the accuracy of that explanation when he testified at the hearing. Petitioners contend, however, that Dr. Evans erred when he said at the hearing that "[m]idazolam attaches to GABA receptors, *inhibiting GABA*." *Id.*, at 312 (emphasis added). Petitioners contend that this statement was incorrect because "far from *inhibiting* GABA, midazolam *facilitates its binding* to GABA receptors." Brief for Petitioners 38.

In making this argument, petitioners are simply quarrelling with the words that Dr. Evans used during oral testimony in an effort to explain how midazolam works in terms understandable to a layman. Petitioners do not suggest that the discussion of midazolam in Dr. Evans' expert report was inaccurate, and as for Dr. Evans' passing use of the term "inhibiting," Dr. Lubarsky's own expert report states that GABA's "*inhibition* of brain activity is accentuated by midazolam." App. 232 (emphasis added). Dr. Evans' oral use of the word "inhibiting"—particularly in light of his written testimony—does not invalidate the District Court's decision to rely on his testimony.

Petitioners also point to an apparent conflict between Dr. Evans' testimony and a declaration by Dr. Lubarsky (submitted after the District Court ruled) regarding the biological process that produces midazolam's ceiling effect. But even if Dr. Lubarsky's declaration is correct, it is largely beside the point. What matters for present purposes is the dosage at which the ceiling effect kicks in, not the biological process

[7] GABA is "an amino acid that functions as an inhibitory neurotransmitter in the brain and spinal cord." Mosby's Medical Dictionary 782 (7th ed. 2006).

that produces the effect. And Dr. Lubarsky's declaration does not render the District Court's findings clearly erroneous with respect to that critical issue.

C

Petitioners' remaining arguments about midazolam all lack merit. First, we are not persuaded by petitioners' argument that Dr. Evans' testimony should have been rejected because of some of the sources listed in his report. Petitioners criticize two of the "selected references" that Dr. Evans cited in his expert report: the Web site drugs.com and a material safety data sheet (MSDS) about midazolam. Petitioners' argument is more of a *Daubert* challenge to Dr. Evans' testimony than an argument that the District Court's findings were clearly erroneous. The District Court concluded that Dr. Evans was "well-qualified to give the expert testimony that he gave" and that "his testimony was the product of reliable principles and methods reliably applied to the facts of this case." App. 75–76. To the extent that the reliability of Dr. Evans' testimony is even before us, the District Court's conclusion that his testimony was based on reliable sources is reviewed under the deferential "abuse-of-discretion" standard. *General Elec. Co.* v. *Joiner*, 522 U. S. 136, 142–143 (1997). Dr. Evans relied on multiple sources and his own expertise, and his testimony may not be disqualified simply because one source (drugs.com) warns that it "'is not intended for medical advice'" and another (the MSDS) states that its information is provided "'without any warranty, express or implied, regarding its correctness.'" Brief for Petitioners 36. Medical journals that both parties rely upon typically contain similar disclaimers. See, *e. g.*, Anesthesiology, Terms and Conditions of Use, online at http://anesthesiology.pubs.asahq.org/ss/terms.aspx ("None of the information on this Site shall be used to diagnose or treat any health problem or disease"). Dr. Lubarsky—petitioners' own expert—relied on an MSDS to argue that midazolam has a ceiling effect. And petitioners do not identify any

incorrect statements from drugs.com on which Dr. Evans relied. In fact, although Dr. Sasich submitted a declaration to the Court of Appeals criticizing Dr. Evans' reference to drugs.com, that declaration does not identify a single fact from that site's discussion of midazolam that was materially inaccurate.

Second, petitioners argue that Dr. Evans' expert report contained a mathematical error, but we find this argument insignificant. Dr. Evans stated in his expert report that the lowest dose of midazolam resulting in human deaths, according to an MSDS, is 0.071 mg/kg delivered intravenously. App. 294. Dr. Lubarsky agreed with this statement. Specifically, he testified that fatalities have occurred in doses ranging from 0.04 to 0.07 mg/kg, and he stated that Dr. Evans' testimony to that effect was "a true statement" (though he added those fatalities occurred among the elderly). *Id.*, at 217. We do not understand petitioners to dispute the testimony of Dr. Evans and their own expert that 0.071 mg/kg is a potentially fatal dose of midazolam. Instead, they make much of the fact that the MSDS attached to Dr. Evans' report apparently contained a typographical error and reported the lowest toxic dose as 71 mg/kg. That Dr. Evans did not repeat that incorrect figure but instead reported the correct dose supports rather than undermines his testimony. In any event, the alleged error in the MSDS is irrelevant because the District Court expressly stated that it did not rely on the figure in the MSDS. See *id.*, at 75.

Third, petitioners argue that there is no consensus among the States regarding midazolam's efficacy because only four States (Oklahoma, Arizona, Florida, and Ohio) have used midazolam as part of an execution. Petitioners rely on the plurality's statement in *Baze* that "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated," and the plurality's emphasis on the fact that 36 States had adopted lethal injection and 30 States used the particular three-drug protocol at issue in that case. 553

U. S., at 53. But while the near-universal use of the particular protocol at issue in *Baze* supported our conclusion that this protocol did not violate the Eighth Amendment, we did not say that the converse was true, *i. e.*, that other protocols or methods of execution are of doubtful constitutionality. That argument, if accepted, would hamper the adoption of new and potentially more humane methods of execution and would prevent States from adapting to changes in the availability of suitable drugs.

Fourth, petitioners argue that difficulties with Oklahoma's execution of Lockett and Arizona's July 2014 execution of Joseph Wood establish that midazolam is sure or very likely to cause serious pain. We are not persuaded. Aside from the Lockett execution, 12 other executions have been conducted using the three-drug protocol at issue here, and those appear to have been conducted without any significant problems. See Brief for Respondents 32; Brief for State of Florida as *Amicus Curiae* 1. Moreover, Lockett was administered only 100 milligrams of midazolam, and Oklahoma's investigation into that execution concluded that the difficulties were due primarily to the execution team's inability to obtain an IV access site. And the Wood execution did not involve the protocol at issue here. Wood did not receive a single dose of 500 milligrams of midazolam; instead, he received fifteen 50-milligram doses over the span of two hours.[8]

---

[8] The principal dissent emphasizes Dr. Lubarsky's testimony that it is irrelevant that Wood was administered the drug over a 2-hour period. *Post*, at 967. But Dr. Evans disagreed and testified that if a 750-milligram dose "was spread out over a long period of time," such as one hour (*i. e.*, half the time at issue in the Wood execution), the drug might not be as effective as if it were administered all at once. Tr. 667. The principal dissent states that this "pronouncement was entirely unsupported," *post*, at 967, n. 6, but it was supported by Dr. Evans' expertise and decades of experience. And it would be unusual for an expert testifying on the stand to punctuate each sentence with citation to a medical journal.

After the Wood execution, Arizona commissioned an independent assessment of its execution protocol and the Wood execution. According to

Brief for Respondents 12, n. 9. And Arizona used a different two-drug protocol that paired midazolam with hydromorphone, a drug that is not at issue in this case. *Ibid.* When all of the circumstances are considered, the Lockett and Wood executions have little probative value for present purposes.

Finally, we find it appropriate to respond to the principal dissent's groundless suggestion that our decision is tantamount to allowing prisoners to be "drawn and quartered, slowly tortured to death, or actually burned at the stake." *Post*, at 974. That is simply not true, and the principal dissent's resort to this outlandish rhetoric reveals the weakness of its legal arguments.

VI

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court, and write to respond to JUSTICE BREYER's plea for judicial abolition of the death penalty.

Welcome to Groundhog Day. The scene is familiar: Petitioners, sentenced to die for the crimes they committed (including, in the case of one petitioner since put to death, raping and murdering an 11-month-old baby), come before this

---

that report, the IV team leader, medical examiner, and an independent physician all agreed that the dosage of midazolam "would result in heavy sedation." Ariz. Dept. of Corrections, Assessment and Review of the Ariz. Dept. of Corrections Execution Protocols 46, 48 (Dec. 15, 2014), online at https://corrections.az.gov/sites/default/files/documents/PDFs/arizona_final_report_12_15_14_w_cover.pdf. And far from blaming midazolam for the Wood execution, the report recommended that Arizona replace its two-drug protocol with Oklahoma's three-drug protocol that includes a 500-milligram dose of midazolam as the first drug. *Id.*, at 49.

Court asking us to nullify their sentences as "cruel and unusual" under the Eighth Amendment. They rely on this provision because it is the only provision they *can* rely on. They were charged by a sovereign State with murder. They were afforded counsel and tried before a jury of their peers—tried twice, once to determine whether they were guilty and once to determine whether death was the appropriate sentence. They were duly convicted and sentenced. They were granted the right to appeal and to seek postconviction relief, first in state and then in federal court. And now, acknowledging that their convictions are unassailable, they ask us for clemency, as though clemency were ours to give.

The response is also familiar: A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now*, at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life . . . without due process of law." Nevertheless, today JUSTICE BREYER takes on the role of the abolitionists in this long-running drama, arguing that the text of the Constitution and two centuries of history must yield to his "20 years of experience on this Court," and inviting full briefing on the continued permissibility of capital punishment, *post*, at 909 (dissenting opinion).

Historically, the Eighth Amendment was understood to bar only those punishments that added " 'terror, pain, or disgrace' " to an otherwise permissible capital sentence. *Baze*

v. *Rees*, 553 U. S. 35, 96 (2008) (THOMAS, J., concurring in judgment). Rather than bother with this troubling detail, JUSTICE BREYER elects to contort the constitutional text. Redefining "cruel" to mean "unreliable," "arbitrary," or causing "excessive delays," and "unusual" to include a "decline in use," he proceeds to offer up a white paper devoid of any meaningful legal argument.

Even accepting JUSTICE BREYER's rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook. He says that the death penalty is cruel because it is unreliable; but it is *convictions*, not *punishments*, that are unreliable. Moreover, the "pressure on police, prosecutors, and jurors to secure a conviction," which he claims increases the risk of wrongful convictions in capital cases, flows from the nature of the crime, not the punishment that follows its commission. *Post*, at 912–913. JUSTICE BREYER acknowledges as much: "[T]he crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure." *Post*, at 912. That same pressure would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases. The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. (Which, again, JUSTICE BREYER acknowledges: "[C]ourts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue," *ibid.*) The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.

JUSTICE BREYER next says that the death penalty is cruel because it is arbitrary. To prove this point, he points to a study of 205 cases that "measured the 'egregiousness' of the murderer's conduct" with "a system of metrics," and then "compared the egregiousness of the conduct of the 9 defend-

ants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases [who were not sentenced to death]," *post*, at 917. If only Aristotle, Aquinas, and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized, *vade mecum* "system of metrics." Of course it cannot: Egregiousness is a moral judgment susceptible of few hard-and-fast rules. More importantly, egregiousness of the crime is only one of several factors that render a punishment condign—culpability, rehabilitative potential, and the need for deterrence also are relevant. That is why this Court has required an individualized consideration of all mitigating circumstances, rather than formulaic application of some egregiousness test.

It is because these questions are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial, that cornerstone of Anglo-American judicial procedure. But when a punishment is authorized by law—if you kill you are subject to death—the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned.

JUSTICE BREYER's third reason that the death penalty is cruel is that it entails delay, thereby (1) subjecting inmates to long periods on death row and (2) undermining the penological justifications of the death penalty. The first point is nonsense. Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. As for the argument that delay undermines the penological rationales for the death penalty: In insisting that "the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates,"

post, at 930, JUSTICE BREYER apparently forgets that one of the plaintiffs *in this very case* was already in prison when he committed the murder that landed him on death row. JUSTICE BREYER further asserts that "whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole," *post*, at 933. My goodness. If he thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary's pay grade. Perhaps JUSTICE BREYER is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose lives have been forever altered by the brutal murder of a child that life imprisonment is punishment enough.

And finally, JUSTICE BREYER speculates that it does not "seem likely" that the death penalty has a "significant" deterrent effect. *Post*, at 931. It seems very likely to me, and there are statistical studies that say so. See, *e. g.*, Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 166 (2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average"); Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003) ("[E]ach execution results, on average, in eighteen fewer murders" per year); Sunstein & Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 713 (2005) ("All in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its 'apparent power and unanimity' "). But we federal judges live in a world apart from the vast majority of Americans.

After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate.

Of course, this delay is a problem of the Court's own making. As JUSTICE BREYER concedes, for more than 160 years, capital sentences were carried out in an average of two years or less. *Post*, at 925. But by 2014, he tells us, it took an average of 18 years to carry out a death sentence. *Ibid.* What happened in the intervening years? Nothing other than the proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court under an interpretation of the Eighth Amendment that empowered it to divine "the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)—a task for which we are eminently ill suited. Indeed, for the past two decades, JUSTICE BREYER has been the Drum Major in this parade. His invocation of the resultant delay as grounds for abolishing the death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan. Amplifying the surrealism of his argument, JUSTICE BREYER uses the fact that many States have abandoned capital punishment—have abandoned it *precisely because of* the costs those suspect decisions have imposed—to conclude that it is now "unusual." *Post*, at 938–944. (A caution to the reader: Do not use the creative arithmetic that JUSTICE BREYER employs in counting the number of States that use the death penalty when you prepare your next tax return; outside the world of our Eighth Amendment abolitionist-inspired jurisprudence, it will be regarded as more misrepresentation than math.)

If we were to travel down the path that JUSTICE BREYER sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled. That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind. JUSTICE BREYER's dissent is the living refutation of *Trop*'s assumption that this Court has the capacity to recognize "evolving standards of decency." Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have "changed radically," *post*, at 909, and has sought to replace the judgments of the People with their own standards of decency.

Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, JUSTICE BREYER does not just reject the death penalty, he rejects the Enlightenment.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

I agree with the Court that petitioners' Eighth Amendment claim fails. That claim has no foundation in the Eighth Amendment, which prohibits only those "method[s] of execution" that are "deliberately designed to inflict pain." *Baze* v. *Rees*, 553 U. S. 35, 94 (2008) (THOMAS, J., concurring in judgment). Because petitioners make no allegation that Oklahoma adopted its lethal injection protocol "to add ele-

ments of terror, pain, or disgrace to the death penalty," they have no valid claim. *Id.*, at 107. That should have been the end of this case, but our precedents have predictably transformed the federal courts "into boards of inquiry charged with determining the 'best practices' for executions," *id.*, at 101 (internal quotation marks omitted), necessitating the painstaking factual inquiry the Court undertakes today. Although I continue to believe that the broader interpretation of the Eighth Amendment advanced in the plurality opinion in *Baze* is erroneous, I join the Court's opinion in full because it correctly explains why petitioners' claim fails even under that controlling opinion.

I write separately to respond to JUSTICE BREYER's dissent questioning the constitutionality of the death penalty generally. No more need be said about the constitutional arguments on which JUSTICE BREYER relies, as my colleagues and I have elsewhere refuted them.[1] But JUSTICE

[1] Generally: *Baze* v. *Rees*, 553 U. S. 35, 94–97 (2008) (THOMAS, J., concurring in judgment) (explaining that the Cruel and Unusual Punishments Clause does not prohibit the death penalty, but only torturous punishments); *Graham* v. *Collins*, 506 U. S. 461, 488 (1993) (THOMAS, J., concurring); *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (Rehnquist, J., dissenting) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed"). On reliability: *Kansas* v. *Marsh*, 548 U. S. 163, 181 (2006) (noting that the death penalty remains constitutional despite imperfections in the criminal justice system); *McGautha* v. *California*, 402 U. S. 183, 221 (1971) ("[T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court"). On arbitrariness: *Ring* v. *Arizona*, 536 U. S. 584, 610 (2002) (SCALIA, J., concurring) (explaining that what compelled States to specify " 'aggravating factors' " designed to limit the death penalty to the worst of the worst was this Court's baseless jurisprudence concerning juror discretion); *McCleskey* v. *Kemp*, 481 U. S. 279, 308–312 (1987) (noting that various procedures, including the right to a jury trial, constitute a defendant's protection against arbitrariness in the application of the death penalty). On excessive delays: *Knight* v. *Florida*,

BREYER's assertion, *post*, at 916, that the death penalty in this country has fallen short of the aspiration that capital punishment be reserved for the "worst of the worst" —a notion itself based on an implicit proportionality principle that has long been discredited, see *Harmelin* v. *Michigan*, 501 U. S. 957, 966 (1991) (opinion of SCALIA, J.)—merits further comment. His conclusion is based on an analysis that itself provides a powerful case against enforcing an imaginary constitutional rule against "arbitrariness."

The thrust of JUSTICE BREYER's argument is that empirical studies performed by death penalty abolitionists reveal that the assignment of death sentences does not necessarily correspond to the "egregiousness" of the crimes, but instead appears to be correlated to "arbitrary" factors, such as the locality in which the crime was committed. Relying on these studies to determine the constitutionality of the death penalty fails to respect the values implicit in the Constitution's allocation of decisionmaking in this context. The Donohue study, on which JUSTICE BREYER relies most heavily, measured the "egregiousness" (or "deathworthiness") of murders by asking lawyers to identify the legal grounds for aggravation in each case, and by asking law students to evaluate written summaries of the murders and assign "egregiousness" scores based on a rubric designed to capture and standardize their moral judgments. Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973; Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. of Empirical Legal Studies 637, 644–645

---

528 U. S. 990 (1999) (THOMAS, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed"); see also *Johnson* v. *Bredesen*, 558 U. S. 1067, 1070 (2009) (THOMAS, J., concurring in denial of certiorari). And on the decline in use of the death penalty: *Atkins* v. *Virginia*, 536 U. S. 304, 345 (2002) (SCALIA, J., dissenting); *Woodson* v. *North Carolina*, 428 U. S. 280, 308–310 (1976) (Rehnquist, J., dissenting).

(2014). This exercise in some ways approximates the function performed by jurors, but there is at least one critical difference: The law students make their moral judgments based on written summaries—they do not sit through hours, days, or weeks of evidence detailing the crime; they do not have an opportunity to assess the credibility of witnesses, to see the remorse of the defendant, to feel the impact of the crime on the victim's family; they do not bear the burden of deciding the fate of another human being; and they are not drawn from the community whose sense of security and justice may have been torn asunder by an act of callous disregard for human life. They are like appellate judges and justices, reviewing only a paper record of each side's case for life or death.

There is a reason the choice between life and death, within legal limits, is left to the jurors and judges who sit through the trial, and not to legal elites (or law students).[2] That reason is memorialized not once, but twice, in our Constitution: Article III guarantees that "[t]he Trial of all Crimes, except in cases of Impeachment, shall be by Jury" and that "such Trial shall be held in the State where the said Crimes shall have been committed." §2, cl. 3. And the Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed." Those provisions ensure that capital defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral

[2] For some, a faith in the jury seems to be correlated to that institution's likelihood of *preventing* imposition of the death penalty. See, *e. g.*, *Ring*, *supra*, at 614 (BREYER, J., concurring in judgment) (arguing that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death"); *Wainwright* v. *Witt*, 469 U. S. 412, 440, n. 1 (1985) (Brennan, J., dissenting) ("However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury of his peers").

judgment between life and death than are the products of contemporary American law schools.

It should come as no surprise, then, that the primary explanation a regression analysis revealed for the gap between the egregiousness scores and the actual sentences was not the race or sex of the offender or victim, but the locality in which the crime was committed. Donohue, *supra*, at 640; see also *post*, at 918–919 (BREYER, J., dissenting). What is more surprising is that JUSTICE BREYER considers this factor to be evidence of arbitrariness. See *ibid.* The constitutional provisions just quoted, which place such decisions in the hands of jurors and trial courts located where "the crime shall have been committed," seem deliberately designed to introduce that factor.

In any event, the results of these studies are inherently unreliable because they purport to control for egregiousness by quantifying moral depravity in a process that is itself arbitrary, not to mention dehumanizing. One such study's explanation of how the author assigned "depravity points" to identify the "worst of the worst" murderers proves the point well. McCord, Lightning Still Strikes, 71 Brooklyn L. Rev. 797, 833–834 (2005). Each aggravating factor received a point value based on the "blameworth[iness]" of the action associated with it. *Id.*, at 830. Killing a prison guard, for instance, earned a defendant three "depravity points" because it improved the case for complete incapacitation, while killing a police officer merited only two, because, "considered dispassionately," such acts do "not seem be a *sine qua non* of the worst criminals." *Id.*, at 834–836. (Do not worry, the author reassures us, "many killers of police officers accrue depravity points in other ways that clearly put them among the worst criminals." *Id.*, at 836.) Killing a child under the age of 12 was worth two depravity points, because such an act "seems particularly heartless," but killing someone over the age of 70 earned the murderer only one, for although "[e]lderly victims tug at our hearts," they do so

"less" than children "because the promise of a long life is less." *Id.*, at 836, 838. Killing to make a political statement was worth three depravity points; killing out of racial hatred, only two. *Id.*, at 835, 837. It goes on, but this small sample of the moral judgments on which this study rested shows just how unsuitable this evidence is to serve as a basis for a judicial decision declaring unconstitutional a punishment duly enacted in more than 30 States, and by the Federal Government.

We owe victims more than this sort of pseudoscientific assessment of their lives. It is bad enough to tell a mother that her child's murder is not "worthy" of society's ultimate expression of moral condemnation. But to do so based on cardboard stereotypes or cold mathematical calculations is beyond my comprehension. In my decades on the Court, I have not seen a capital crime that could not be considered sufficiently "blameworthy" to merit a death sentence (even when genuine constitutional errors justified a vacatur of that sentence).[3]

---

[3] For his part, JUSTICE BREYER explains that his experience on the Court has shown him "discrepancies for which [he] can find no rational explanations." *Post*, at 922. Why, he asks, did one man receive death for a single-victim murder, while another received life for murdering a young mother and nearly killing her infant? *Ibid.* The outcomes in those two cases may not be morally compelled, but there was certainly a rational explanation for them: The first man, who had previously confessed to another murder, killed a disabled man who had offered him a place to stay for the night. *State* v. *Badgett*, 361 N. C. 234, 239–240, 644 S. E. 2d 206, 209–210 (2007). The killer stabbed his victim's throat and prevented him from seeking medical attention until he bled to death. *Ibid.* The second man expressed remorse for his crimes and claimed to suffer from mental disorders. See Charbonneau, Andre Edwards Sentenced to Life in Prison for 2001 Murder, WRAL, Mar. 26, 2004, online at http://www.wral.com/news/local/story/109648 (all Internet materials as visited June 25, 2015, and available in Clerk of Court's case file); Charbonneau, Jury Finds Andre Edwards Guilty of First-Degree Murder, WRAL, Mar. 23, 2004, online at http://www.wral.com/news/local/story/109563. The other "discrepancies" similarly have "rational" explanations, even if reasonable juries could have reached different results.

A small sample of the applications for a stay of execution that have come before the Court this Term alone proves my point. Mark Christeson was due to be executed in October 2014 for his role in the murder of Susan Brouk and her young children, Adrian and Kyle. After raping Ms. Brouk at gunpoint, he and his accomplice drove the family to a remote pond, where Christeson cut Ms. Brouk's throat with a bone knife. *State* v. *Christeson*, 50 S. W. 3d 251, 257–258 (Mo. 2001). Although bleeding profusely, she stayed alive long enough to tell her children she loved them and to watch as Christeson murdered them—her son, by cutting his throat twice and drowning him; her daughter, by pressing down on her throat until she suffocated. *Ibid.* Christeson and his accomplice then threw Ms. Brouk—alive but barely breathing—into the pond to drown on top of her dead children. *Ibid.* This Court granted him a stay of execution. *Christeson* v. *Roper*, 574 U. S. 968 (2014). Lisa Ann Coleman was not so lucky. She was executed on September 17, 2014, for murdering her girlfriend's son, 9-year-old Davontae Williams, by slowly starving him to death. *Coleman* v. *State*, 2009 WL 4696064, *1 (Tex. Crim. App., Dec. 9, 2009). When he died, Davontae had over 250 distinct injuries—including cigarette burns and ligature marks—on his 36-pound frame. *Id.*, at *2. Infections from untreated wounds contributed to his other cause of death: pneumonia. *Id.*, at *1–*2. And Johnny Shane Kormondy, who met his end on January 15, 2015, did so after he and his two accomplices invaded the home of a married couple, took turns raping the wife and forcing her to perform oral sex at gunpoint—at one point, doing both simultaneously—and then put a bullet in her husband's head during the final rape. *Kormondy* v. *Secretary, Fla. Dept. of Corrections*, 688 F. 3d 1244, 1247–1248 (CA11 2012).

Some of our most "egregious" cases have been those in which we have granted relief based on an unfounded Eighth Amendment claim. For example, we have granted relief in

a number of egregious cases based on this Court's decision in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), exempting certain "mentally retarded" offenders from the death penalty. Last Term, the Court granted relief to a man who kidnaped, beat, raped, and murdered a 21-year-old pregnant newlywed, Karol Hurst, also murdering her unborn child, and then, on the same day, murdered a sheriff's deputy acting in the line of duty. *Hall* v. *Florida*, 572 U. S. 701, 704 (2014). And in *Atkins* itself, the Court granted relief to a man who carjacked Eric Michael Nesbitt, forced him to withdraw money from a bank, drove him to a secluded area, and then shot him multiple times before leaving him to bleed to death. *Atkins* v. *Commonwealth*, 257 Va. 160, 166–167, 510 S. E. 2d 445, 449–450 (1999).

The Court has also misinterpreted the Eighth Amendment to grant relief in egregious cases involving rape. In *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008), the Court granted relief to a man who had been sentenced to death for raping his 8-year-old stepdaughter. The rape was so violent that it "separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure," and tore her "entire perineum . . . from the posterior fourchette to the anus." *Id.*, at 414. The evidence indicated that the petitioner spent *at least* an hour and half attempting to destroy the evidence of his crime before seeking emergency assistance, even as his stepdaughter bled profusely from her injuries. *Id.*, at 415. And in *Coker* v. *Georgia*, 433 U. S. 584 (1977) (plurality opinion), the Court granted relief to a petitioner who had escaped from prison, broken into the home of a young married couple and their newborn, forced the wife to bind her husband, gagged her husband with her underwear, raped her (even after being told that she was recovering from a recent childbirth), and then kidnaped her after threatening her husband, *Coker* v. *State*, 234 Ga. 555, 556–557, 216 S. E. 2d 782, 786–787 (1975). In each case, the Court crafted an Eighth Amendment right to be free

from execution for the crime of rape—whether it be of an adult, *Coker*, 433 U. S., at 592, or a child, *Kennedy*, *supra*, at 413.

The Court's recent decision finding that the Eighth Amendment prohibits the execution of those who committed their crimes as juveniles is no different. See *Roper* v. *Simmons*, 543 U. S. 551 (2005). Although the Court had rejected the claim less than two decades earlier, *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), it decided to revisit the issue for a petitioner who had slain his victim because "he wanted to murder someone" and believed he could "get away with it" because he was a few months shy of his 18th birthday. 543 U. S., at 556. His randomly chosen victim was Shirley Crook, whom he and his friends kidnaped in the middle of the night, bound with duct tape and electrical wire, and threw off a bridge to drown in the river below. *Id.*, at 556–557. The State of Alabama's brief in that case warned the Court that its decision would free from death row a number of killers who had been sentenced for crimes committed as juveniles. Brief for State of Alabama et al. as *Amici Curiae* in *Roper* v. *Simmons*, O. T. 2004, No. 03–633. Mark Duke, for example, murdered his father for refusing to loan him a truck, and his father's girlfriend and her two young daughters because he wanted no witnesses to the crime. *Id.*, at 4. He shot his father and his father's girlfriend pointblank in the face as they pleaded for their lives. *Id.*, at 5–6. He then tracked the girls down in their hiding places and slit their throats, leaving them alive for several minutes as they drowned in their own blood. *Id.*, at 6–7.

Whatever one's views on the permissibility or wisdom of the death penalty, I doubt anyone would disagree that each of these crimes was egregious enough to merit the severest condemnation that society has to offer. The only *constitutional* problem with the fact that these criminals were spared that condemnation, while others were not, is that their amnesty came in the form of unfounded claims. Arbi-

trariness has nothing to do with it.[4] To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

For the reasons stated in JUSTICE SOTOMAYOR's opinion, I dissent from the Court's holding. But rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

The relevant legal standard is the standard set forth in the Eighth Amendment. The Constitution there forbids the "inflict[ion]" of "cruel and unusual punishments." Amdt. 8. The Court has recognized that a "claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002). Indeed, the Constitution prohibits various gruesome punishments that were common in Blackstone's day. See 4 W. Blackstone, Commentaries on the Laws of England 369–370 (1769) (listing mutilation and dismembering, among other punishments).

Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied

[4] JUSTICE BREYER appears to acknowledge that our decision holding mandatory death penalty schemes unconstitutional, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), may have introduced the problem of arbitrary application. *Post*, at 920–921. I agree that *Woodson* eliminated one reliable legislative response to concerns about arbitrariness. *Graham*, 506 U. S., at 486 (THOMAS, J., concurring). Because that decision was also questionable on constitutional grounds, *id.*, at 486–488, I would be willing to revisit it in a future case.

reliably and not arbitrarily. See *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt* v. *Florida*, 428 U. S. 242, 247 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Jurek* v. *Texas*, 428 U. S. 262, 268 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); but cf. *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion) (striking down mandatory death penalty); *Roberts* v. *Louisiana*, 428 U. S. 325, 331 (1976) (plurality opinion) (similar). The circumstances and the evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishmen[t]." U. S. Const., Amdt. 8.

I

"Cruel"—Lack of Reliability

This Court has specified that the finality of death creates a "qualitative difference" between the death penalty and other

punishments (including life in prison). *Woodson*, 428 U. S., at 305 (plurality opinion). That "qualitative difference" creates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Ibid.* There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability. Cf. *Kansas* v. *Marsh*, 548 U. S. 163, 207–211 (2006) (Souter, J., dissenting) (DNA exonerations constitute "a new body of fact" when considering the constitutionality of capital punishment).

For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed. See, *e. g.*, Liebman, Fatal Injustice: Carlos DeLuna's Execution Shows That a Faster, Cheaper Death Penalty Is a Dangerous Idea, L. A. Times, June 1, 2012, p. A19 (describing results of a 4-year investigation, later published as The Wrong Carlos: Anatomy of a Wrongful Execution (2014), that led its authors to conclude that Carlos DeLuna, sentenced to death and executed in 1989, six years after his arrest in Texas for stabbing a single mother to death in a convenience store, was innocent); Grann, Trial by Fire: Did Texas Execute an Innocent Man? The New Yorker, Sept. 7, 2009, p. 42 (describing evidence that Cameron Todd Willingham was convicted, and ultimately executed in 2004, for the apparently motiveless murder of his three children as the result of invalid scientific analysis of the scene of the house fire that killed his children). See also, *e. g.*, Press Release: Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s, Jan. 7, 2011, p. 1 (Colorado Governor granted full and unconditional posthumous pardon to Joe Arridy, a man with an IQ of 46 who was executed in 1936, because, according to the Governor, "an overwhelming body of evidence indicates the 23-year-old Arridy was innocent, including false and coerced confessions, the likelihood that Arridy was not

in Pueblo at the time of the killing, and an admission of guilt by someone else"); R. Warden, Wilkie Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions 157–158 (2005) (in 1987, Nebraska Governor Bob Kerrey pardoned William Jackson Marion, who had been executed a century earlier for the murder of John Cameron, a man who later turned up alive; the alleged victim, Cameron, had gone to Mexico to avoid a shotgun wedding).

For another, the evidence that the death penalty has been wrongly *imposed* (whether or not it was carried out), is striking. As of 2002, this Court used the word "disturbing" to describe the number of instances in which individuals had been sentenced to death but later exonerated. At that time, there was evidence of approximately 60 exonerations in capital cases. *Atkins*, 536 U. S., at 320, n. 25; National Registry of Exonerations, online at http://www.law.umich.edu/special/exoneration/Pages/about.aspx (all Internet materials as visited June 25, 2015, and available in Clerk of Court's case file). (I use "exoneration" to refer to relief from *all* legal consequences of a capital conviction through a decision by a prosecutor, a Governor, or a court, after new evidence of the defendant's innocence was discovered.) Since 2002, the number of exonerations in capital cases has risen to 115. *Ibid.*; National Registry of Exonerations, Exonerations in the United States, 1989–2012, pp. 6–7 (2012) (Exonerations 2012 Report) (defining exoneration); accord, Death Penalty Information Center (DPIC), Innocence: List of Those Freed From Death Row, online at http://www.deathpenaltyinfo.org/innocence-and-death-penalty (calculating, under a slightly different definition of exoneration, the number of exonerations since 1973 as 154). Last year, in 2014, six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations. National Registry of Exonerations, Exonerations in 2014, p. 2 (2015).

The stories of three of the men exonerated within the last year are illustrative. DNA evidence showed that Henry Lee McCollum did not commit the rape and murder for which he had been sentenced to death. Katz & Eckholm, DNA Evidence Clears Two Men in 1983 Murder, N. Y. Times, Sept. 3, 2014, p. A1. Last Term, this Court ordered that Anthony Ray Hinton, who had been convicted of murder, receive further hearings in state court; he was exonerated earlier this year because the forensic evidence used against him was flawed. *Hinton* v. *Alabama*, 571 U. S. 263 (2014) (*per curiam*); Blinder, Alabama Man on Death Row for Three Decades Is Freed as State's Case Erodes, N. Y. Times, Apr. 4, 2014, p. A11. And when Glenn Ford, also convicted of murder, was exonerated, the prosecutor admitted that even "[a]t the time this case was tried there was evidence that would have cleared Glenn Ford." Stroud, Lead Prosecutor Apologizes for Role in Sending Man to Death Row, Shreveport Times, Mar. 27, 2015. All three of these men spent 30 years on death row before being exonerated. I return to these examples *infra*. Furthermore, exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue. Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue. They are nine times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue. Exonerations 2012 Report 15–16, and nn. 24–26.

Why is that so? To some degree, it must be because the law that governs capital cases is more complex. To some degree, it must reflect the fact that courts scrutinize capital cases more closely. But, to some degree, it likely also reflects a *greater likelihood of an initial wrongful conviction*. How could that be so? In the view of researchers who have conducted these studies, it could be so because the crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure on police,

prosecutors, and jurors to secure a conviction. This pressure creates a greater likelihood of convicting the wrong person. See Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 531–533 (2005); Gross & O'Brien, Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases, 5 J. Empirical L. Studies 927, 956–957 (2008) (noting that, in comparing those who were exonerated from death row to other capital defendants who were not so exonerated, the initial police investigations tended to be shorter for those exonerated); see also B. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) (discussing other common causes of wrongful convictions generally including false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, and ineffective defense counsel).

In the case of Cameron Todd Willingham, for example, who (as noted earlier) was executed despite likely innocence, the State Bar of Texas recently filed formal misconduct charges against the lead prosecutor for his actions—actions that may have contributed to Willingham's conviction. Possley, Prosecutor Accused of Misconduct in Death Penalty Case, Washington Post, Mar. 19, 2015, p. A3. And in Glenn Ford's case, the prosecutor admitted that he was partly responsible for Ford's wrongful conviction, issuing a public apology to Ford and explaining that, at the time of Ford's conviction, he was "not as interested in justice as [he] was in winning." Stroud, *supra*.

Other factors may also play a role. One is the practice of death qualification; no one can serve on a capital jury who is not willing to impose the death penalty. See Rozelle, The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation, 38 Ariz. St. L. J. 769, 772–793, 807 (2006) (summarizing research and concluding that "[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death"); Note, Mandatory Voir Dire Questions in Capital Cases: A Potential

Solution to the Biases of Death Qualification, 10 Roger Williams Univ. L. Rev. 211, 214–223 (2004) (similar).

Another is the more general problem of flawed forensic testimony. See Garrett, *supra*, at 7. The Federal Bureau of Investigation (FBI), for example, recently found that flawed microscopic hair analysis was used in 33 of 35 capital cases under review; 9 of the 33 had already been executed. FBI, National Press Releases, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, Apr. 20, 2015. See also Hsu, FBI Admits Errors at Trials: False Matches on Crime-Scene Hair, Washington Post, Apr. 19, 2015, p. A1 (in the District of Columbia, which does not have the death penalty, five of seven defendants in cases with flawed hair analysis testimony were eventually exonerated).

In light of these and other factors, researchers estimate that about 4% of those sentenced to death are actually innocent. See Gross, O'Brien, Hu, & Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, 111 Proceeding of the National Academy of Sciences 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007) (examination of DNA exonerations in death penalty cases for murder-rapes between 1982 and 1989 suggesting an analogous rate of between 3.3% and 5%).

Finally, if we expand our definition of "exoneration" (which we limited to errors suggesting the defendant was actually innocent) and thereby also categorize as "erroneous" instances in which courts failed to follow legally required procedures, the numbers soar. Between 1973 and 1995, courts identified prejudicial errors in 68% of the capital cases before them. Gelman, Liebman, West, & Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. Empirical L. Studies 209, 217 (2004).

State courts on direct and postconviction review overturned 47% of the sentences they reviewed. *Id.*, at 232. Federal courts, reviewing capital cases in habeas corpus proceedings, found error in 40% of those cases. *Ibid.*

This research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care. But, at a minimum, they suggest a serious problem of reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime. See Earley, A Pink Cadillac, An IQ of 63, and A Fourteen-Year-Old From South Carolina: Why I Can No Longer Support the Death Penalty, 49 U. Rich. L. Rev. 811, 813 (2015) ("I have come to the conclusion that the death penalty is based on a false utopian premise. That false premise is that we have had, do have, will have 100% accuracy in death penalty convictions and executions"); Earley, I Oversaw 36 Executions. Even Death Penalty Supporters Can Push for Change, Guardian, May 12, 2014 (Earley presided over 36 executions as Virginia attorney general from 1998–2001); but see *ante*, at 895 (SCALIA, J., concurring) (apparently finding no special constitutional problem arising from the fact that the execution of an innocent person is irreversible). Unlike 40 years ago, we now have plausible *evidence* of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application.

II

"Cruel"—Arbitrariness

The arbitrary imposition of punishment is the antithesis of the rule of law. For that reason, Justice Potter Stewart

(who supplied critical votes for the holdings in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*), and *Gregg*) found the death penalty unconstitutional as administered in 1972:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Furman*, 408 U. S., at 309–310 (concurring opinion).

See also *id.*, at 310 ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); *id.*, at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

When the death penalty was reinstated in 1976, this Court acknowledged that the death penalty is (and would be) unconstitutional if "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U. S., at 188 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *id.*, at 189 ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion) (similar).

The Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called "'the worst of the worst.'" *Kansas* v. *Marsh*, 548 U. S., at 206 (dissenting opinion); see also *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005)

("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" (internal quotation marks omitted)); *Kennedy* v. *Louisiana*, 554 U. S. 407, 420 (2008) (citing *Roper*, *supra*, at 568).

Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i. e.*, without the "reasonable consistency" legally necessary to reconcile its use with the Constitution's commands. *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982).

Thorough studies of death penalty sentences support this conclusion. A recent study, for example, examined all death penalty sentences imposed between 1973 and 2007 in Connecticut, a State that abolished the death penalty in 2012. Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637 (2014). The study reviewed treatment of all homicide defendants. It found 205 instances in which Connecticut law made the defendant eligible for a death sentence. *Id.*, at 641–643. Courts imposed a death sentence in 12 of these 205 cases, of which 9 were sustained on appeal. *Id.*, at 641. The study then measured the "egregiousness" of the murderer's conduct in those nine cases, developing a system of metrics designed to do so. *Id.*, at 643–645. It then compared the egregiousness of the conduct of the nine defendants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases (those in which the defendant, though found guilty of a death-eligible offense, was ultimately not sentenced to death). Application of the studies' metrics made clear that only one of those nine defendants was indeed the "worst of the worst" (or was, at least, within the 15% considered most "egregious"). The remaining eight were not. Their behavior was no worse than

the behavior of at least 33 and as many as *170* other defendants (out of a total pool of 205) who had not been sentenced to death. *Id.*, at 678–679.

Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.

Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty. See GAO, Report to the Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (GAO/GGD–90–57, 1990) (82% of the 28 studies conducted between 1972 and 1990 found that race of victim influences capital murder charge or death sentence, a "finding . . . remarkably consistent across data sets, states, data collection methods, and analytic techniques"); Shatz & Dalton, Challenging the Death Penalty With Statistics: *Furman*, *McCleskey*, and a Single County Case Study, 34 Cardozo L. Rev. 1227, 1245–1251 (2013) (same conclusion drawn from 20 plus studies conducted between 1990 and 2013).

Fewer, but still many, studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference. *Id.*, at 1251–1253 (citing many studies).

Geography also plays an important role in determining who is sentenced to death. See *id.*, at 1253–1256. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012) (hereinafter Smith); see also Donohue, *supra*, at 673 ("[T]he single most important influence from

1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]"). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. Smith 233. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide. DPIC, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All 9 (Oct. 2013).

What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decision-making authority, the legal discretion, and ultimately the power of the local prosecutor. See, *e. g.*, Goelzhauser, Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions, 96 Judicature 161, 162–163 (2013); Barnes, Sloss, & Thaman, Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases, 51 Ariz. L. Rev. 305 (2009) (analyzing Missouri); Donohue, *supra*, at 681 (Connecticut); Marceau, Kamin, & Foglia, Death Eligibility in Colorado: Many Are Called, Few Are Chosen, 84 U. Colo. L. Rev. 1069 (2013) (Colorado); Shatz & Dalton, *supra*, at 1260–1261 (Alameda County).

Others suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences. See, *e. g.*, Smith 258–265 (counties with higher death-sentencing rates tend to have weaker public defense programs); Liebman & Clarke, Minority Practice, Majority's Burden: The Death Penalty Today, 9 Ohio St. J. Crim. L. 255, 274 (2011) (hereinafter Liebman & Clarke) (similar); see generally Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835 (1994).

Still others indicate that the racial composition of and distribution within a county plays an important role. See, *e. g.*,

Levinson, Smith, & Young, Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, 89 N. Y. U. L. Rev. 513, 533–536 (2014) (summarizing research on this point); see also Shatz & Dalton, *supra*, at 1275 (describing research finding that death-sentencing rates were lowest in counties with the highest nonwhite population); cf. Cohen & Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425 (2010) (arguing that the federal death penalty is sought disproportionately where the federal district, from which the jury will be drawn, has a dramatic racial difference from the county in which the federal crime occurred).

Finally, some studies suggest that political pressures, including pressures on judges who must stand for election, can make a difference. See *Woodward* v. *Alabama*, 571 U. S. 1045, 1050 (2013) (SOTOMAYOR, J., dissenting from denial of certiorari) (noting that empirical evidence suggests that, when Alabama judges reverse jury recommendations, these "judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures"); *Harris* v. *Alabama*, 513 U. S. 504, 519 (1995) (Stevens, J., dissenting) (similar); Gelman, 1 J. Empirical L. Studies, at 247 (elected state judges are less likely to reverse flawed verdicts in capital cases in small towns than in larger communities).

Thus, whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as "egregiousness"—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

JUSTICE THOMAS catalogs the tragic details of various capital cases, *ante*, at 904–908, and nn. 3, 4 (concurring opinion), but this misses my point. Every murder is tragic, but unless we return to the mandatory death penalty struck down

in *Woodson*, 428 U. S., at 304–305, the constitutionality of capital punishment rests on its limited application to the worst of the worst, *supra*, at 916–918. And this extensive body of evidence suggests that it is not so limited.

Four decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence. See *Gregg*, 428 U. S., at 195 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met"). But that no longer seems likely.

The Constitution does not prohibit the use of prosecutorial discretion. *Id.*, at 199, and n. 50 (joint opinion of Stewart, Powell, and Stevens, JJ.); *McCleskey* v. *Kemp*, 481 U. S. 279, 307–308, and n. 28, 311–312 (1987). It has not proved possible to increase capital defense funding significantly. Smith, The Supreme Court and the Politics of Death, 94 Va. L. Rev. 283, 355 (2008) ("Capital defenders are notoriously underfunded, particularly in states . . . that lead the nation in executions"); American Bar Assn. (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1, Commentary (rev. ed. Feb. 2003), in 31 Hofstra L. Rev. 913, 985 (2003) ("[C]ompensation of attorneys for death penalty representation remains notoriously inadequate"). And courts cannot easily inquire into judicial motivation. See, *e. g.*, *Harris*, *supra*.

Moreover, racial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury's evaluation of mitigating evidence, see *Callins* v. *Collins*, 510 U. S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death"). Nevertheless, it remains the jury's task to make the individualized assessment of whether the defendant's

mitigation evidence entitles him to mercy. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989); *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (opinion of Burger, C. J.); *Woodson*, *supra*, at 304–305 (plurality opinion).

Finally, since this Court held that comparative proportionality review is not constitutionally required, *Pulley* v. *Harris*, 465 U. S. 37 (1984), it seems unlikely that appeals can prevent the arbitrariness I have described. See Kaufman-Osborn, Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons From Washington State), 79 Wash. L. Rev. 775, 791–792 (2004) (after *Pulley*, many States repealed their statutes requiring comparative proportionality review, and most state high courts "reduced proportionality review to a perfunctory exercise" (internal quotation marks omitted)).

The studies bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years. I see discrepancies for which I can find no rational explanations. Cf. *Godfrey*, 446 U. S., at 433 (plurality opinion) ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not"). Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnaped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime? Compare *State* v. *Badgett*, 361 N. C. 234, 644 S. E. 2d 206 (2007), and Pet. for Cert. in *Badgett* v. *North Carolina*, O. T. 2006, No. 07–6156, with Charbonneau, Andre Edwards Sentenced to Life in Prison for 2001 Murder, WRAL, Mar. 26, 2004, online at http://www.wral.com/news/local/story/109648. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another

defendant does not, despite having committed a "triple murder" by killing a young man and his pregnant wife? Compare *Commonwealth* v. *Boxley*, 596 Pa. 620, 948 A. 2d 742 (2008), and Pet. for Cert., O. T. 2008, No. 08–6172, with Shea, Judge Gives Consecutive Life Sentences for Triple Murder, Philadelphia Inquirer, June 29, 2004, p. B5. For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept? See Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation From 4686 Murders to One Execution, pp. 128–134 (2013), online at http://works.bepress.com/john_donohue/87. In each instance, the sentences compared were imposed in the same State at about the same time.

The question raised by these examples (and the many more I could give but do not), as well as by the research to which I have referred, is the same question Justice Stewart, Justice Powell, and others raised over the course of several decades: The imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?

III

"Cruel"—Excessive Delays

The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That is to say, delay is in part a problem that the Constitution's own

demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty "with special force." *Roper*, 543 U. S., at 568. Those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall* v. *Florida*, 572 U. S. 701, 724 (2014). At the same time, the Constitution insists that "every safeguard" be "observed" when "a defendant's life is at stake." *Gregg*, 428 U. S., at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U. S., at 306 (Stewart, J., concurring) (death "differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson*, 428 U. S., at 305 (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two").

These procedural necessities take time to implement. And, unless we abandon the procedural requirements that ensure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.

A

Consider first the statistics. In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death. DPIC, Execution List 2014, online at http://www.deathpenaltyinfo.org/execution-list-2014 (showing an average delay of 17 years, 7 months). In some death penalty States, the average delay is longer. In an oral argument last year, for example, the State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before execution. Tr. of Oral Arg. in *Hall* v. *Florida*, O. T. 2013, No. 12–10882, p. 46.

The length of the average delay has increased dramatically over the years. In 1960, the average delay between sentencing and execution was two years. See Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment? 29 Seton Hall L. Rev. 147, 181 (1998). Ten years ago (in 2004) the average delay was about 11 years. See Dept. of Justice, Bureau of Justice Statistics (BJS), T. Snell, Capital Punishment, 2013–Statistical Tables 14 (Table 10) (rev. Dec. 2014) (hereinafter BJS 2013 Stats). By last year the average had risen to about 18 years. DPIC, Execution List 2014, *supra*. Nearly half of the 3,000 inmates now on death row have been there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an additional 37.5 years there before being executed. BJS 2013 Stats, at 14, 18 (Tables 11 and 15).

I cannot find any reasons to believe the trend will soon be reversed.

B

These lengthy delays create two special constitutional difficulties. See *Johnson* v. *Bredesen*, 558 U. S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari). First, a lengthy delay in and of itself is especially cruel because it "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." *Ibid.*; *Gomez* v. *Fierro*, 519 U. S. 918 (1996) (Stevens, J., dissenting) (excessive delays from sentencing to execution can themselves "constitute cruel and unusual punishment prohibited by the Eighth Amendment"); see also *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (BREYER, J., dissenting from denial of certiorari). Second, lengthy delay undermines the death penalty's penological rationale. *Johnson*, *supra*, at 1069; *Thompson* v. *McNeil*, 556

U. S. 1114, 1115 (2009) (statement of Stevens, J., respecting denial of certiorari).

1

Turning to the first constitutional difficulty, nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day. American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report). This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days. See *id.*, at 2, 4; ABA Standards for Criminal Justice: Treatment of Prisoners 6 (3d ed. 2011). And it is well documented that such prolonged solitary confinement produces numerous deleterious harms. See, *e. g.*, Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency 124, 130 (2003) (cataloging studies finding that solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations," among many other symptoms); Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash U. J. L. & Policy 325, 331 (2006) ("[E]ven a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium"); accord, *In re Medley*, 134 U. S. 160, 167–168 (1890); see also *Davis* v. *Ayala*, *ante*, at 286–289 (KENNEDY, J., concurring).

The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, this Court recognized that, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *Medley*, *supra*, at 172. The Court was there *de-*

scribing a delay of a mere four weeks. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in decades. *Supra*, at 925–926.

Moreover, we must consider death warrants that have been issued and revoked, not once, but repeatedly. See, *e. g.*, Pet. for Cert. in *Suárez Medina* v. *Texas*, O. T. 2001, No. 02–5752, pp. 35–36 (filed Aug. 13, 2002) ("On fourteen separate occasions since Mr. Suárez Medina's death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains"); Lithwick, Cruel but Not Unusual, Slate, Apr. 1, 2011, online at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html (John Thompson had seven death warrants signed before he was exonerated); see also, *e. g.*, WFMZ–TV 69 News, Michael John Parrish's Execution Warrant Signed by Governor Corbett (Aug. 18, 2014), online at http://www.wfmz.com/news/Regional-Poconos-Coal/Local/michael-john-parrishs-execution-warrant-signed-by-governorcorbett/27595356 (former Pennsylvania Governor signed 36 death warrants in his first 3.5 years in office even though Pennsylvania has not carried out an execution since 1999).

Several inmates have come within hours or days of execution before later being exonerated. Willie Manning was *four hours* from his scheduled execution before the Mississippi Supreme Court stayed the execution. See Robertson, With Hours To Go, Execution Is Postponed, N. Y. Times, Apr. 8, 2015, p. A17. Two years later, Manning was exonerated after the evidence against him, including flawed testimony from an FBI hair examiner, was severely undermined. Nave, Why Does the State Still Want To Kill Willie Jerome Manning? Jackson Free Press, Apr. 29, 2015. Nor is Manning an outlier case. See, *e. g.*, Martin, Randall Adams, 61, Dies; Freed With Help of Film, N. Y. Times, June 26, 2011,

p. 24 (Randall Adams: stayed by this Court 3 days before execution; later exonerated); N. Davies, White Lies 231, 292, 298, 399 (1991) (Clarence Lee Brandley: execution stayed twice, once 6 days and once 10 days before; later exonerated); M. Edds, An Expendable Man 93 (2003) (Earl Washington, Jr.: stayed 9 days before execution; later exonerated).

Furthermore, given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. See, *e. g.,* ACLU Report 8; Rountree, Volunteers for Execution: Directions for Further Research Into Grief, Culpability, and Legal Structures, 82 UMKC L. Rev. 295 (2014) (11% of those executed have dropped appeals and volunteered); ACLU Report 3 (account of " 'guys who dropped their appeals because of the intolerable conditions' "). Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & C. 860, 869 (1983). Nor is it surprising that many inmates consider, or commit, suicide. *Id.*, at 872, n. 44 (35% of those confined on death row in Florida attempted suicide).

Others have written at great length about the constitutional problems that delays create, and, rather than repeat their facts, arguments, and conclusions, I simply refer to some of their writings. See, *e. g., Johnson*, 558 U. S., at 1069 (statement of Stevens, J.) (delay "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement"); *Furman*, 408 U. S., at 288 (Brennan, J., concurring) ("long wait between the imposition of sentence and the actual infliction of death" is "inevitable" and often "exacts a frightful toll"); *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *People* v. *Anderson*, 6

Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972) (collecting sources) ("[C]ruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out" (footnote omitted)); *District Attorney for Suffolk Dist.* v. *Watson*, 381 Mass. 648, 673, 411 N. E. 2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty unconstitutional under State Constitution in part because "[it] will be carried out only after agonizing months and years of uncertainty"); see also *Riley* v. *Attorney General of Jamaica*, [1983] 1 A. C. 719, 734–735 (P. C. 1982) (Lord Scarman, joined by Lord Brightman, dissenting) ("execution after inordinate delay" would infringe prohibition against "cruel and unusual punishments" in § 10 of the "Bill of Rights of 1689," the precursor to our Eighth Amendment); *Pratt* v. *Attorney Gen. of Jamaica*, [1994] 2 A. C. 1, 4 (P. C. 1993); *id.*, at 32–33 (collecting cases finding inordinate delays unconstitutional or the equivalent); *State* v. *Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.); *Catholic Commission for Justice & Peace in Zimbabwe* v. *Attorney-General*, [1993] 1 Zim. L. R. 242, 282 (inordinate delays unconstitutional); *Soering* v. *United Kingdom*, 11 Eur. Ct. H. R. (ser. A), p. 439 (1989) (extradition of murder suspect to United States would violate the European Convention on Human Rights in light of risk of delay before execution); *United States* v. *Burns*, [2001] 1 S. C. R. 283, 353, ¶123 (similar).

2

The second constitutional difficulty resulting from lengthy delays is that those delays undermine the death penalty's penological rationale, perhaps irreparably so. The rationale for capital punishment, as for any punishment, classically rests upon society's need to secure deterrence, incapacitation, retribution, or rehabilitation. Capital punishment by definition does not rehabilitate. It does, of course, incapaci-

tate the offender. But the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates. See *Ring* v. *Arizona*, 536 U. S. 584, 615 (2002) (BREYER, J., concurring in judgment).

Thus, as the Court has recognized, the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution. See, *e. g.*, *Gregg*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.). Many studies have examined the death penalty's deterrent effect; some have found such an effect, whereas others have found a lack of evidence that it deters crime. Compare *ante*, at 897–898 (SCALIA, J., concurring) (collecting studies finding deterrent effect), with, *e. g.*, Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinquency 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A Special Report, States With No Death Penalty Share Lower Homicide Rates, N. Y. Times, Sept. 22, 2000, p. A1 (from 1980–2000, homicide rate in death penalty States was 48% to 101% higher than in non-death-penalty States); Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification); Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791, 794 (2005) (evaluating existing statistical evidence and concluding that there is "profound uncertainty" about the existence of a deterrent effect).

Recently, the National Research Council (whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine) reviewed 30 years of empirical evidence and concluded that it was insufficient to establish a deterrent effect and thus should "not be used to inform" discussion

about the deterrent value of the death penalty. National Research Council, Deterrence and the Death Penalty 2 (D. Nagin & J. Pepper eds. 2012); accord, *Baze* v. *Rees*, 553 U. S. 35, 79 (2008) (Stevens, J., concurring in judgment) ("Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders").

I recognize that a "lack of evidence" for a proposition does not prove the contrary. See *Ring*, *supra*, at 615 (one might believe the studies "inconclusive"). But suppose that we add to these studies the fact that, today, very few of those sentenced to death are actually executed, and that even those executions occur, on average, after nearly two decades on death row. DPIC, Execution List 2014. Then, does it still seem likely that the death penalty has a significant deterrent effect?

Consider, for example, what actually happened to the 183 inmates sentenced to death in 1978. As of 2013 (35 years later), 38 (or 21% of them) had been executed; 132 (or 72%) had had their convictions or sentences overturned or commuted; and 7 (or 4%) had died of other (likely natural) causes. Six (or 3%) remained on death row. BJS 2013 Stats, at 19 (Table 16).

The example illustrates a general trend. Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row. *Id.*, at 20 (Table 17); see also Baumgartner & Dietrich, Most Death Penalty Sentences Are Overturned: Here's Why That Matters, Washington Post Blog, Monkey Cage, Mar. 17, 2015 (similar).

Thus an offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration)

can take place. In a word, executions are *rare*. And an individual contemplating a crime but evaluating the potential punishment would know that, in any event, he faces a potential sentence of life without parole.

These facts, when recurring, must have some offsetting effect on a potential perpetrator's fear of a death penalty. And, even if that effect is no more than slight, it makes it difficult to believe (given the studies of deterrence cited earlier) that such a rare event significantly deters horrendous crimes. See *Furman*, 408 U. S., at 311–312 (White, J., concurring) (It cannot "be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient").

But what about retribution? Retribution is a valid penological goal. I recognize that surviving relatives of victims of a horrendous crime, or perhaps the community itself, may find vindication in an execution. And a community that favors the death penalty has an understandable interest in representing their voices. But see A. Sarat, Mercy on Trial: What It Means To Stop an Execution 130 (2005) (Illinois Governor George Ryan explained his decision to commute all death sentences on the ground that it was "cruel and unusual" for "family members to go through this . . . legal limbo for [20] years").

The relevant question here, however, is whether a "community's sense of retribution" can often find vindication in "a death that comes," if at all, "only several decades after the crime was committed." *Valle* v. *Florida*, 564 U. S. 1067, 1068 (2011) (BREYER, J., dissenting from denial of stay). By then the community is a different group of people. The offenders and the victims' families have grown far older. Feelings of outrage may have subsided. The offender may have found himself a changed human being. And sometimes repentance and even forgiveness can restore meaning to lives once ruined. At the same time, the community and victims' families will know that, even without a further

death, the offender will serve decades in prison under a sentence of life without parole.

I recognize, of course, that this may not always be the case, and that sometimes the community believes that an execution could provide closure. Nevertheless, the delays and low probability of execution must play some role in any calculation that leads a community to insist on death as retribution. As I have already suggested, they may well attenuate the community's interest in retribution to the point where it cannot by itself amount to a significant justification for the death penalty. *Id.*, at 1067. In any event, I believe that whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole (a sentence that every State now permits, see ACLU, A Living Death: Life Without Parole for Nonviolent Offenses 11, and n. 10 (2013)).

Finally, the fact of lengthy delays undermines any effort to justify the death penalty in terms of its prevalence when the Founders wrote the Eighth Amendment. When the Founders wrote the Constitution, there were no 20- or 30-year delays. Execution took place soon after sentencing. See P. Mackey, Hanging in the Balance: The Anti-Capital Punishment Movement in New York State, 1776–1861, p. 17 (1982); T. Jefferson, A Bill for Proportioning Crimes and Punishments (1779), reprinted in The Complete Jefferson 90, 95 (S. Padover ed. 1943); 2 Papers of John Marshall 207–209 (C. Cullen & H. Johnson eds. 1977) (describing petition for commutation based in part on 5-month delay); *Pratt* v. *Attorney Gen. of Jamaica*, [1994] 2 A. C., at 7 (same in United Kingdom) (collecting cases). And, for reasons I shall describe, *infra*, at 935–938, we cannot return to the quick executions in the founding era.

3

The upshot is that lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale. And this Court has said that, if the death penalty

does not fulfill the goals of deterrence or retribution, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment." *Atkins*, 536 U. S., at 319 (quoting *Enmund* v. *Florida*, 458 U. S. 782, 798 (1982); internal quotation marks omitted); see also *Gregg*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *Furman*, *supra*, at 312 (White, J., concurring) (a "penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment"); *Thompson*, 556 U. S., at 1115 (statement of Stevens, J., respecting denial of certiorari) (similar).

Indeed, Justice Lewis Powell (who provided a crucial vote in *Gregg*) came to much the same conclusion, albeit after his retirement from this Court. Justice Powell had come to the Court convinced that the Federal Constitution did not outlaw the death penalty but rather left the matter up to individual States to determine. *Furman*, *supra*, at 431–432 (Powell, J., dissenting); see also J. Jeffries, Justice Lewis F. Powell, Jr., p. 409 (2001) (describing Powell, during his time on the Court, as a "fervent partisan" of "the constitutionality of capital punishment").

Soon after Justice Powell's retirement, Chief Justice Rehnquist appointed him to chair a committee addressing concerns about delays in capital cases, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Committee). The Committee presented a report to Congress, and Justice Powell testified that "[d]elay robs the penalty of much of its deterrent value." Habeas Corpus Reform, Hearings before the Senate Committee on the Judiciary, 100th Cong., 1st and 2d Sess., 35 (1989 and 1990). Justice Powell, according to his official biographer, ultimately concluded that capital punishment:

> "'serves no useful purpose.' The United States was 'unique among the industrialized nations of the West in maintaining the death penalty,' and it was enforced so rarely that it could not deter. More important, the haggling and delay and seemingly endless litigation in every capital case brought the law itself into disrepute." Jeffries, *supra*, at 452.

In short, the problem of excessive delays led Justice Powell, at least in part, to conclude that the death penalty was unconstitutional.

As I have said, today delays are much worse. When Chief Justice Rehnquist appointed Justice Powell to the Committee, the average delay between sentencing and execution was 7 years and 11 months, compared with 17 years and 7 months today. Compare BJS, L. Greenfeld, Capital Punishment, 1990, p. 11 (Table 12) (Sept. 1991), with *supra*, at 925.

C

One might ask, why can Congress or the States not deal directly with the delay problem? Why can they not take steps to shorten the time between sentence and execution, and thereby mitigate the problems just raised? The answer is that shortening delay is much more difficult than one might think. And that is in part because efforts to do so risk causing procedural harms that also undermine the death penalty's constitutionality.

For one thing, delays have helped to make application of the death penalty more reliable. Recall the case of Henry Lee McCollum, whom DNA evidence exonerated 30 years after his conviction. Katz & Eckholm, N. Y. Times, at A1. If McCollum had been executed earlier, he would not have lived to see the day when DNA evidence exonerated him and implicated another man; that man is already serving a life sentence for a rape and murder that he committed just a few weeks after the murder McCollum was convicted of. *Ibid.*

In fact, this Court had earlier denied review of McCollum's claim over the public dissent of only one Justice. *McCollum* v. *North Carolina*, 512 U. S. 1254 (1994). And yet a full 20 years after the Court denied review, McCollum was exonerated by DNA evidence. There are a significant number of similar cases, some of which I have discussed earlier. See also DPIC, Innocence List (Nathson Fields, 23 years; Paul House, 23 years; Nicholas Yarris, 21 years; Anthony Graves, 16 years; Damon Thibodeaux, 15 years; Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu, all exonerated for the same crime 39 years after their convictions).

In addition to those who are exonerated on the ground that they are innocent, there are other individuals whose sentences or convictions have been overturned for other reasons (as discussed above, state and federal courts found error in 68% of the capital cases they reviewed between 1973 and 1995). See Part I, *supra*. In many of these cases, a court will have found that the individual did not merit the death penalty in a special sense—namely, he failed to receive all the procedural protections that the law requires for the death penalty's application. By eliminating some of these protections, one likely could reduce delay. But which protections should we eliminate? Should we eliminate the trial-related protections we have established for capital defendants: that they be able to present to the sentencing judge or jury all mitigating circumstances, *Lockett* v. *Ohio*, 438 U. S. 586; that the State provide guidance adequate to reserve the application of the death penalty to particularly serious murders, *Gregg*, *supra*; that the State provide adequate counsel and, where warranted, adequate expert assistance, *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Wiggins* v. *Smith*, 539 U. S. 510 (2003); *Ake* v. *Oklahoma*, 470 U. S. 68 (1985); or that a jury must find the aggravating factors necessary to impose the death penalty, *Ring*, 536 U. S. 584; see also *id.*, at 614 (BREYER, J., concurring in judgment)? Should we no longer ensure that the State does not execute those who are seriously intellectually disabled, *Atkins*, 536 U. S. 304?

Should we eliminate the requirement that the manner of execution be constitutional, *Baze*, 553 U. S. 35, or the requirement that the inmate be mentally competent at the time of his execution, *Ford* v. *Wainwright*, 477 U. S. 399 (1986)? Or should we get rid of the criminal protections that all criminal defendants receive—for instance, that defendants claiming violation of constitutional guarantees (say, "due process of law") may seek a writ of habeas corpus in federal courts? See, *e. g.*, *O'Neal* v. *McAninch*, 513 U. S. 432 (1995). My answer to these questions is "surely not." But see *ante*, at 898–899 (SCALIA, J., concurring).

One might, of course, argue that courts, particularly federal courts providing additional layers of review, apply these and other requirements too strictly, and that causes delay. But, it is difficult for judges, as it would be difficult for anyone, *not* to apply legal requirements punctiliously when the consequence of failing to do so may well be death, particularly the death of an innocent person. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983) ("[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error"); *Kyles* v. *Whitley*, 514 U. S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case" (internal quotation marks omitted)); *Thompson*, 556 U. S., at 1116 (statement of Stevens, J.) ("Judicial process takes time, but the error rate in capital cases illustrates its necessity").

Moreover, review by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court, see *Hinton* v. *Alabama*, 571 U. S. 263, he may well have been executed rather than exonerated. In my own view, our legal system's complexity, our federal system with its separate state and federal courts, our constitutional guarantees, our commitment to fair procedure, and, above all, a special need for re-

liability and fairness in capital cases, combine to make significant procedural "reform" unlikely in practice to reduce delays to an acceptable level.

And that fact creates a dilemma: A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. See *Knight*, 528 U. S., at 998 (BREYER, J., dissenting from denial of certiorari) (one of the primary causes of the delay is the States' "failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing"). But a death penalty system that minimizes delays would undermine the legal system's efforts to secure reliability and procedural fairness.

In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact, demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment. A death penalty system that is unreliable or procedurally unfair would violate the Eighth Amendment. *Woodson*, 428 U. S., at 305 (plurality opinion); *Hall*, 572 U. S., at 724; *Roper*, 543 U. S., at 568. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose. *Furman*, 408 U. S., at 312 (White, J., concurring); *Gregg*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Atkins*, *supra*, at 319.

IV

"Unusual"—Decline in Use of the Death Penalty

The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the

last two decades, the imposition and implementation of the death penalty have increasingly become unusual. I can illustrate the significant decline in the use of the death penalty in several ways.

An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970's to present day. In 1977—just after the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Many States having revised their death penalty laws to meet *Furman*'s requirements, the number of death sentences then increased. Between 1986 and 1999, 286 persons on average were sentenced to death each year. BJS 2013 Stats, at 14, 19 (Tables 11 and 16). But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since. See Appendix A, *infra* (showing sentences from 1977–2014). In 1999, 279 persons were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Last year, just 73 persons were sentenced to death. DPIC, The Death Penalty in 2014: Year End Report 1 (2015).

That trend, a significant decline in the last 15 years, also holds true with respect to the number of annual executions. See Appendix B, *infra* (showing executions from 1977–2014). In 1999, 98 people were executed. BJS, Data Collection: National Prisoner Statistics Program (BJS Prisoner Statistics) (available in Clerk of Court's case file). Last year, that number was only 35. DPIC, The Death Penalty in 2014, *supra*, at 1.

Next, one can consider state-level data. Often when deciding whether a punishment practice is, constitutionally speaking, "unusual," this Court has looked to the number of States engaging in that practice. *Atkins*, 536 U. S., at 313–316; *Roper*, *supra*, at 564–566. In this respect, the number of active death penalty States has fallen dramatically. In 1972, when the Court decided *Furman*, the death penalty

was lawful in 41 States. Nine States had abolished it. E. Mandery, A Wild Justice: The Death and Resurrection of Capital Punishment in America 145 (2013). As of today, 19 States have abolished the death penalty (along with the District of Columbia), although some did so prospectively only. See DPIC, States With and Without the Death Penalty, online at http://www.deathpenaltyinfo.org/states-and-without-death-penalty. In 11 other States that maintain the death penalty on the books, no execution has taken place for more than eight years: Arkansas (last execution 2005); California (2006); Colorado (1997); Kansas (no executions since the death penalty was reinstated in 1976); Montana (2006); Nevada (2006); New Hampshire (no executions since the death penalty was reinstated in 1976); North Carolina (2006); Oregon (1997); Pennsylvania (1999); and Wyoming (1992). DPIC, Executions by State and Year, online at http://www.deathpenaltyinfo.org/node/5741.

Accordingly, 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years. Of the 20 States that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time, making an execution in those States a fairly rare event. BJS Prisoner Statistics (Delaware, Idaho, Indiana, Kentucky, Louisiana, South Dakota, Tennessee, Utah, and Washington). That leaves 11 States in which it is fair to say that capital punishment is not "unusual." And just three of those States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014. See DPIC, Number of Executions by State and Region Since 1976, online at http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976. Indeed, last year, only seven States conducted an execution. DPIC, Executions by State and Year, *supra*; DPIC, Death Sentences in the United States From 1977 by State and by Year, online at http://www.deathpenaltyinfo.org/

death-sentences-united-states-1977-2008. In other words, in 43 States, no one was executed.

In terms of population, if we ask how many Americans live in a State that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% or 70%. Today, that number is 33%. See Appendix C, *infra*.

At the same time, use of the death penalty has become increasingly concentrated geographically. County-by-county figures are relevant, for decisions to impose the death penalty typically take place at a county level. See *supra*, at 918–920. County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed. Liebman & Clarke 264–265; cf. *id.*, at 266 (counties with 10% of the Nation's population imposed 43% of its death sentences). By the early 2000's, the death penalty was only actively practiced in a very small number of counties: Between 2004 and 2009, only 35 counties imposed five or more death sentences, *i. e.*, approximately one per year. See Appendix D, *infra* (such counties colored in red) (citing Ford, The Death Penalty's Last Stand, The Atlantic, Apr. 21, 2015). And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. See Appendix E, *infra*. In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties. Liebman & Clarke 265–266, and n. 47; cf. *ibid.* (counties with less than 5% of the Nation's population carried out over half of its executions from 1976–2007).

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i. e.*, three States, account

for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole. See *Furman*, 408 U. S., at 311 (1972) (White, J., concurring) (executions could be so infrequently carried out that they "would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system . . . when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied").

Moreover, we have said that it "'is not so much the number of these States that is significant, but the consistency of the direction of change.'" *Roper*, 543 U. S., at 566 (quoting *Atkins*, *supra*, at 315) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court's decision in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989)). Judged in that way, capital punishment has indeed become unusual. Seven States have abolished the death penalty in the last decade, including (quite recently) Nebraska. DPIC, States With and Without the Death Penalty, *supra*. And several States have come within a single vote of eliminating the death penalty. Seelye, Measure To Repeal Death Penalty Fails by a Single Vote in New Hampshire Senate, N. Y. Times, Apr. 17, 2014, p. A12; Dennison, House Deadlocks on Bill To Abolish Death Penalty in Montana, Billings Gazette, Feb. 23, 2015; see also Offredo, Delaware Senate Passes Death Penalty Repeal Bill, Delaware News Journal, Apr. 3, 2015. Eleven States, as noted earlier, have not executed anyone in eight years. *Supra*, at 941 and this page. And several States have formally stopped executing inmates. See Yardley, Oregon's Governor Says He Will Not Allow Executions, N. Y. Times, Nov. 23, 2011, p. A14 (Ore-

gon); Governor of Colorado, Exec. Order No. D2013–006, May 22, 2013 (Colorado); Lovett, Executions Are Suspended by Governor in Washington, N. Y. Times, Feb. 12, 2014, p. A12 (Washington); Begley, Pennsylvania Stops Using the Death Penalty, Time, Feb. 13, 2015 (Pennsylvania); see also Welsh-Huggins, Associated Press, Ohio Executions Rescheduled, Jan. 30, 2015 (Ohio).

Moreover, the direction of change is consistent. In the past two decades, no State without a death penalty has passed legislation to reinstate the penalty. See *Atkins*, 536 U. S., at 315–316; DPIC, States With and Without the Death Penalty. Indeed, even in many States most associated with the death penalty, remarkable shifts have occurred. In Texas, the State that carries out the most executions, the number of executions fell from 40 in 2000 to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015). DPIC, Executions by State and Year; BJS, T. Snell, Capital Punishment, 1999, p. 6 (Dec. 2000) (Table 5) (hereinafter BJS 1999 Stats); BJS 2013 Stats, at 19 (Table 16); von Drehle, Bungled Executions, Backlogged Courts, and Three More Reasons the Modern Death Penalty Is a Failed Experiment, Time, June 8, 2015, p. 26. Similarly dramatic declines are present in Virginia, Oklahoma, Missouri, and North Carolina. BJS 1999 Stats, at 6 (Table 5); BJS 2013 Stats, at 19 (Table 16).

These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter. Wilson, Support for Death Penalty Still High, But Down, Washington Post, GovBeat, June 5, 2014, online at www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down; see also ALI, Report of the Council to the Membership on the Matter of the Death Penalty 4 (Apr. 15, 2009) (withdrawing Model Penal Code section on capital punishment from the Code, in part because of doubts that the American Law Institute

could "recommend procedures that would" address concerns about the administration of the death penalty); cf. *Gregg*, 428 U. S., at 193–194 (joint opinion of Stewart, Powell, and Stevens, JJ.) (relying in part on Model Penal Code to conclude that a "carefully drafted statute" can satisfy the arbitrariness concerns expressed in *Furman*).

I rely primarily upon domestic, not foreign, events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is "unusual." Those circumstances are sufficient to warrant our reconsideration of the death penalty's constitutionality. I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. Oakford, UN Vote Against Death Penalty Highlights Global Abolitionist Trend—and Leaves the US Stranded, Vice News, Dec. 19, 2014, online at https://news.vice.com/article/un-vote-against-death-penalty-highlights-global-abolitionist-trend-and-leaves-the-us-stranded. In 2013, only 22 countries in the world carried out an execution. International Commission Against Death Penalty, Review 2013, pp. 2–3. No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. *Id.*, at 3. Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). *Id.*, at 2. And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia. Amnesty International, Death Sentences and Executions 2013, p. 3 (2014). (This figure does not include China, which has a large population, but where precise data cannot be obtained. *Id.*, at 2.)

V

I recognize a strong counterargument that favors constitutionality. We are a court. Why should we not leave the matter up to the people acting democratically through legis-

latures? The Constitution foresees a country that will make most important decisions democratically. Most nations that have abandoned the death penalty have done so through legislation, not judicial decision. And legislators, unlike judges, are free to take account of matters such as monetary costs, which I do not claim are relevant here. See, *e. g.*, Berman, Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor's Veto, Washington Post Blog, Post Nation, May 27, 2015) (listing cost as one of the reasons why Nebraska legislators recently repealed the death penalty in that State); cf. California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California 10 (June 30, 2008) (death penalty costs California $137 million per year; a comparable system of life imprisonment without parole would cost $11.5 million per year), online at http://www.ccfaj.org/rr-dp-official.html; Dáte, The High Price of Killing Killers, Palm Beach Post, Jan. 4, 2000, p. 1A (cost of each execution is $23 million above cost of life imprisonment without parole in Florida).

The answer is that the matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the unfair, cruel, and unusual infliction—of a serious punishment upon an individual. I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. See *Marbury* v. *Madison*, 1 Cranch 137,

177 (1803); *Hall*, 572 U. S., at 721 ("That exercise of independent judgment is the Court's judicial duty"). We have made clear that "'[t]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Id.*, at 721 (quoting *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion)); see also *Thompson* v. *Oklahoma*, 487 U. S. 815, 833, n. 40 (1988) (plurality opinion).

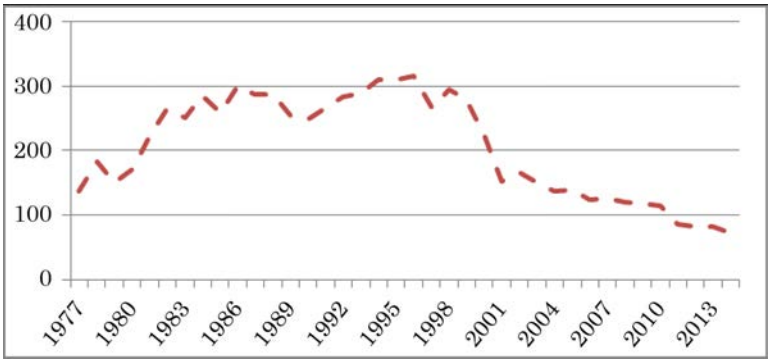
For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.

With respect, I dissent.

APPENDIXES

A

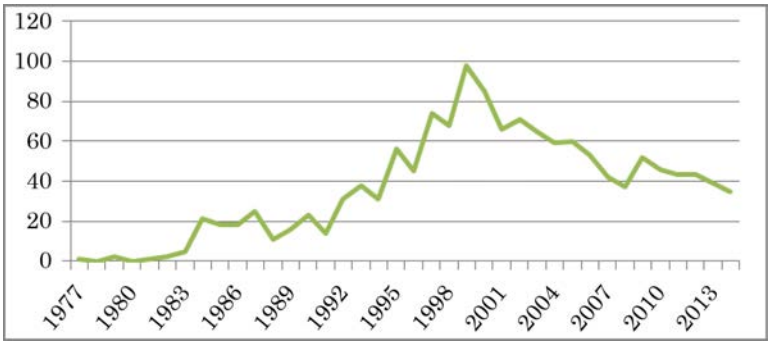
Death Sentences Imposed 1977–2014



Appendix B to opinion of BREYER, J.

B

Executions 1977–2014



C

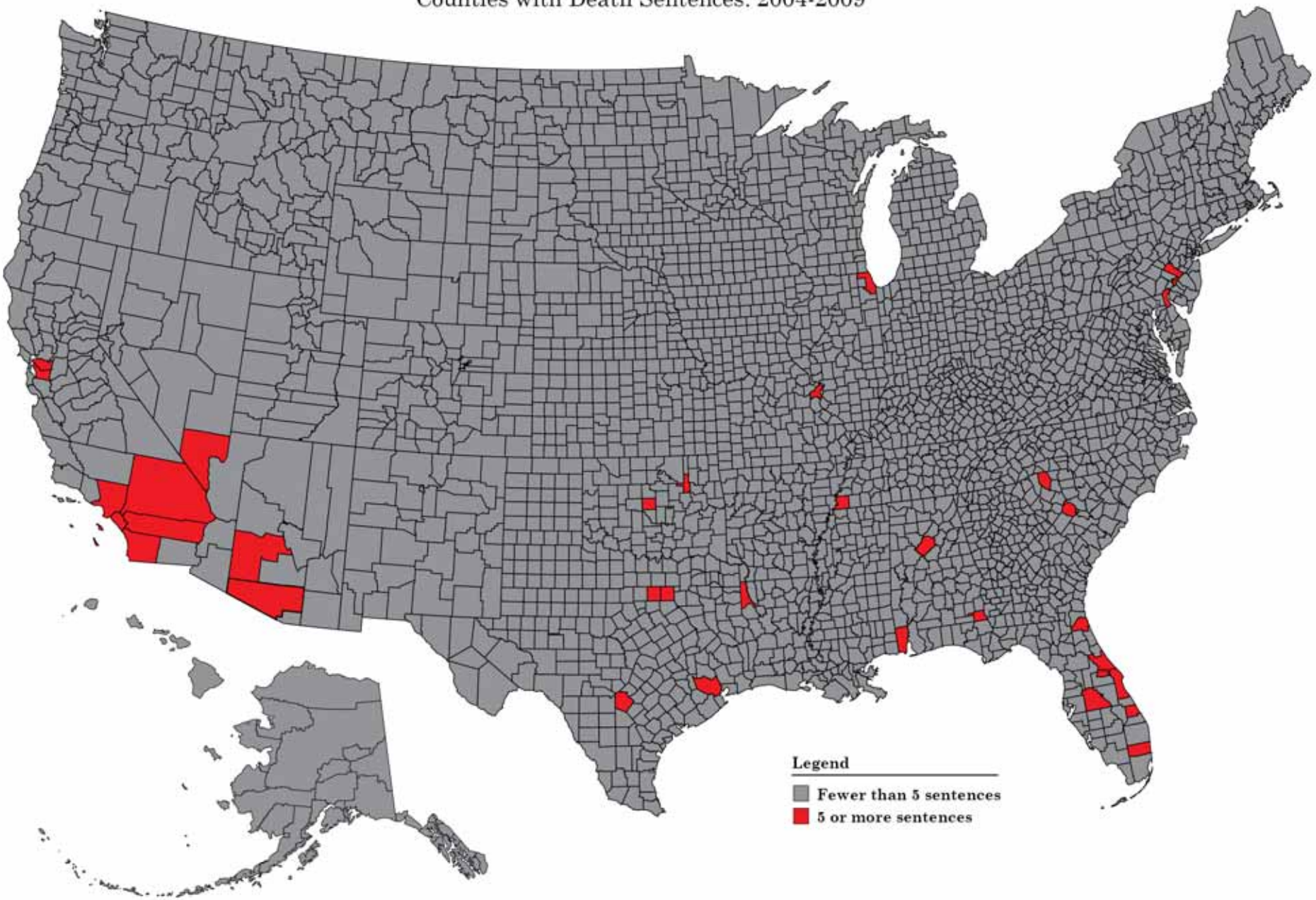
Percentage of U. S. population in States that conducted an execution within prior 3 years

Year	Percentage
1994	54%
1995	60%
1996	63%
1997	63%
1998	61%
1999	70%
2000	68%
2001	67%
2002	57%
2003	53%
2004	52%
2005	52%
2006	55%
2007	57%
2008	53%
2009	39%
2010	43%
2011	42%
2012	39%
2013	34%
2014	33%

[Appendixes D and E to opinion of BREYER, J., follow this page.]

APPENDIX D

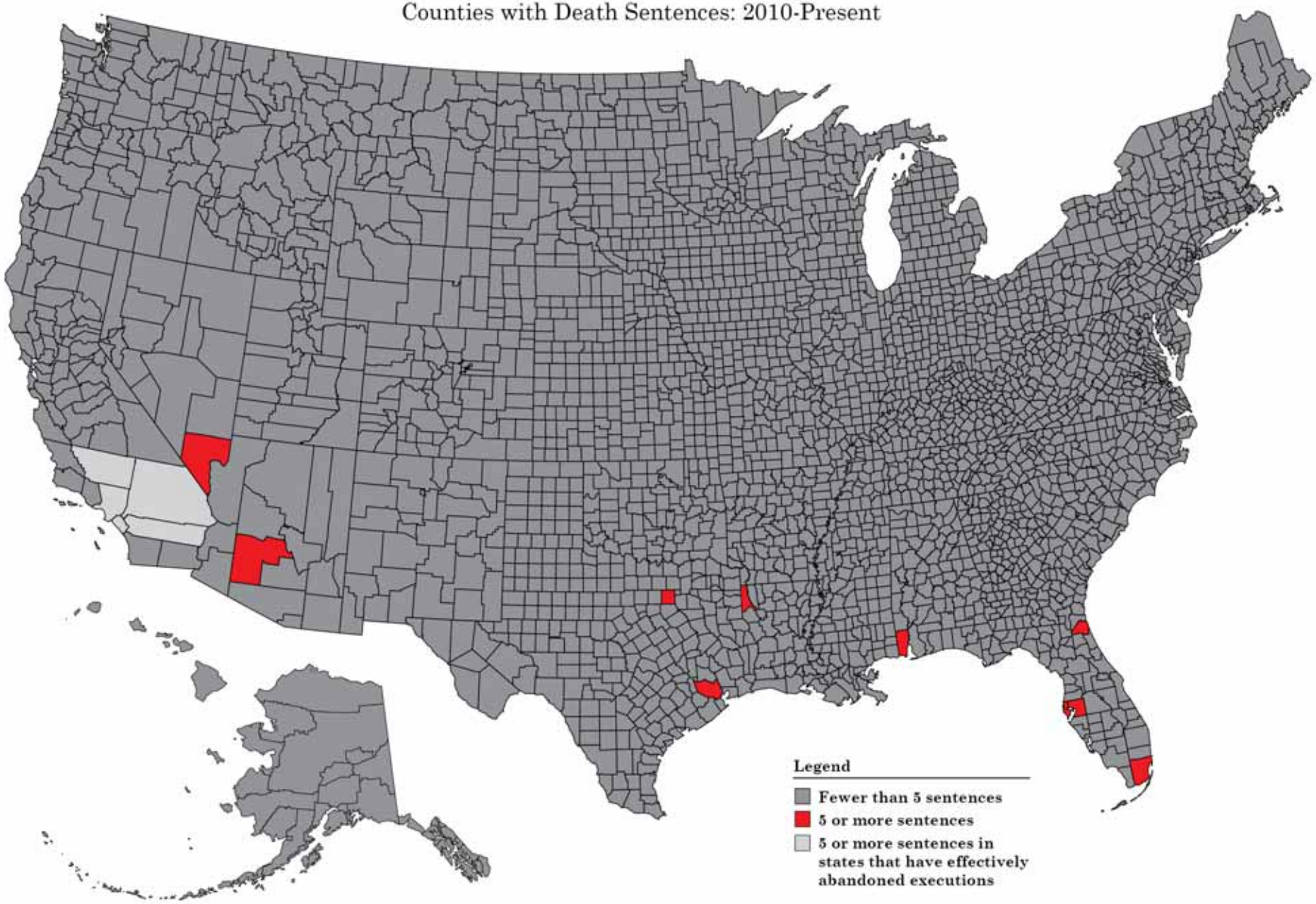
Counties with Death Sentences: 2004-2009



Source: Ford, The Death Penalty's Last Stand, The Atlantic, Apr. 21, 2015.

APPENDIX E

Counties with Death Sentences: 2010-Present



Source: The underlying data was compiled with research assistance from the Supreme Court Library (current as of June 22, 2015).

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

Petitioners, three inmates on Oklahoma's death row, challenge the constitutionality of the State's lethal injection protocol. The State plans to execute petitioners using three drugs: midazolam, rocuronium bromide, and potassium chloride. The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain. It is thus critical that the first drug, midazolam, do what it is supposed to do, which is to render and keep the inmate unconscious. Petitioners claim that midazolam cannot be expected to perform that function, and they have presented ample evidence showing that the State's planned use of this drug poses substantial, constitutionally intolerable risks.

Nevertheless, the Court today turns aside petitioners' plea that they at least be allowed a stay of execution while they seek to prove midazolam's inadequacy. The Court achieves this result in two ways: first, by deferring to the District Court's decision to credit the scientifically unsupported and implausible testimony of a single expert witness; and second, by faulting petitioners for failing to satisfy the wholly novel requirement of proving the availability of an alternative means for their own executions. On both counts the Court errs. As a result, it leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake.

I

A

The Eighth Amendment succinctly prohibits the infliction of "cruel and unusual punishments." Seven years ago, in *Baze* v. *Rees*, 553 U. S. 35 (2008), the Court addressed the application of this mandate to Kentucky's lethal injection protocol. At that time, Kentucky, like at least 29 of the 35 other States with the death penalty, utilized a series of three drugs to perform executions: (1) sodium thiopental, a "fast-

acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection"; (2) pancuronium bromide, "a paralytic agent that inhibits all muscular-skeletal movements and . . . stops respiration"; and (3) potassium chloride, which "interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest." *Id.*, at 44 (plurality opinion of ROBERTS, C. J.).

In *Baze*, it was undisputed that absent a "proper dose of sodium thiopental," there would be a "substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.*, at 53. That is because, if given to a conscious inmate, pancuronium bromide would leave him or her asphyxiated and unable to demonstrate "any outward sign of distress," while potassium chloride would cause "excruciating pain." *Id.*, at 71 (Stevens, J., concurring in judgment). But the *Baze* petitioners conceded that if administered as intended, Kentucky's method of execution would nevertheless "result in a humane death," *id.*, at 41 (plurality opinion), as the "proper administration" of sodium thiopental "eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride," *id.*, at 49. Based on that premise, the Court ultimately rejected the challenge to Kentucky's protocol, with the plurality opinion concluding that the State's procedures for administering these three drugs ensured there was no "objectively intolerable risk" of severe pain. *Id.*, at 61–62 (internal quotation marks omitted).

B

For many years, Oklahoma performed executions using the same three drugs at issue in *Baze*. After *Baze* was decided, however, the primary producer of sodium thiopental refused to continue permitting the drug to be used in executions. *Ante*, at 869–870. Like a number of other States, Oklahoma

opted to substitute pentobarbital, another barbiturate, in its place. But in March 2014, shortly before two scheduled executions, Oklahoma found itself unable to secure this drug. App. 144.

The State rescheduled the executions for the following month to give it time to locate an alternative anesthetic. In less than a week, a group of officials from the Oklahoma Department of Corrections and the attorney general's office selected midazolam to serve as a replacement for pentobarbital. *Id.*, at 145, 148–149.

Soon thereafter, Oklahoma used midazolam for the first time in its execution of Clayton Lockett. That execution did not go smoothly. Ten minutes after an intravenous (IV) line was set in Lockett's groin area and 100 milligrams of midazolam were administered, an attending physician declared Lockett unconscious. *Id.*, at 392–393. When the paralytic and potassium chloride were administered, however, Lockett awoke. *Ibid.* Various witnesses reported that Lockett began to writhe against his restraints, saying, "[t]his s*** is f***ing with my mind," "something is wrong," and "[t]he drugs aren't working." *Id.*, at 53 (internal quotation marks omitted). State officials ordered the blinds lowered, then halted the execution. *Id.*, at 393, 395. But 10 minutes later—approximately 40 minutes after the execution began—Lockett was pronounced dead. *Id.*, at 395.

The State stayed all future executions while it sought to determine what had gone wrong in Lockett's. Five months later, the State released an investigative report identifying a flaw in the IV line as the principal difficulty: The IV had failed to fully deliver the lethal drugs into Lockett's veins. *Id.*, at 398. An autopsy determined, however, that the concentration of midazolam in Lockett's blood was more than sufficient to render an average person unconscious. *Id.*, at 397, 405.

In response to this report, the State modified its lethal injection protocol. The new protocol contains a number of

procedures designed to guarantee that members of the execution team are able to insert the IV properly, and charges them with ensuring that the inmate is unconscious. *Id.*, at 57–66, 361–369. But the protocol continues to authorize the use of the same three-drug formula used to kill Lockett—though it does increase the intended dose of midazolam from 100 milligrams to 500 milligrams. *Id.*, at 61. The State has indicated that it plans to use this drug combination in all upcoming executions, subject to only an immaterial substitution of paralytic agents. *Ante*, at 872–873.

C

In June 2014, inmates on Oklahoma's death row filed a 42 U. S. C. §1983 suit against respondent prison officials challenging the constitutionality of Oklahoma's method of execution. After the State released its revised execution protocol, the four inmates whose executions were most imminent—Charles Warner, along with petitioners Richard Glossip, John Grant, and Benjamin Cole—moved for a preliminary injunction. They contended, among other things, that the State's intended use of midazolam would violate the Eighth Amendment because, unlike sodium thiopental or pentobarbital, the drug "is incapable of producing a state of unawareness that will be reliably maintained after either of the other two pain-producing drugs . . . is injected." Amended Complaint ¶101.

The District Court held a 3-day evidentiary hearing, at which petitioners relied principally on the testimony of two experts: Dr. David Lubarsky, an anesthesiologist, and Dr. Larry Sasich, a doctor of pharmacy. The State, in turn, based its case on the testimony of Dr. Roswell Evans, also a doctor of pharmacy.

To a great extent, the experts' testimony overlapped. All three experts agreed that midazolam is from a class of sedative drugs known as benzodiazepines (a class that includes Valium and Xanax), and that it has no analgesic—or pain-

relieving—effects. App. 205 (Lubarsky), 260–261 (Sasich), 311 (Evans). They further agreed that while midazolam can be used to render someone unconscious, it is not approved by the Federal Drug Administration (FDA) for use as, and is not in fact used as, a "sole drug to produce and maintain anesthesia in surgical proceedings." *Id.*, at 307, 327 (Evans); see *id.*, at 171 (Lubarsky); *id.*, at 262 (Sasich). Finally, all three experts recognized that midazolam is subject to a ceiling effect, which means that there is a point at which increasing the dose of the drug does not result in any greater effect. *Id.*, at 172 (Lubarsky), 243 (Sasich), 331 (Evans).

The experts' opinions diverged, however, on the crucial questions of how this ceiling effect operates, and whether it will prevent midazolam from keeping a condemned inmate unconscious when the second and third lethal injection drugs are administered. Dr. Lubarsky testified that while benzodiazepines such as midazolam may, like barbiturate drugs such as sodium thiopental and pentobarbital, induce unconsciousness by inhibiting neuron function, they do so in a materially different way. *Id.*, at 207. More specifically, Dr. Lubarsky explained that both barbiturates and benzodiazepines initially cause sedation by facilitating the binding of a naturally occurring chemical called gamma-aminobutyric acid (GABA) with GABA receptors, which then impedes the flow of electrical impulses through the neurons in the central nervous system. *Id.*, at 206. But at higher doses, barbiturates also act as a GABA substitute and mimic its neuron-suppressing effects. *Ibid.* By contrast, benzodiazepines lack this mimicking function, which means their effect is capped at a lower level of sedation. *Ibid.* Critically, according to Dr. Lubarsky, this ceiling on midazolam's sedative effect is reached before full anesthesia can be achieved. *Ibid.* Thus, in his view, while "midazolam unconsciousness is . . . sufficient" for "minor procedure[s]," Tr. of Preliminary Injunction Hearing 132–133 (Tr.), it is incapable of keeping someone "insensate and immobile in the face of [more] nox-

ious stimuli," including the extreme pain and discomfort associated with administration of the second and third drugs in Oklahoma's lethal injection protocol, App. 218. Dr. Sasich endorsed Dr. Lubarsky's description of the ceiling effect, and offered similar reasons for reaching the same conclusion. See *id.*, at 243, 248, 262.

In support of these assertions, both experts cited a variety of evidence. Dr. Lubarsky emphasized, in particular, Arizona's 2014 execution of Joseph Wood, which had been conducted using midazolam and the drug hydromorphone rather than the three-drug cocktail Oklahoma intends to employ.[1] *Id.*, at 176. Despite being administered 750 milligrams of midazolam, Wood had continued breathing and moving for nearly two hours—which, according to Dr. Lubarsky, would not have occurred "during extremely deep levels of anesthesia." *Id.*, at 177. Both experts also cited various scientific articles and textbooks to support their conclusions. For instance, Dr. Lubarsky relied on a study measuring the brain activity of rats that were administered midazolam, which showed that the drug's impact significantly tailed off at higher doses. See Hovinga et al., Pharmacokinetic-EEG Effect Relationship of Midazolam in Aging BN/BiRij Rats, 107 British J. Pharmacology 171, 173, Fig. 2 (1992). He also pointed to a pharmacology textbook that confirmed his description of how benzodiazepines and barbiturates produce their effects, see Stoelting & Hillier 127–128, 140–144, and a survey article concluding that "[m]idazolam cannot be used alone . . . to maintain adequate anesthesia," Reves, Fragen, Vinik, & Greenblatt, Midazolam: Pharmacology and Uses, 62 Anesthesiology 310, 318 (1985) (Reves). For his part, Dr. Sasich referred to a separate survey article, which similarly recognized and described the ceiling effect to which benzodiazepines are subject. See Saari, Uusi-Oukari, Ahonen, &

[1] Hydromorphone is a powerful analgesic similar to morphine or heroin. See R. Stoelting & S. Hillier, Pharmacology & Physiology in Anesthetic Practice 87–88 (4th ed. 2006) (Stoelting & Hillier).

Olkkola, Enhancement of GABAergic Activity: Neuropharmacological Effects of Benzodiazepines and Therapeutic Use in Anesthesiology, 63 Pharmacological Rev. 243, 244, 250 (2011) (Saari).

By contrast, Dr. Evans, the State's expert, asserted that a 500-milligram dose of midazolam would "render the person unconscious and 'insensate' during the remainder of the [execution] procedure." App. 294. He rested this conclusion on two interrelated propositions.

First, observing that a therapeutic dose of midazolam to treat anxiety is less than 5 milligrams for a 70-kilogram adult, Dr. Evans emphasized that Oklahoma's planned administration of 500 milligrams of the drug was "at least 100 times the normal therapeutic dose." *Ibid.* While he acknowledged that "[t]here are no studies that have been done . . . administering that much . . . midazolam . . . to anybody," he noted that deaths had occurred in doses as low as 0.04 to 0.07 milligrams per kilogram (2.8 to 4.9 milligrams for a 70-kilogram adult), and contended that a 500-milligram dose would itself cause death within less than an hour—a conclusion he characterized as "essentially an extrapolation from a toxic effect." *Id.*, at 327; see *id.*, at 308.

Second, in explaining how he reconciled his opinion with the evidence of midazolam's ceiling effect, Dr. Evans testified that while "GABA receptors are found across the entire body," midazolam's ceiling effect is limited to the "spinal cord" and there is "no ceiling effect" at the "higher level of [the] brain." *Id.*, at 311–312. Consequently, in his view, "as you increase the dose of midazolam, it's a linear effect, so you're going to continue to get an impact from higher doses of the drug," *id.*, at 332, until eventually "you're paralyzing the brain," *id.*, at 314. Dr. Evans also understood the chemical source of midazolam's ceiling effect somewhat differently from petitioners' experts. Although he agreed that midazolam produces its effect by "binding to [GABA] receptors," *id.*, at 293, he appeared to believe that midazolam produced

sedation by "inhibiting GABA" from attaching to GABA receptors, not by promoting GABA's sedative effects, *id.*, at 312. Thus, when asked about Dr. Lubarsky's description of the ceiling effect, Dr. Evans characterized the phenomenon as stemming from "the competitive nature of substances trying to attach to GABA receptors." *Id.*, at 313.

Dr. Evans cited no scholarly research in support of his opinions. Instead, he appeared to rely primarily on two sources: the Web site www.drugs.com and a "Material Safety Data Sheet" produced by a midazolam manufacturer. See *id.*, at 303. Both simply contained general information that covered the experts' areas of agreement.

D

The District Court denied petitioners' motion for a preliminary injunction. It began by making a series of factual findings regarding the characteristics of midazolam and its use in Oklahoma's execution protocol. Most relevant here, the District Court found that "[t]he proper administration of 500 milligrams of midazolam . . . would make it a virtual certainty that an individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." *Id.*, at 77. Respecting petitioners' contention that there is a "ceiling effect which prevents an increase in dosage from having a corresponding incremental effect on anesthetic depth," the District Court concluded:

> "Dr. Evans testified persuasively . . . that whatever the ceiling effect of midazolam may be with respect to anesthesia, which takes effect at the spinal cord level, there is no ceiling effect with respect to the ability of a 500 milligram dose of midazolam to effectively paralyze the brain, a phenomenon which is not anesthesia but does have the effect of shutting down respiration and eliminating the individual's awareness of pain." *Id.*, at 78.

Having made these findings, the District Court held that petitioners had shown no likelihood of success on the merits of their Eighth Amendment claim for two independent reasons. First, it determined that petitioners had "failed to establish that proceeding with [their] execution[s] . . . on the basis of the revised protocol presents . . . 'an objectively intolerable risk of harm.'" *Id.*, at 96. Second, the District Court held that petitioners were unlikely to prevail because they had not identified any "'known and available alternative'" means by which they could be executed—a requirement it understood *Baze* to impose. App. 97. The District Court concluded that the State "ha[d] affirmatively shown that sodium thiopental and pentobarbital, the only alternatives to which the [petitioners] have even alluded, are not available to the [State]." *Id.*, at 98.

The Court of Appeals for the Tenth Circuit affirmed. *Warner* v. *Gross*, 776 F. 3d 721 (2015). It, like the District Court, held that petitioners were unlikely to prevail on the merits because they had failed to prove the existence of "'known and available alternatives.'" *Id.*, at 732. "In any event," the court continued, it was unable to conclude that the District Court's factual findings had been clearly erroneous, and thus petitioners had also "failed to establish that the use of midazolam in their executions . . . creates a demonstrated risk of severe pain." *Ibid.*

Petitioners and Charles Warner filed a petition for certiorari and an application to stay their executions. The Court denied the stay application, and Charles Warner was executed on January 15, 2015. See *Warner* v. *Gross*, 574 U. S. 1112 (2015) (SOTOMAYOR, J., dissenting from denial of stay). The Court subsequently granted certiorari and, at the request of the State, stayed petitioners' pending executions.

II

I begin with the second of the Court's two holdings: that the District Court properly found that petitioners did not

demonstrate a likelihood of showing that Oklahoma's execution protocol poses an unconstitutional risk of pain. In reaching this conclusion, the Court sweeps aside substantial evidence showing that, while midazolam may be able to *induce* unconsciousness, it cannot be utilized to *maintain* unconsciousness in the face of agonizing stimuli. Instead, like the District Court, the Court finds comfort in Dr. Evans' wholly unsupported claims that 500 milligrams of midazolam will "paralyz[e] the brain." In so holding, the Court disregards an objectively intolerable risk of severe pain.

A

Like the Court, I would review for clear error the District Court's finding that 500 milligrams of midazolam will render someone sufficiently unconscious "'to resist the noxious stimuli which could occur from the application of the second and third drugs.'" *Ante*, at 883 (quoting App. 77). Unlike the Court, however, I would do so without abdicating our duty to examine critically the factual predicates for the District Court's finding—namely, Dr. Evans' testimony that midazolam has a "ceiling effect" only "at the spinal cord level," and that a "500 milligram dose of midazolam" can therefore "effectively paralyze the brain." *Id.*, at 78. To be sure, as the Court observes, such scientific testimony may at times lie at the boundaries of federal courts' expertise. See *ante*, at 882. But just because a purported expert says something does not make it so. Especially when important constitutional rights are at stake, federal district courts must carefully evaluate the premises and evidence on which scientific conclusions are based, and appellate courts must ensure that the courts below have in fact carefully considered all the evidence presented. Clear error exists "when although there is evidence to support" a finding, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364,

395 (1948). Here, given the numerous flaws in Dr. Evans' testimony, there can be little doubt that the District Court clearly erred in relying on it.

To begin, Dr. Evans identified no scientific literature to support his opinion regarding midazolam's properties at higher-than-normal doses. Apart from a Material Safety Data Sheet that was relevant only insofar as it suggests that a low dose of midazolam may occasionally be toxic, see *ante*, at 891—an issue I discuss further below—Dr. Evans' testimony seems to have been based on the Web site www.drugs.com. The Court may be right that "petitioners do not identify any incorrect statements from drugs.com on which Dr. Evans relied." *Ante*, at 890–891. But that is because there were *no* statements from drugs.com that supported the critically disputed aspects of Dr. Evans' opinion. If anything, the Web site supported petitioners' contentions, as it expressly cautioned that midazolam "[s]hould not be used alone for maintenance of anesthesia," App. H to Pet. for Cert. 6519, and contained no warning that an excessive dose of midazolam could "paralyze the brain," see *id.*, at 6528–6529.

Most importantly, nothing from drugs.com—or, for that matter, any other source in the record—corroborated Dr. Evans' key testimony that midazolam's ceiling effect is limited to the spinal cord and does not pertain to the brain. Indeed, the State appears to have disavowed Dr. Evans' spinal-cord theory, refraining from even mentioning it in its brief despite the fact that the District Court expressly relied on this testimony as the basis for finding that larger doses of midazolam will have greater anesthetic effects. App. 78. The Court likewise assiduously avoids defending this theory.

That is likely because this aspect of Dr. Evans' testimony was not just unsupported, but was directly refuted by the studies and articles cited by Drs. Lubarsky and Sasich. Both of these experts relied on academic texts describing benzodiazepines' ceiling effect and explaining why it prevents these drugs from rendering a person completely in-

sensate. See Stoelting & Hillier 141, 144 (describing midazolam's ceiling effect and contrasting the drug with barbiturates); Saari 244 (observing that "abolishment of perception of environmental stimuli cannot usually be generated"). One study further made clear that the ceiling effect is apparent in the brain. See *id.*, at 250.

These scientific sources also appear to demonstrate that Dr. Evans' spinal-cord theory—*i. e.*, that midazolam's ceiling effect is limited to the spinal cord—was premised on a basic misunderstanding of midazolam's mechanism of action. I say "appear" not because the sources themselves are unclear about how midazolam operates: They plainly state that midazolam functions by promoting GABA's inhibitory effects on the central nervous system. See, *e. g.*, Stoelting & Hillier 140. Instead, I use "appear" because discerning the rationale underlying Dr. Evans' testimony is difficult. His spinal-cord theory might, however, be explained at least in part by his apparent belief that rather than promoting GABA's inhibitory effects, midazolam produces sedation by "compet[ing]" with GABA and thus "inhibit[ing]" GABA's effect. App. 312–313.[2] Regardless, I need not delve too deeply into Dr. Evans' alternative scientific reality. It suffices to say

[2] The Court disputes this characterization of Dr. Evans' testimony, insisting that Dr. Evans accurately described midazolam's properties in the written report he submitted prior to the hearing below, and suggesting that petitioners' experts would have "dispute[d] the accuracy" of this explanation were it in fact wrong. *Ante*, at 889. But Dr. Evans' written report simply said midazolam "produces different levels of central nervous system (CNS) depression through binding to [GABA] receptors." App. 293. That much is true. Only after Drs. Sasich and Lubarsky testified did Dr. Evans further claim that midazolam produced CNS depression by binding to GABA receptors *and thereby preventing GABA itself from binding to those receptors*—which is where he went wrong. The Court's further observation that Dr. Lubarsky also used a variant on the word "inhibiting" in his testimony—in saying that GABA's "'*inhibition* of brain activity is accentuated by midazolam,'" *ante*, at 889 (quoting App. 232)—is completely nonresponsive. "Inhibiting" is a perfectly good word; the problem here is the manner in which Dr. Evans used it in a sentence.

that to the extent that Dr. Evans' testimony was based on his understanding of the source of midazolam's pharmacological properties, that understanding was wrong.

These inconsistencies and inaccuracies go to the very heart of Dr. Evans' expert opinion, as they were the key components of his professed belief that one can extrapolate from what is known about midazolam's effect at low doses to conclude that the drug would "paralyz[e] the brain" at Oklahoma's planned dose. *Id.*, at 314. All three experts recognized that there had been no scientific testing on the use of this amount of midazolam in conjunction with these particular lethal injection drugs. See *ante*, at 883–884; App. 176 (Lubarsky), 243–244 (Sasich), 327 (Evans). For this reason, as the Court correctly observes, "extrapolation was reasonable." *Ante*, at 884. But simply because extrapolation may be reasonable or even required does not mean that every conceivable method of extrapolation can be credited, or that all estimates stemming from purported extrapolation are worthy of belief. Dr. Evans' view was that because 40 milligrams of midazolam could be used to induce unconsciousness, App. 294, and because more drug will generally produce more effect, a significantly larger dose of 500 milligrams would not just induce unconsciousness but allow for its maintenance in the face of extremely painful stimuli, and ultimately even cause death itself. In his words: "[A]s you increase the dose of midazolam, it's a linear effect, so you're going to continue to get an impact from higher doses of the drug." *Id.*, at 332. If, however, there is a ceiling with respect to midazolam's effect on the brain—as petitioners' experts established there is—then such simplistic logic is not viable. In this context, more is not necessarily better, and Dr. Evans was plainly wrong to presume it would be.

If Dr. Evans had any other basis for the "extrapolation" that led him to conclude 500 milligrams of midazolam would "paralyz[e] the brain," *id.*, at 314, it was even further divorced from scientific evidence and logic. Having empha-

sized that midazolam had been known to cause approximately 80 deaths, Dr. Evans asserted that his opinion regarding the efficacy of Oklahoma's planned use of the drug represented "essentially an extrapolation from a *toxic* effect." *Id.*, at 327 (emphasis added); see *id.*, at 308. Thus, Dr. Evans appeared to believe—and again, I say "appeared" because his rationale is not clear—that because midazolam caused *some* deaths, it would necessarily cause complete unconsciousness and then death at especially high doses. But Dr. Evans also thought, and Dr. Lubarsky confirmed, that these midazolam fatalities had occurred at very low doses—well below what any expert said would produce unconsciousness. See *id.*, at 207, 308. These deaths thus seem to represent the rare, unfortunate side effects that one would expect to see with any drug at normal therapeutic doses; they provide no indication of the effect one would expect midazolam to have on the brain at substantially higher doses. Deaths occur with almost any product. One might as well say that because some people occasionally die from eating one peanut, one hundred peanuts would necessarily induce a coma and death in anyone.[3]

In sum, then, Dr. Evans' conclusions were entirely unsupported by any study or third-party source, contradicted by the extrinsic evidence proffered by petitioners, inconsistent with the scientific understanding of midazolam's properties, and apparently premised on basic logical errors. Given

---

[3] For all the reasons discussed in Part II–B, *infra*, and contrary to the Court's claim, see *ante*, at 885, n. 4, there are good reasons to doubt that 500 milligrams of midazolam will, in light of the ceiling effect, inevitably kill someone. The closest the record comes to providing support for this contention is the fleeting mention in the FDA-approved product label that one of the possible consequences of midazolam overdosage is coma. See *ibid.*, n. 5. Moreover, even if this amount of the drug could kill some people in "under an hour," *ibid.*, n. 4, that would not necessarily mean that the condemned would be insensate during the approximately 10 minutes it takes for the paralytic and potassium chloride to do their work.

these glaring flaws, the District Court's acceptance of Dr. Evans' claim that 500 milligrams of midazolam would "paralyz[e] the brain" cannot be credited. This is not a case "[w]here there are two permissible views of the evidence," and the District Court chose one; rather, it is one where the trial judge credited "one of two or more witnesses" even though that witness failed to tell "a coherent and facially plausible story that is not contradicted by extrinsic evidence." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574–575 (1985). In other words, this is a case in which the District Court clearly erred. See *ibid.*

B

Setting aside the District Court's erroneous factual finding that 500 milligrams of midazolam will necessarily "paralyze the brain," the question is whether the Court is nevertheless correct to hold that petitioners failed to demonstrate that the use of midazolam poses an "objectively intolerable risk" of severe pain. See *Baze*, 553 U. S., at 50 (plurality opinion) (internal quotation marks omitted). I would hold that they made this showing. That is because, in stark contrast to Dr. Evans, petitioners' experts were able to point to objective evidence indicating that midazolam cannot serve as an effective anesthetic that "render[s] a person insensate to pain caused by the second and third [lethal injection] drugs." *Ante*, at 888.

As observed above, these experts cited multiple sources supporting the existence of midazolam's ceiling effect. That evidence alone provides ample reason to doubt midazolam's efficacy. Again, to prevail on their claim, petitioners need only establish an intolerable *risk* of pain, not a certainty. See *Baze*, 553 U. S., at 50. Here, the State is attempting to use midazolam to produce an effect the drug has never previously been demonstrated to produce, and despite studies indicating that at some point increasing the dose will not actually increase the drug's effect. The State is thus pro-

ceeding in the face of a very real risk that the drug will not work in the manner it claims.

Moreover, and perhaps more importantly, the record provides good reason to think this risk is substantial. The Court insists that petitioners failed to provide "probative evidence" as to whether "midazolam's ceiling effect occurs below the level of a 500-milligram dose and at a point at which the drug does not have the effect of rendering a person insensate to pain." *Ante*, at 887. It emphasizes that Dr. Lubarsky was unable to say "at what dose the ceiling effect occurs," and could only estimate that it was "'[p]robably after about . . . 40 to 50 milligrams.'" *Ibid.* (quoting App. 225).

But the precise *dose* at which midazolam reaches its ceiling effect is irrelevant if there is no dose at which the drug can, in the Court's words, render a person "insensate to pain." *Ante*, at 888. On this critical point, Dr. Lubarsky was quite clear.[4] He explained that the drug "does not work to produce" a "lack of consciousness as noxious stimuli are applied" and is "not sufficient to produce a surgical plane of anesthesia in human beings." App. 204. He also noted that

[4] Dr. Sasich, as the Court emphasizes, was perhaps more hesitant to reach definitive conclusions, see *ante*, at 883–885, and n. 5, 887–888, but the statements highlighted by the Court largely reflect his (truthful) observations that no testing has been done at doses of 500 milligrams, and his inability to pinpoint the precise dose at which midazolam's ceiling effect might be reached. Dr. Sasich did not, as the Court suggests, claim that midazolam's ceiling effect would be reached only after a person became fully insensate to pain. *Ante*, at 888. What Dr. Sasich actually said was: "As the dose increases, the benzodiazepines are expected to produce sedation, amnesia, and finally lack of response to stimuli such as pain (unconsciousness)." App. 243. In context, it is clear that Dr. Sasich was simply explaining that a drug like midazolam can be used to *induce* unconsciousness—an issue that was and remains undisputed—not that it could render an inmate sufficiently unconscious to resist all noxious stimuli. Indeed, it was midazolam's possible inability to serve the latter function that led Dr. Sasich to conclude that "it is not an appropriate drug to use when administering a paralytic followed by potassium chloride." *Id.*, at 248.

"[t]he drug would never be used and has never been used as a sole anesthetic to give anesthesia during a surgery," *id.*, at 223, and asserted that "the drug was not approved by the FDA as a sole anesthetic because after the use of fairly large doses that were sufficient to reach the ceiling effect and produce induction of unconsciousness, the patients responded to the surgery," *id.*, at 219. Thus, Dr. Lubarsky may not have been able to identify whether this effect would be reached at 40, 50, or 60 milligrams or some higher threshold, but he could specify that at no level would midazolam reliably keep an inmate unconscious once the second and third drugs were delivered.[5]

These assertions were amply supported by the evidence of the manner in which midazolam is and can be used. All three experts agreed that midazolam is utilized as the sole sedative only in minor procedures. Dr. Evans, for example, acknowledged that while midazolam may be used as the sole drug in some procedures that are not "terribly invasive," even then "you would [generally] see it used in combination with a narcotic." *Id.*, at 307. And though, as the Court observes, Dr. Sasich believed midazolam could be "used for medical procedures like colonoscopies and gastroscopies," *ante*, at 885, he insisted that these procedures were not necessarily painful, and that it would be a "big jump" to conclude that midazolam would be effective to maintain unconscious-

[5] The Court claims that the District Court could have properly disregarded Dr. Lubarsky's testimony because he asserted that a protocol with sodium thiopental would "'produce egregious harm and suffering.'" *Ante*, at 888, n. 6 (quoting App. 227). But Dr. Lubarsky did not testify that, like midazolam, sodium thiopental would not render an inmate fully insensate even if properly administered; rather, he simply observed that he had previously contended that *protocols* using that drug were ineffective. See App. 227. He was presumably referring to an article he coauthored that found many condemned inmates were not being successfully delivered the dose of sodium thiopental necessary to fully anesthetize them. See *Baze* v. *Rees*, 553 U. S. 35, 67 (2008) (ALITO, J., concurring) (discussing this study).

ness throughout an execution. Tr. 369–370. Indeed, the record provides no reason to think that these procedures cause excruciating pain remotely comparable to that produced by the second and third lethal injection drugs Oklahoma intends to use.

As for more painful procedures, the consensus was also clear: Midazolam is not FDA approved for, and is not used as, a sole drug to maintain unconsciousness. See App. 171 (Lubarsky), 262 (Sasich), 327 (Evans). One might infer from the fact that midazolam *is not* used as the sole anesthetic for more serious procedures that it *cannot* be used for them. But drawing such an inference is unnecessary, as petitioners' experts invoked sources expressly stating as much. In particular, Dr. Lubarsky pointed to a survey article that cited four separate authorities and declared that "[m]idazolam cannot be used alone . . . to maintain adequate anesthesia." Reves 318; see also Stoelting & Hillier 145 (explaining that midazolam is used for "induction of anesthesia," and that, "*[i]n combination with other drugs*, [it] may be used for maintenance of anesthesia" (emphasis added)).

This evidence was alone sufficient, but if one wanted further support for these conclusions it was provided by the Lockett and Wood executions. The procedural flaws that marred the Lockett execution created the conditions for an unintended (and grotesque) experiment on midazolam's efficacy. Due to problems with the IV line, Lockett was not fully paralyzed after the second and third drugs were administered. He had, however, been administered more than enough midazolam to "render an average person unconscious," as the District Court found. App. 57. When Lockett awoke and began to writhe and speak, he demonstrated the critical difference between midazolam's ability to render an inmate unconscious and its ability to maintain the inmate in that state. The Court insists that Lockett's execution involved "only 100 milligrams of midazolam," *ante*, at 892, but as explained previously, more is not necessarily better given midazolam's ceiling effect.

The Wood execution is perhaps even more probative. Despite being given over 750 milligrams of midazolam, Wood gasped and snorted for nearly two hours. These reactions were, according to Dr. Lubarsky, inconsistent with Wood being fully anesthetized, App. 177–178, and belie the claim that a lesser dose of 500 milligrams would somehow suffice. The Court attempts to distinguish the Wood execution on the ground that the timing of Arizona's administration of midazolam was different. *Ante*, at 892–893. But as Dr. Lubarsky testified, it did not "matter" whether in Wood's execution the "midazolam was introduced all at once or over . . . multiple doses," because "[t]he drug has a sufficient half life that the effect is cumulative." App. 220; see also Saari 253 (midazolam's "elimination half-life ranges from 1.7 to 3.5 h[ours]").[6] Nor does the fact that Wood's dose of midazolam was paired with hydromorphone rather than a paralytic and potassium chromide, see *ante*, at 893, appear to have any relevance—other than that the use of this analgesic drug may have meant that Wood did not experience the same degree of searing pain that an inmate executed under Oklahoma's protocol may face.

By contrast, Florida's use of this same three-drug protocol in 11 executions, see *ante*, at 892 (citing Brief for State of Florida as *Amicus Curiae* 1), tells us virtually nothing. Although these executions have featured no obvious mishaps, the key word is "obvious." Because the protocol involves the administration of a powerful paralytic, it is, as Drs. Sasich and Lubarsky explained, impossible to tell whether the condemned inmate in fact remained unconscious. App. 218, 273; see also *Baze*, 553 U. S., at 71 (Stevens, J., concurring in judgment). Even in these executions, moreover, there have

[6] The Court asserts that the State refuted these contentions, pointing to Dr. Evans' testimony that 750 milligrams of the drug "might not have the effect that was sought" if administered over an hour. Tr. 667; see *ante*, at 888, n. 6. But as has been the theme here, this pronouncement was entirely unsupported, and appears to be contradicted by the secondary sources cited by petitioners' experts.

been indications of the inmates' possible awareness. See Brief for State of Alabama et al. as *Amici Curiae* 9–13 (describing the 11 Florida executions, and noting that some allegedly involved blinking and other movement after administration of the three drugs).[7]

Finally, none of the State's "safeguards" for administering these drugs would seem to mitigate the substantial risk that midazolam will not work, as the Court contends. See *ante*, at 886. Protections ensuring that officials have properly secured a viable IV site will not enable midazolam to have an effect that it is chemically incapable of having. Nor is there any indication that the State's monitoring of the inmate's consciousness will be able to anticipate whether the inmate will *remain* unconscious while the second and third drugs are administered. No one questions whether midazolam can induce unconsciousness. The problem, as Lockett's execution vividly illustrates, is that an unconscious inmate may be awakened by the pain and respiratory distress caused by administration of the second and third drugs. At that point, even if it were possible to determine whether the inmate is conscious—dubious, given the use of a paralytic—it is already too late. Presumably for these reasons, the Tenth Circuit characterized the District Court's reliance on these procedural mechanisms as "not relevant to its rejection of [petitioners'] claims regarding the inherent characteristics of midazolam." *Warner*, 776 F. 3d, at 733.

C

The Court not only disregards this record evidence of midazolam's inadequacy, but also fails to fully appreciate the procedural posture in which this case arises. Petitioners

[7] The fact that courts in Florida have approved the use of midazolam in this fashion is arguably slightly more relevant, though it is worth noting that the majority of these decisions were handed down before the Lockett and Wood executions, and that some relied, as here, on Dr. Evans' testimony. See *ante*, at 882.

have not been accorded a full hearing on the merits of their claim. They were granted only an abbreviated evidentiary proceeding that began less than three months after the State issued its amended execution protocol; they did not even have the opportunity to present rebuttal evidence after Dr. Evans testified. They sought a preliminary injunction, and thus were not required to prove their claim, but only to show that they were likely to succeed on the merits. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008); *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006).

Perhaps the State could prevail after a full hearing, though this would require more than Dr. Evans' unsupported testimony. At the preliminary injunction stage, however, petitioners presented compelling evidence suggesting that midazolam will not work as the State intends. The State, by contrast, offered absolutely no contrary evidence worth crediting. Petitioners are thus at the very least *likely* to prove that, due to midazolam's inherent deficiencies, there is a constitutionally intolerable risk that they will be awake, yet unable to move, while chemicals known to cause "excruciating pain" course through their veins. *Baze*, 553 U. S., at 71 (Stevens, J., concurring in judgment).

III

The Court's determination that the use of midazolam poses no objectively intolerable risk of severe pain is factually wrong. The Court's conclusion that petitioners' challenge also fails because they identified no available alternative means by which the State may kill them is legally indefensible.

A

This Court has long recognized that certain methods of execution are categorically off limits. The Court first confronted an Eighth Amendment challenge to a method of execution in *Wilkerson* v. *Utah*, 99 U. S. 130 (1879). Although *Wilkerson* approved the particular method at issue—the fir-

ing squad—it made clear that "public dissection," "burning alive," and other "punishments of torture . . . in the same line of unnecessary cruelty, are forbidden by [the Eighth A]mendment to the Constitution." *Id.*, at 135–136. Eleven years later, in rejecting a challenge to the first proposed use of the electric chair, the Court again reiterated that "if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." *In re Kemmler*, 136 U. S. 436, 446 (1890).

In the more than a century since, the Members of this Court have often had cause to debate the full scope of the Eighth Amendment's prohibition of cruel and unusual punishment. See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*). But there has been little dispute that it at the very least precludes the imposition of "barbarous physical punishments." *Rhodes* v. *Chapman*, 452 U. S. 337, 345 (1981); see, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277, 284 (1983); *id.*, at 312–313 (Burger, C. J., dissenting); *Baze*, 553 U. S., at 97–99 (THOMAS, J., concurring in judgment); *Harmelin* v. *Michigan*, 501 U. S. 957, 976 (1991) (opinion of SCALIA, J.). Nor has there been any question that the Amendment prohibits such "inherently barbaric punishments *under all circumstances*." *Graham* v. *Florida*, 560 U. S. 48, 59 (2010) (emphasis added). Simply stated, the "Eighth Amendment *categorically* prohibits the infliction of cruel and unusual punishments." *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989) (emphasis added).

B

The Court today, however, would convert this categorical prohibition into a conditional one. A method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if*, and only if, there is a "known and

available alternative" method of execution. *Ante*, at 880. It deems *Baze* to foreclose any argument to the contrary. *Ante*, at 879.

Baze held no such thing. In the first place, the Court cites only the plurality opinion in *Baze* as support for its known-and-available-alternative requirement. See *ante*, at 879. Even assuming that the *Baze* plurality set forth such a requirement—which it did not—none of the Members of the Court whose concurrences were necessary to sustain the *Baze* Court's judgment articulated a similar view. See 553 U. S., at 71–77, 87 (Stevens, J., concurring in judgment); *id.*, at 94, 99–107 (THOMAS, J., concurring in judgment); *id.*, at 107–108, 113 (BREYER, J., concurring in judgment). In general, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (internal quotation marks omitted). And as the Court observes, *ante*, at 879, n. 2, the opinion of JUSTICE THOMAS, joined by JUSTICE SCALIA, took the broadest position with respect to the degree of intent that state officials must have in order to have violated the Eighth Amendment, concluding that only a method of execution deliberately designed to inflict pain, and not one simply designed with deliberate indifference to the risk of severe pain, would be unconstitutional. 553 U. S., at 94 (THOMAS, J., concurring in judgment). But this understanding of the Eighth Amendment's intent requirement is unrelated to, and thus not any broader or narrower than, the requirement the Court now divines from *Baze*. Because the position that a plaintiff challenging a method of execution under the Eighth Amendment must prove the availability of an alternative means of execution did not "represent the views of a majority of the Court," it was not the holding of the *Baze* Court. *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 81 (1987).

In any event, even the *Baze* plurality opinion provides no support for the Court's proposition. To be sure, that opinion

contains the following sentence: "[The condemned] must show that the risk is substantial when compared to the known and available alternatives." 553 U. S., at 61. But the meaning of that key sentence and the limits of the requirement it imposed are made clear by the sentence directly preceding it: "A stay of execution may not be granted *on grounds such as those asserted here* unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain." *Ibid.* (emphasis added). In *Baze*, the very premise of the petitioners' Eighth Amendment claim was that they had "identified a significant risk of harm [in Kentucky's protocol] that [could] be eliminated by adopting alternative procedures." *Id.*, at 51. Their basic theory was that even if the risk of pain was only, say, 25%, that risk would be objectively intolerable if there was an obvious alternative that would reduce the risk to 5%. See Brief for Petitioners in *Baze* v. *Rees*, O. T. 2007, No. 07–5439, p. 29 ("In view of the severity of the pain risked and the ease with which it could be avoided, Petitioners should not have been required to show a high likelihood that they would suffer such pain . . . "). Thus, the "grounds . . . asserted" for relief in *Baze* were that the State's protocol was intolerably risky given the alternative procedures the State could have employed.

Addressing this claim, the *Baze* plurality clarified that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative," 553 U. S., at 51; instead, to succeed in a challenge of this type, the comparative risk must be "substantial," *id.*, at 61. Nowhere did the plurality suggest that *all* challenges to a State's method of execution would require this sort of comparative-risk analysis. Recognizing the relevance of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks. If, for example, prison officials chose a method of exe-

cution that has a 99% chance of causing lingering and excruciating pain, certainly that risk would be objectively intolerable whether or not the officials ignored other methods in making this choice. Irrespective of the existence of alternatives, there are some risks "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to" them. *Helling* v. *McKinney*, 509 U. S. 25, 36 (1993) (emphasis in original).

That the *Baze* plurality's statement regarding a condemned inmate's ability to point to an available alternative means of execution pertained only to challenges premised on the existence of such alternatives is further evidenced by the opinion's failure to distinguish or even mention the Court's unanimous decision in *Hill* v. *McDonough*, 547 U. S. 573. *Hill* held that a § 1983 plaintiff challenging a State's method of execution need not "identif[y] an alternative, authorized method of execution." *Id.*, at 582. True, as the Court notes, *ante*, at 879–880, *Hill* did so in the context of addressing § 1983's pleading standard, rejecting the proposed alternative-means requirement because the Court saw no basis for the "[i]mposition of heightened pleading requirements," 547 U. S., at 582. But that only confirms that the Court in *Hill* did not view the availability of an alternative means of execution as an element of an Eighth Amendment claim: If it had, then requiring the plaintiff to plead this element would not have meant imposing a heightened standard at all, but rather would have been entirely consistent with "traditional pleading requirements." *Ibid.*; see *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009). The *Baze* plurality opinion should not be understood to have so carelessly tossed aside *Hill*'s underlying premise less than two years later.

C

In reengineering *Baze* to support its newfound rule, the Court appears to rely on a flawed syllogism. If the death penalty is constitutional, the Court reasons, then there must

be a means of accomplishing it, and thus some available method of execution must be constitutional. See *ante*, at 869, 880–881. But even accepting that the death penalty is, in the abstract, consistent with evolving standards of decency, but see *ante*, p. 908 (BREYER, J., dissenting), the Court's conclusion does not follow. The constitutionality of the death penalty may inform our conception of the degree of pain that would render a particular method of imposing it unconstitutional. See *Baze*, 553 U. S., at 47 (plurality opinion) (because "[s]ome risk of pain is inherent in any method of execution," "[i]t is clear . . . the Constitution does not demand the avoidance of all risk of pain"). But a method of execution that is "barbarous," *Rhodes*, 452 U. S., at 345, or "involve[s] torture or a lingering death," *Kemmler*, 136 U. S., at 447, does not become less so just because it is the only method currently available to a State. If all available means of conducting an execution constitute cruel and unusual punishment, then conducting the execution will constitute cruel and usual punishment. Nothing compels a State to perform an execution. It does not get a constitutional free pass simply because it desires to deliver the ultimate penalty; its ends do not justify any and all means. If a State wishes to carry out an execution, it must do so subject to the constraints that our Constitution imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.

For these reasons, the Court's available-alternative requirement leads to patently absurd consequences. Petitioners contend that Oklahoma's current protocol is a barbarous method of punishment—the chemical equivalent of being burned alive. But under the Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: Because petitioners failed to prove the availability of sodium thiopental

or pentobarbital, the State could execute them using whatever means it designated. But see *Baze*, 553 U. S., at 101–102 (THOMAS, J., concurring in judgment) ("It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that they involved risks of pain that could be eliminated by using alternative methods of execution").[8] The Eighth Amendment cannot possibly countenance such a result.

D

In concocting this additional requirement, the Court is motivated by a desire to preserve States' ability to conduct executions in the face of changing circumstances. See *ante*, at 869–871, 892. It is true, as the Court details, that States have faced "practical obstacle[s]" to obtaining lethal injection drugs since *Baze* was decided. *Ante*, at 869–870. One study concluded that recent years have seen States change their protocols "with a frequency that is unprecedented among execution methods in this country's history." Denno, Lethal Injection Chaos Post-*Baze*, 102 Geo. L. J. 1331, 1335 (2014).

But why such developments compel the Court's imposition of further burdens on those facing execution is a mystery. Petitioners here had no part in creating the shortage of execution drugs; it is odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty—actions which are, of course, wholly lawful. Nor, certainly, should these rapidly changing circumstances give us any greater confidence that the execution methods ultimately selected will be sufficiently humane to satisfy the Eighth Amendment. Quite the con-

[8] The Court protests that its holding does not extend so far, deriding this description of the logical implications of its legal rule as "simply not true" and "outlandish rhetoric." *Ante*, at 893. But presumably when the Court imposes a "requirement o[n] all Eighth Amendment method-of-execution claims," that requirement in fact applies to "*all*" methods of execution, without exception. *Ante*, at 867 (emphasis added).

trary. The execution protocols States hurriedly devise as they scramble to locate new and untested drugs, see *supra*, at 952–954, are all the more likely to be cruel and unusual—presumably, these drugs would have been the States' first choice were they in fact more effective. But see Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 65–79 (2007) (describing the hurried and unreasoned process by which States first adopted the original three-drug protocol). Courts' review of execution methods should be more, not less, searching when States are engaged in what is in effect human experimentation.

It is also worth noting that some condemned inmates may read the Court's surreal requirement that they identify the means of their death as an invitation to propose methods of executions less consistent with modern sensibilities. Petitioners here failed to meet the Court's new test because of their assumption that the alternative drugs to which they pointed, pentobarbital and sodium thiopental, were available to the State. See *ante*, at 878–879. This was perhaps a reasonable assumption, especially given that neighboring Texas and Missouri still to this day continue to use pentobarbital in executions. See Death Penalty Information Center, Execution List 2015, online at www.deathpenaltyinfo.org/execution-list-2015 (as visited June 26, 2015, and available in Clerk of Court's case file).

In the future, however, condemned inmates might well decline to accept States' current reliance on lethal injection. In particular, some inmates may suggest the firing squad as an alternative. Since the 1920's, only Utah has utilized this method of execution. See S. Banner, The Death Penalty 203 (2002); Johnson, Double Murderer Executed by Firing Squad in Utah, N. Y. Times, June 19, 2010, p. A12. But there is evidence to suggest that the firing squad is significantly more reliable than other methods, including lethal injection using the various combinations of drugs thus far developed. See A. Sarat, Gruesome Spectacles: Botched Executions and

America's Death Penalty, App. A, p. 177 (2014) (calculating that while 7.12% of the 1,054 executions by lethal injection between 1900 and 2010 were "botched," none of the 34 executions by firing squad had been). Just as important, there is some reason to think that it is relatively quick and painless. See Banner, *supra*, at 203.

Certainly, use of the firing squad could be seen as a devolution to a more primitive era. See *Wood* v. *Ryan*, 759 F. 3d 1076, 1103 (CA9 2014) (Kozinski, C. J., dissenting from denial of rehearing en banc). That is not to say, of course, that it would therefore be unconstitutional. But lethal injection represents just the latest iteration of the States' centuries-long search for "neat and non-disfiguring homicidal methods." C. Brandon, The Electric Chair: An Unnatural American History 39 (1999) (quoting Editorial, New York Herald, Aug. 10, 1884); see generally Banner, *supra*, at 169–207. A return to the firing squad—and the blood and physical violence that comes with it—is a step in the opposite direction. And some might argue that the visible brutality of such a death could conceivably give rise to its own Eighth Amendment concerns. See *Campbell* v. *Wood*, 511 U. S. 1119, 1121–1123 (1994) (Blackmun, J., dissenting from denial of stay of execution and certiorari); *Glass* v. *Louisiana*, 471 U. S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari). At least from a condemned inmate's perspective, however, such visible yet relatively painless violence may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication. The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see. But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names.

* * *

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper* v. *Sim-*

mons, 543 U. S. 551, 560 (2005). Today, however, the Court absolves the State of Oklahoma of this duty. It does so by misconstruing and ignoring the record evidence regarding the constitutional insufficiency of midazolam as a sedative in a three-drug lethal injection cocktail, and by imposing a wholly unprecedented obligation on the condemned inmate to identify an available means for his or her own execution. The contortions necessary to save this particular lethal injection protocol are not worth the price. I dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 978 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 8 THROUGH
OCTOBER 2, 2015

JUNE 8, 2015

Certiorari Granted—Vacated and Remanded

No. 13–697. MADRIGAL-BARCENAS *v.* LYNCH, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mellouli* v. *Lynch*, 575 U. S. 798 (2015). Reported below: 507 Fed. Appx. 715.

No. 13–8837. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Elonis* v. *United States*, 575 U. S. 723 (2015). Reported below: 736 F. 3d 981.

No. 14–235. BANK OF AMERICA, N. A. *v.* BELLO. C. A. 11th Cir. Reported below: 563 Fed. Appx. 691;

No. 14–580. BANK OF AMERICA, N. A. *v.* WAITS. C. A. 11th Cir. Reported below: 578 Fed. Appx. 827;

No. 14–581. BANK OF AMERICA, N. A. *v.* LEE ET AL. C. A. 11th Cir. Reported below: 578 Fed. Appx. 835;

No. 14–600. BANK OF AMERICA, N. A. *v.* VANDER IEST. C. A. 11th Cir. Reported below: 578 Fed. Appx. 906;

No. 14–652. BANK OF AMERICA, N. A. *v.* NEMCIK. C. A. 11th Cir. Reported below: 573 Fed. Appx. 917;

No. 14–749. BANK OF AMERICA, N. A. *v.* HALL ET AL. C. A. 11th Cir.;

No. 14–750. BANK OF AMERICA, N. A. *v.* PHILLIPS ET AL. C. A. 11th Cir. Reported below: 575 Fed. Appx. 876;

No. 14–787. BANK OF AMERICA, N. A. *v.* VANDER IEST. C. A. 11th Cir. Reported below: 580 Fed. Appx. 865;

No. 14–828. BANK OF NEW YORK MELLON, FKA BANK OF NEW YORK *v.* LANG. C. A. 11th Cir. Reported below: 580 Fed. Appx. 890; and

No. 14–829. BANK OF AMERICA, N. A. *v.* FARMER. C. A. 11th Cir. Reported below: 580 Fed. Appx. 893. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bank of America, N. A.* v. *Caulkett*, 575 U. S. 790 (2015).

No. 14–808. NOBACH *v.* WOODLAND VILLAGE NURSING CENTER, INC. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768 (2015). Reported below: 762 F. 3d 442.

No. 14–1052. BELMONT HOLDINGS CORP. ET AL. *v.* DEUTSCHE BANK AG ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. 175 (2015). Reported below: 572 Fed. Appx. 58.

No. 14–7915. ABDUL-AZIZ *v.* RICCI ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Holt* v. *Hobbs*, 574 U. S. 352 (2015). Reported below: 569 Fed. Appx. 62.

Certiorari Dismissed

No. 14–9200. LAVERGNE *v.* BAJAT ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 591 Fed. Appx. 270.

No. 14–9323. WARE *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–9530. SNIPES *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 14M122. WILKINS *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY, ET AL.; and

No. 14M123. SHELTON *v.* BITER, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M124. JOLLEY *v.* DEPARTMENT OF JUSTICE. Motion for leave to proceed as a veteran granted.

No. 14M125. GARCIA *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 14–8806. TEICHMANN *v.* NEW YORK. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 982] denied.

No. 14–9160. SCOTT *v.* LACKEY ET AL. C. A. 3d Cir.;

No. 14–9373. CRUZ MEZA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist.; and

No. 14–9495. TADLOCK *v.* FOXX, SECRETARY OF TRANSPORTATION. C. A. 10th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 29, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9865. IN RE BUSH. Petition for writ of habeas corpus denied.

No. 14–9760. IN RE MILL. Petition for writ of mandamus denied.

No. 14–9151. IN RE LAMB. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed.

Certiorari Granted

No. 14–419. LUIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 564 Fed. Appx. 493.

No. 14–990. SHAPIRO ET AL. *v.* MACK, CHAIRMAN, MARYLAND STATE BOARD OF ELECTIONS, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 584 Fed. Appx. 140.

No. 14–1146. TYSON FOODS, INC. *v.* BOUAPHAKEO ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.

C. A. 8th Cir. Certiorari granted. Reported below: 765 F. 3d 791.

Certiorari Denied

No. 14–772. FIELDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 443.

No. 14–847. FORT BEND COUNTY, TEXAS *v.* DAVIS. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 3d 480.

No. 14–882. U. S. LEGAL SERVICES GROUP, L. P. *v.* ATALESE. Sup. Ct. N. J. Certiorari denied. Reported below: 219 N. J. 430, 99 A. 3d 306.

No. 14–883. STATE OF MICHIGAN WORKERS' COMPENSATION INSURANCE AGENCY ET AL. *v.* ACE AMERICAN INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 10.

No. 14–891. SUPERVALU, INC., ET AL. *v.* D&G, INC., DBA GARY'S FOODS. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 3d 728.

No. 14–992. MAYHEW, COMMISSIONER, MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 772 F. 3d 80.

No. 14–1060. AURORA ENERGY SERVICES, LLC, ET AL. *v.* ALASKA COMMUNITY ACTION ON TOXICS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 3d 1169.

No. 14–1062. GARCIA-PADILLA, GOVERNOR OF PUERTO RICO *v.* DIAZ-CARRASQUILLO. Sup. Ct. P. R. Certiorari denied. Reported below: 191 D. P. R. 97.

No. 14–1070. G. M., BY AND THROUGH HIS NEXT FRIEND, LOPEZ *v.* ALEDO INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 262.

No. 14–1193. DIAMOND *v.* LOCAL 807 LABOR-MANAGEMENT PENSION FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 595 Fed. Appx. 22.

No. 14–1197. WILLIAMS *v.* NASSAU COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 56.

No. 14–1211. ACCORD ET AL. *v.* PHILIP MORRIS USA INC. ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–1221. STIEGEL *v.* PETERS TOWNSHIP, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 600 Fed. Appx. 60.

No. 14–1226. SWEPORTS, LTD. *v.* MUCH SHELIST, P. C., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 364.

No. 14–1239. BUDIK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 14–1244. CHIQUILLO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 14–1259. CALEB ET AL. *v.* GRIER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 227.

No. 14–1261. STONE *v.* LOUISIANA DEPARTMENT OF REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 332.

No. 14–1271. MOODY *v.* VOZEL, DEPUTY DIRECTOR AND CHIEF ENGINEER, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 3d 1093.

No. 14–1292. HOLZ *v.* FOSTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–1297. MOHAMED *v.* LYNCH, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 804.

No. 14–1298. CARLSON *v.* MARIN GENERAL SERVICES AUTHORITY ET AL. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 14–1300. SEA SHEPHERD CONSERVATION SOCIETY *v.* INSTITUTE OF CETACEAN RESEARCH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 3d 935 and 588 Fed. Appx. 701.

No. 14–1305. TROWBRIDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 298.

No. 14–1307. AL-DABAGH *v.* CASE WESTERN RESERVE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 3d 355.

No. 14–1311. FISCHER ET AL. *v.* ALLAMVASUTAK ZRT. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 847.

No. 14–1325. TROYER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 897.

No. 14–1333. MILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 3d 563.

No. 14–1339. KIVISTO *v.* SOIFER. C. A. 11th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 522.

No. 14–8355. CLEWIS *v.* MEDCO HEALTH SOLUTIONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 469.

No. 14–8665. ESPARZA *v.* JENKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 3d 615.

No. 14–8976. GILMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 390.

No. 14–9156. NIXON *v.* ABBOTT, GOVERNOR OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 279.

No. 14–9159. NORMAN *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–9163. STRAHORN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 152 So. 3d 594.

No. 14–9164. ELLISON *v.* EVANS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 586 Fed. Appx. 825.

No. 14–9166. CASTILLO *v.* JOHNSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 499.

No. 14–9169. WILSON *v.* JOYNER, CORRECTIONAL ADMINISTRATOR, HARNETT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 216.

No. 14–9170. M. K. *v.* N. B. Ct. App. Ind. Certiorari denied.

No. 14–9172. DELK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9173. MOLINE *v.* CBS NEWS INC. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 14–9174. REISER *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 14–9176. KHA THAO PHAM *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–9178. RICHARDSON *v.* KNIGHT, WARDEN. Sup. Ct. Ind. Certiorari denied. Reported below: 22 N. E. 3d 580.

No. 14–9180. KING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–9187. YHWHNEWBN *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 14–9191. ROACH *v.* BOTTOM, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9195. SANDS-WEDEWARD *v.* LOCAL 306, NATIONAL POSTAL MAIL HANDLERS UNION. C. A. 7th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 333.

No. 14–9196. RAMSEY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–9197. MOATS *v.* WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 208.

No. 14–9205. WARNER *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2013–0168 (La. App. 4 Cir. 3/12/14), 137 So. 3d 715.

No. 14–9207. BOB *v.* ALAN M. CASS AND ASSOCIATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–9211. ADKINS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 14–9218. BRADFORD *v.* GORDY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9219. STEWART *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–9225. DUC VAN NGUYEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 14–9232. CRUSE *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–9260. MARCEAUX *v.* UNITED STATES MARINE CORPS. C. A. 6th Cir. Certiorari denied.

No. 14–9302. BROZ *v.* DEUTSCHE BANK NATIONAL TRUST CO. Sup. Ct. Fla. Certiorari denied. Reported below: 160 So. 3d 893.

No. 14–9306. PALAFOX *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 231 Cal. App. 4th 68, 179 Cal. Rptr. 3d 789.

No. 14–9312. TEAGUE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 14–9315. SCOTT *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–2061 (La. App. 1 Cir. 5/2/14).

No. 14–9330. FURS-JULIUS *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 510.

No. 14–9339. EDGARD *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9347. LEONG *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–9370. HOLMES *v.* WASHINGTON (two judgments). Ct. App. Wash. Certiorari denied.

No. 14–9392. DIAMANTOPOULOS *v.* RICKETTS, GOVERNOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 14–9410. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 435.

No. 14–9441. MINTO *v.* MAFNAS, COMMISSIONER, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 712.

No. 14–9446. TRUJILLO *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 14–9460. KENDRICK *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 14–9462. SMALL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 155 So. 3d 354.

No. 14–9471. KARSTEN *v.* CAMACHO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 835.

No. 14–9472. KWONG *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 153 Conn. App. 911, 101 A. 3d 404.

No. 14–9477. JAMES *v.* CARTLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 72.

No. 14–9527. FAIRCHILD-LITTLEFIELD *v.* CAVAZOS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9541. DAHLK *v.* WOOMER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 523.

No. 14–9542. ELAM *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9555. BLAKENEY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 631 Pa. 1, 108 A. 3d 739.

No. 14–9562. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 14–9563. HENRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 201.

No. 14–9564. SOLIS-JARAMILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 720.

No. 14–9567. Moreno-Azua *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 150.

No. 14–9570. Jones *v.* Pierce, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 599 Fed. Appx. 433.

No. 14–9571. March *v.* McAllister, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 450.

No. 14–9573. Gathings *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–9577. Rivers *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 14–9578. Grado-Meza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 717.

No. 14–9579. Hawthorne *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 676.

No. 14–9586. Futch *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9587. Green *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 3d 1352.

No. 14–9588. Ferranti *v.* Atkinson, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 129.

No. 14–9591. Simons *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 717.

No. 14–9592. Marshall *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9595. Delval-Estrada, aka Ochoa Olguin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 777.

No. 14–9596. Devos *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 649.

No. 14–9597. Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 317.

No. 14–9599. Bell, aka El-Bey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 72.

No. 14–9600. MILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 615.

No. 14–9602. SARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 176.

No. 14–9606. KABIR *v.* BRENNAN, POSTMASTER GENERAL (two judgments). C. A. 6th Cir. Certiorari denied.

No. 14–9610. MCCRACKEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 530.

No. 14–9612. SCRIPPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 Fed. Appx. 443.

No. 14–9621. JACKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 570.

No. 14–9622. TRALA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 211.

No. 14–9624. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 3d 769.

No. 14–9626. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9631. FULLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 346.

No. 14–9633. YOUNG *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9637. BEAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9638. ARBODELA, AKA ORTIZ, AKA RIVERA GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9639. BARTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9640. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 311.

No. 14–9641. LIMON-JUVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 601.

No. 14–9651. VIOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9652. DOHOU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9653. INGRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 151.

No. 14–9654. MUHAMMAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9658. BARRETO ABILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 387.

No. 14–9663. CHAPMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 623.

No. 14–9666. WILKERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 587 Fed. Appx. 703.

No. 14–9668. VASQUEZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 280.

No. 14–9670. KIEFFER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 653.

No. 14–9675. REID *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 3d 990.

No. 14–9679. MCCAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 220.

No. 14–9681. MICKENS, AKA DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 746.

No. 14–9688. MOSES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9689. MELENDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 775 F. 3d 50.

No. 14–9696. ESPINOZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 3d 689.

No. 14–9697. LYNCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 191.

No. 14–9698. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 890.

No. 14–9699. ROBBINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9700. NDIAGU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 632.

No. 14–9702. CARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 546.

No. 14–9704. WATKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 84.

No. 14–9710. SEVERINO-BATISTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 352.

No. 14–9713. SMITH ET AL. *v.* UNITED STATES (Reported below: 775 F. 3d 1262); MOSS *v.* UNITED STATES (592 Fed. Appx. 914); PEREZ-PRADO *v.* UNITED STATES (598 Fed. Appx. 739); PHILLIPS *v.* UNITED STATES (598 Fed. Appx. 742); LOWRY *v.* UNITED STATES (599 Fed. Appx. 358); WILLIAMS *v.* UNITED STATES (605 Fed. Appx. 833); and HEPBURN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9721. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 777 F. 3d 984.

No. 14–9730. MAXWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 778 F. 3d 719.

No. 14–9748. LAGONA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 4.

No. 14–704. JACKSON ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 3d 953.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

"Self-defense is a basic right" and "the central component" of the Second Amendment's guarantee of an individual's right to keep and bear arms. *McDonald* v. *Chicago*, 561 U. S. 742, 767 (2010) (emphasis deleted). Less than a decade ago, we explained that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the

Second Amendment because it "ma[de] it impossible for citizens to use [their firearms] for the core lawful purpose of self-defense." *District of Columbia* v. *Heller*, 554 U. S. 570, 630 (2008). Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition.

I

Section 4512 of the San Francisco Police Code provides that "[n]o person shall keep a handgun within a residence owned or controlled by that person unless" (1) "the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice" or (2) "[t]he handgun is carried on the person of an individual over the age of 18" or "under the control of a person who is a peace officer under [California law]." San Francisco Police Code, Art. 45, §§ 4512(a), (c) (2015). The law applies across the board, regardless of whether children are present in the home. A violation of the law is punishable by up to six months of imprisonment and/or a fine of up to $1,000. § 4512(e).

Petitioners—six San Francisco residents who keep handguns in their homes, as well as two organizations—filed suit to challenge this law under the Second Amendment. According to petitioners, the law impermissibly rendered their handguns "[in]operable for the purpose of immediate self-defense" in the home. *Heller*, *supra*, at 635. Because it is impossible to "carry" a firearm on one's person while sleeping, for example, petitioners contended that the law effectively denies them their right to self-defense at times when their potential need for that defense is most acute. In support of that point, they cited a Department of Justice, Bureau of Justice Statistics, survey estimating that over 60 percent of all robberies of occupied dwellings between 2003 and 2007 occurred between 6 p.m. and 6 a.m.

The District Court for the Northern District of California denied them a preliminary injunction, and the U. S. Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals readily acknowledged that the law "burdens the core of the Second Amendment right" because "[h]aving to retrieve handguns from locked containers or removing trigger locks makes it more

difficult 'for citizens to use them for the core lawful purpose of self-defense' in the home." 746 F. 3d 953, 964 (2014) (quoting *Heller*, *supra*, at 630). But it reasoned that this was not a "severe burden" justifying the application of strict scrutiny because "a modern gun safe may be opened quickly." 746 F. 3d, at 964. Applying intermediate scrutiny, the court evaluated San Francisco's proffered "evidence that 'guns kept in the home are most often used in suicides and against family and friends rather than in self-defense' and that children are particularly at risk of injury and death." *Id.*, at 965. The court concluded that the law served "a significant government interest by reducing the number of gun-related injuries and deaths from having an unlocked handgun in the home" and was "substantially related" to that interest. *Id.*, at 966.

II

The decision of the Court of Appeals is in serious tension with *Heller*. We explained in *Heller* that the Second Amendment codified a right "'inherited from our English ancestors,'" a key component of which is the right to keep and bear arms for the lawful purpose of self-defense. 554 U. S., at 599. We therefore rejected as inconsistent with the Second Amendment a ban on possession of handguns in the home because "handguns are the most popular weapon chosen by Americans for self-defense in the home" and because a trigger-lock requirement prevented residents from rendering their firearms "operable for the purpose of immediate self-defense." *Id.*, at 629, 635. San Francisco's law allows residents to *use* their handguns for the purpose of self-defense, but it prohibits them from *keeping* those handguns "operable for the purpose of *immediate* self-defense" when not carried on their person. The law thus burdens their right to self-defense at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed. There is consequently no question that San Francisco's law burdens the core of the Second Amendment right.

That burden is significant. One petitioner, an elderly woman who lives alone, explained that she is currently forced to store her handgun in a lockbox and that if an intruder broke into her home at night, she would need to "turn on the light, find [her] glasses, find the key to the lockbox, insert the key in the lock and unlock the box (under the stress of the emergency), and then get [her] gun before being in position to defend [herself]." Decla-

ration of Espanola Jackson in Support of Motion for Preliminary Injunction, Record in Case 3:09–cv–02143 (ND Cal.), Doc. 136–3, p. 2. As she is over 79 years old, that would "not [be] an easy task." *Ibid.* Another petitioner stated that she is forced to store her gun in a code-operated safe and, in the event of an emergency, would need to get to that safe, remember her code under stress, and correctly enter it before she could retrieve her gun and be in a position to defend herself. If she erroneously entered the number due to stress, the safe would impose a delay before she could try again. A third petitioner explained that he would face the same challenge and, in the event the battery drains on his battery-operated safe, would need to locate a backup key to access his handgun. In an emergency situation, the delay imposed by this law could prevent San Francisco residents from using their handguns for the lawful purpose of self-defense. And that delay could easily be the difference between life and death.

Since our decision in *Heller*, members of the Courts of Appeals have disagreed about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights. Compare *Heller* v. *District of Columbia*, 670 F. 3d 1244, 1252 (CADC 2011) ("We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny"), with *id.*, at 1271 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny"). One need not resolve that dispute to know that something was seriously amiss in the decision below. In that decision, the Court of Appeals recognized that the law "burdens the core of the Second Amendment right," yet concluded that, because the law's burden was not as "severe" as the one at issue in *Heller*, it was "not a substantial burden on the Second Amendment right itself." 746 F. 3d, at 963–965. But nothing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a "substantial burden" on the core of the Second Amendment right. And when a law burdens a constitutionally protected right, we have generally required a higher showing than the Court of Appeals demanded here. See generally *Heller*, 554 U. S., at 628–635; *Turner Broadcasting Sys-*

tem, Inc. v. *FCC*, 512 U. S. 622, 662 (1994) (explaining that even intermediate scrutiny requires that a regulation not "burden substantially more speech than is necessary to further the government's legitimate interests" (internal quotation marks omitted)).

The Court should have granted a writ of certiorari to review this questionable decision and to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights. See *Heller*, 554 U. S., at 634 ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis what is *really worth* insisting upon"); *id.*, at 635 (explaining that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

The Court's refusal to review this decision is difficult to account for in light of its repeated willingness to review splitless decisions involving alleged violations of other constitutional rights. See, *e. g.*, *Glossip* v. *Gross*, 574 U. S. 1133 (2015) (cert. granted) (Eighth Amendment); *Ontario* v. *Quon*, 560 U. S. 746 (2010) (Fourth Amendment); *Hill* v. *Colorado*, 530 U. S. 703 (2000) (First Amendment). Indeed, the Court has been willing to review splitless decisions involving alleged violations of rights it has never previously enforced. See, *e. g., BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996) (right to limit on punitive damages awards). And it has even gone so far as to review splitless decisions involving alleged violations of rights expressly foreclosed by precedent. See, *e. g.*, *Boumediene* v. *Bush*, 553 U. S. 723 (2008) (right of aliens held outside U. S. territory to the privilege of habeas corpus); *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in adult, consensual same-sex intimate behavior). I see no reason that challenges based on Second Amendment rights should be treated differently.

* * *

We warned in *Heller* that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." 554 U. S., at 634. The Court of Appeals in this case recognized that San Francisco's law burdened the core component of the Second Amendment guarantee, yet upheld the law. Because of the importance of the constitutional right at

stake and the questionable nature of the Court of Appeals' judgment, I would have granted a writ of certiorari.

No. 14–9417. EL-HAGE, AKA SABBUR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 589 Fed. Appx. 29.

Rehearing Denied

No. 14–806. TRIPLETT-FAZZONE *v.* CITY OF COLUMBUS DIVISION OF POLICE ET AL., 575 U. S. 913;

No. 14–1034. SCHMUDE *v.* TEXAS, 575 U. S. 963;

No. 14–5180. BAJO-GONZALEZ *v.* UNITED STATES, 574 U. S. 886;

No. 14–7845. SORO *v.* SORO, 575 U. S. 905;

No. 14–7934. AUGUST *v.* WARREN, WARDEN, 575 U. S. 917;

No. 14–7962. HAMMERSLEY *v.* COUNTY OF OCONTO, WISCONSIN, 575 U. S. 918;

No. 14–8242. PRINCE *v.* LOMA LINDA UNIVERSITY MEDICAL CENTER, 575 U. S. 953;

No. 14–8259. LUCIEN *v.* HOLDER, ATTORNEY GENERAL, 575 U. S. 941;

No. 14–8342. YEGOROV *v.* MELNICHUK, 575 U. S. 955;

No. 14–8354. CURRIE *v.* MISSOURI, 575 U. S. 965;

No. 14–8406. WILLIAMS *v.* RUSSELL, WARDEN, 575 U. S. 966;

No. 14–8411. JAIME REYNA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 575 U. S. 966;

No. 14–8431. RICHARDSON *v.* TEXAS WORKFORCE COMMISSION ET AL., 575 U. S. 967;

No. 14–8607. CASTEEL *v.* UNITED STATES, 575 U. S. 944; and

No. 14–8703. GRIFFITH *v.* NEW YORK, 575 U. S. 971. Petitions for rehearing denied.

JUNE 9, 2015

Miscellaneous Order

No. 14A1202 (14–9223). STRONG *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

Certiorari Denied

No. 14–10020 (14A1221). STRONG *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 14–10137 (14A1239). STRONG *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 462 S. W. 3d 732.

JUNE 15, 2015

Certiorari Granted—Vacated and Remanded

No. 14–851. BANK OF AMERICA, N. A. *v.* PEELE. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–852. BANK OF AMERICA, N. A. *v.* JOHNSON. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–853. BANK OF AMERICA, N. A. *v.* BOYKINS. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–854. BANK OF AMERICA, N. A. *v.* HAMILTON-PRESHA. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–855. BANK OF AMERICA, N. A. *v.* GARRO. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–856. BANK OF AMERICA, N. A. *v.* BELOTSERKOVSKY. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–979. BANK OF AMERICA, N. A. *v.* LAKHANI. C. A. 11th Cir. Reported below: 583 Fed. Appx. 896; and

No. 14–980. BANK OF AMERICA, N. A. *v.* CORRAD. C. A. 11th Cir. Reported below: 583 Fed. Appx. 904. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bank of America, N. A.* v. *Caulkett*, 575 U. S. 790 (2015).

Certiorari Dismissed

No. 14–9253. ARIEGWE *v.* KIRKEGARD, WARDEN, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance

with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–9267. EVANS *v.* OHIO. Ct. App. Ohio, 4th App. Dist., Scioto County. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–9284. SOLOMON *v.* KESS-LEWIS ET AL. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 107 A. 3d 1118.

No. 14–9291. MANLEY *v.* MONROE COUNTY PROSECUTOR. Ct. App. Ind. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 16 N. E. 3d 488.

No. 14–9443. KOON *v.* CARTLEDGE, WARDEN, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 585 Fed. Appx. 32.

No. 14–9801. GARCON *v.* CRUZ, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 581 Fed. Appx. 193.

Miscellaneous Orders

No. 14M126. RUCKER *v.* MOORE, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 14M127. WHITEHEAD *v.* WHITE & CASE LLP ET AL. Motion for leave to proceed as a veteran denied.

No. 14M128. HOPKINS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 14–8499. MANKO *v.* LENOX HILL HOSPITAL. Ct. App. N. Y. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 959] denied.

No. 14–8617. HORSLEY *v.* UNIVERSITY OF ALABAMA ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 961] denied.

No. 14–8931. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 960] denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 14–9320. MISSUD *v.* CALIFORNIA ET AL. C. A. 9th Cir.; and

No. 14–9799. HARDRICK *v.* UNITED STATES. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 6, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9891. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 14–1238. IN RE JOLING ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 13–1496. DOLLAR GENERAL CORP. ET AL. *v.* MISSISSIPPI BAND OF CHOCTAW INDIANS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 746 F. 3d 167.

No. 14–844. BRUCE *v.* SAMUELS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 761 F. 3d 1.

Certiorari Denied

No. 14–748. VOLVO POWERTRAIN CORP. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 758 F. 3d 330.

No. 14–807. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* DEBRUCE. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 3d 1263.

No. 14–1077. LEAKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 96 A. 3d 1.

No. 14–1111. ASSOCIATED BUILDERS & CONTRACTORS INC. *v.* SHIU ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 773 F. 3d 257.

No. 14–1121. HUI HSIUNG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 778 F. 3d 738.

No. 14–1122. MOTOROLA MOBILITY LLC *v.* AU OPTRONICS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 3d 816.

No. 14–1212. RAMSAY *v.* TAPPER. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 204.

No. 14–1218. JOHNSON *v.* CHICAGO TRIBUNE CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 133087–U.

No. 14–1220. SAFARI ET AL. *v.* KAISER FOUNDATION HEALTH PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 849.

No. 14–1227. KUGLER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 110, 357 Wis. 2d 722, 855 N. W. 2d 904.

No. 14–1229. MOTOYAMA *v.* HAWAII DEPARTMENT OF TRANSPORTATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 399.

No. 14–1250. WIEDER *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 569 Fed. Appx. 28.

No. 14–1264. RICKARD *v.* SWEDISH MATCH NORTH AMERICA, INC. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 3d 181.

No. 14–1279. WASHINGTON *v.* WALKER. Sup. Ct. Wash. Certiorari denied. Reported below: 182 Wash. 2d 463, 341 P. 3d 976.

No. 14–1296. OHNEMUS *v.* THOMPSON. C. A. 6th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 864.

No. 14–1330. DORN *v.* ANNUCCI, ACTING COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION. C. A. 2d Cir. Certiorari denied.

No. 14–1338. KUNG DA CHANG *v.* SHANGHAI COMMERCIAL BANK LTD. Ct. App. Wash. Certiorari denied. Reported below: 183 Wash. App. 1007.

No. 14–1357. TIRADO TAMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 654.

No. 14–8115. CORROTHERS, AKA CARROTHERS, AKA CAROTHER, AKA COROTHERS, AKA CAROTHERS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 148 So. 3d 278.

No. 14–8449. SPENCER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 3d 1132.

No. 14–8491. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL. Ct. App. Mich. Certiorari denied.

No. 14–8780. COHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 196.

No. 14–8793. ALLEBBAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 492.

No. 14–8943. HAUGABOOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9220. ROBINSON *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 14–9240. HACKNEY *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9247. SOLORIO *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9254. SANCHEZ *v.* LIZARRAGA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9264. CHANCE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 14–9269. SAENZ *v.* STEPHENS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–9270. CHANCE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 150 So. 3d 1136.

No. 14–9283. BURDA *v.* KORENMAN, FKA BURDA. Super. Ct. Pa. Certiorari denied. Reported below: 96 A. 3d 1084.

No. 14–9286. ROBITSCHEK *v.* ESCOVEDO. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–9298. MASTERSON *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 282.

No. 14–9300. AGUIRRE *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 586.

No. 14–9304. ANGEL MENDEZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–9309. YATES *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 859 N. W. 2d 672.

No. 14–9311. TURNER *v.* COLEMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9313. THOMAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 14–9325. WATSON *v.* MCCLAIN ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–9327. WEBB *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 216 Md. App. 759.

No. 14–9328. MARION *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9342. PETERKA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 160 So. 3d 897.

No. 14–9343. CRUZ *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 89.

No. 14–9344. FORT *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2014-Ohio-3412, 17 N. E. 3d 1172.

No. 14–9397. HUTCHINSON *v.* RAZDAN. C. A. 11th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 795.

No. 14–9433. BLACKSHEAR *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 158 So. 3d 564.

No. 14–9501. YOUNG *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 14–9513. BLAINE *v.* NORMAN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 14–9516. PEEPLES *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9517. PHILLIPS *v.* BARNES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9518. FONG SOTO *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 3d 947 and 583 Fed. Appx. 782.

No. 14–9519. HENDERSON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 289 Neb. 271, 854 N. W. 2d 616.

No. 14–9545. POWELL *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 392.

No. 14–9556. BRIDGES *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–9576. GRICE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 753, 767 S. E. 2d 312.

No. 14–9580. HAWES *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 2014 WY 127, 335 P. 3d 1073.

No. 14–9616. M. G. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied. Reported below: 228 Cal. App. 4th 1268, 176 Cal. Rptr. 3d 459.

No. 14–9619. CLARK *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 452 S. W. 3d 268.

No. 14–9630. FLOWERS *v.* MCEWEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 867.

No. 14–9678. JEFFERSON *v.* BURGER KING CORP. ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 160 So. 3d 448.

No. 14–9694. DEMOUCHETTE *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 14–9711. TUCKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 616.

No. 14–9725. RENE DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9728. GIDDENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 889.

No. 14–9729. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 985.

No. 14–9734. HODGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9737. BURGOS-ORTEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 777 F. 3d 1047.

No. 14–9738. BEALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9739. GATSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 3d 405.

No. 14–9745. DIEHL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 568.

No. 14–9761. WASHINGTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 775 F. 3d 405.

No. 14–9763. GIBSON *v.* WILSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 285.

No. 14–9769. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9771. ERNESTO ISRAEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9772. GOINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 284.

No. 14–9774. BRITTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 608 Fed. Appx. 111.

No. 14–9777. GABE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9785. CRENSHAW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9792. FOOTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 784 F. 3d 931.

No. 14–9795. HERNANDEZ-MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9796. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 241.

No. 14–9803. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9805. DUNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 101.

No. 14–9809. GARCIA-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 262.

No. 14–9812. ELIZALDE-ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 715.

No. 14–9813. DIAZ-BERMUDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 309.

No. 14–9815. CARABALLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9846. RODRIGUEZ GIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 607 Fed. Appx. 956.

No. 14–9849. TORRES-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 398.

No. 14–9851. AYALA-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 866.

No. 14–9852. MCDANIELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 763.

No. 14–910. ALLSTATE INSURANCE CO. *v.* JIMENEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 9th Cir. Motions of Retail Litigation Center, Inc.; Chamber of Commerce of the United States of America et al.; Equal Employment Advisory Council; Product Liability Advisory Council, Inc.; and DRI–The Voice of the Defense Bar for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 765 F. 3d 1161.

No. 14–1074. REPUBLIC OF IRAQ *v.* ABB AG ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 768 F. 3d 145.

No. 14–1172. WALKER-MCGILL, PRESIDENT OF THE NORTH CAROLINA MEDICAL BOARD, ET AL. *v.* STUART ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE SCALIA dissents. Reported below: 774 F. 3d 238.

No. 14–8589. HITTSON *v.* CHATMAN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 3d 1210.

JUSTICE GINSBURG, with whom JUSTICE KAGAN joins, concurring.

The Antiterrorism and Effective Death Penalty Act of 1996 directs a federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims. Only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented" may a federal court grant habeas relief premised on a federal claim previously adjudicated on the merits in state court. 28 U. S. C. § 2254(d).

This task is straightforward when the last state court to decide a claim has issued an opinion explaining its decision. In that

situation, a federal habeas court simply evaluates deferentially the specific reasons set out by the state court. *E. g.*, *Porter* v. *McCollum*, 558 U. S. 30, 39–44 (2009) (*per curiam*); *Rompilla* v. *Beard*, 545 U. S. 374, 388–392 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 523–538 (2003).

In *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991), this Court stated how federal courts should handle a more challenging circumstance: when the last state court to reject a prisoner's claim issues only an unexplained order. "Where there has been one reasoned state judgment rejecting a federal claim," the Court held, federal habeas courts should presume that "later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.*, at 803. "[U]nexplained orders," the Court recognized, typically reflect "agree[ment] . . . with the reasons given below." *Id.*, at 804. Accordingly, "a presumption . . . which simply 'looks through' [unexplained orders] to the last reasoned decision . . . most nearly reflects the role [such orders] are ordinarily intended to play." *Ibid.*

In this case, the Eleventh Circuit decided that it would no longer apply the *Ylst* "look through" presumption—at least when assessing the Georgia Supreme Court's unexplained denial of a certificate of probable cause to appeal. Although it had long "'look[ed] through' summary decisions by state appellate courts," the Eleventh Circuit believed that a recent decision of this Court—*Harrington* v. *Richter*, 562 U. S. 86 (2011)—had superseded *Ylst*. *Hittson* v. *GDCP Warden*, 759 F. 3d 1210, 1232, n. 25 (2014). Accordingly, instead of "review[ing] the reasoning given in the [last reasoned state court] decision," the Eleventh Circuit held it would consider hypothetical theories that could have supported the Georgia Supreme Court's unexplained order. *Id.*, at 1233, n. 25.

The Eleventh Circuit plainly erred in discarding *Ylst*. In *Richter*, the only state court to reject the prisoner's federal claim had done so in an unexplained order. See 562 U. S., at 96–97. With no reasoned opinion to look through to, the Court had no occasion to cast doubt on *Ylst*. To the contrary, the Court cited *Ylst* approvingly in *Richter*, 562 U. S., at 99–100, and did so again two years later in *Johnson* v. *Williams*, 568 U. S. 287, 297, n. 1 (2013).

The Eleventh Circuit believed that the following language from *Richter* superseded *Ylst* and required the appeals court to hypothesize reasons that might have supported the state court's

unexplained order: "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, *could* have supported, the state court's decision." 562 U. S., at 102 (emphasis added). See 759 F. 3d, at 1232. *Richter*'s hypothetical inquiry was necessary, however, because *no* state court "opinion explain[ed] the reasons relief ha[d] been denied." 562 U. S., at 98. In that circumstance, a federal habeas court can assess whether the state court's decision "*involved* an unreasonable application of . . . clearly established Federal law," § 2254(d)(1) (emphasis added), only by hypothesizing reasons that might have supported it. But *Richter* makes clear that where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual "arguments or theories [that] supported . . . the state court's decision." *Id.*, at 102.

The Eleventh Circuit also appears to have thought it relevant that the Georgia Supreme Court exercises mandatory, not discretionary, review when deciding whether to grant or deny a certificate of probable cause to appeal. See 759 F. 3d, at 1231–1232. *Ylst* itself, however, looked through a nondiscretionary adjudication. See 501 U. S., at 800–801. And *Richter* confirms that it matters not whether the state court exercised mandatory or discretionary review. Although *Richter* required a federal habeas court to presume that an unexplained summary affirmance adjudicated the merits of any federal claim presented to the state court, *Richter* cited *Ylst* as an example of how this "presumption may be overcome." 562 U. S., at 99. If looking through the summary affirmance reveals that the last reasoned state-court decision found a claim procedurally defaulted, then it is "more likely," *id.*, at 100, that the summary affirmance of that claim "rest[ed] upon the same ground," *Ylst*, 501 U. S., at 803. In short, *Richter* instructs that federal habeas courts should continue to "look through" even nondiscretionary adjudications to determine whether a claim was procedurally defaulted. There is no reason not to "look through" such adjudications, as well, to determine the particular reasons why the state court rejected the claim on the merits.

Although the Eleventh Circuit clearly erred in declining to apply *Ylst*, I concur in the denial of certiorari. The District Court did "look through" to the last reasoned state-court opinion, and for the reasons given by that court, I am convinced that the Eleventh Circuit would have reached the same conclusion had it

properly applied *Ylst*. See *Hittson* v. *Humphrey*, 2012 WL 5497808, *17–*25 (MD Ga., Nov. 13, 2012). Moreover, an en banc rehearing petition raising the *Ylst* issue is currently pending before the Eleventh Circuit. See *Wilson* v. *Warden*, No. 14–10681. That petition affords the Eleventh Circuit an opportunity to correct its error without the need for this Court to intervene.

No. 14–9539. VIEIRA *v.* CALIFORNIA. C. A. D. C. Cir. Certiorari before judgment denied.

No. 14–9755. WILKERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 14–326. YACUBIAN *v.* UNITED STATES, 575 U. S. 983;

No. 14–922. GOMEZ *v.* CHASE HOME FINANCE, LLC, 575 U. S. 936;

No. 14–1012. ESCAMILLA ET AL. *v.* M2 TECHNOLOGY, INC.; and ESCAMILLA *v.* M2 TECHNOLOGY, INC., ET AL., 575 U. S. 984;

No. 14–7553. COOPER *v.* COOPER, 575 U. S. 965;

No. 14–7641. GARZA *v.* UNITED STATES, 574 U. S. 1171;

No. 14–7795. FREY *v.* FOSTER ET AL., 574 U. S. 1196;

No. 14–8189. SCOTT *v.* ALABAMA, 575 U. S. 979;

No. 14–8194. LOCKHART *v.* ALABAMA, 575 U. S. 979;

No. 14–8382. MOSES *v.* TEXAS WORKFORCE COMMISSION ET AL., 575 U. S. 966;

No. 14–8448. WALTERS *v.* CALIFORNIA, 575 U. S. 968;

No. 14–8543. DONGSHENG HUANG *v.* ULTIMO SOFTWARE SOLUTIONS, INC., 575 U. S. 969;

No. 14–8553. WALTON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 969; and

No. 14–8598. DAVIS *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 575 U. S. 988. Petitions for rehearing denied.

No. 14–7861. TWEED *v.* COBURN ET AL., 575 U. S. 905. Motion for leave to file petition for rehearing denied.

JUNE 22, 2015

Certiorari Granted—Vacated and Remanded

No. 14–902. BANK OF AMERICA, N. A. *v.* GLASPIE. C. A. 11th Cir. Reported below: 581 Fed. Appx. 830;

No. 14–903. BANK OF AMERICA, N. A. *v.* MADDEN ET AL. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824; and

No. 14–904. BANK OF AMERICA, N. A. *v.* BROWN. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bank of America, N. A.* v. *Caulkett*, 575 U. S. 790 (2015).

Certiorari Dismissed

No. 14–9385. ISRAEL *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–9821. WILLIAMS *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari before judgment dismissed. See this Court's Rule 39.8.

No. 14–9835. COX *v.* O'BRIEN, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 597 Fed. Appx. 189.

No. 14–9838. CROSBY *v.* IVES, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. D–2813. IN RE DISBARMENT OF MONGELLI. Disbarment entered. [For earlier order herein, see 574 U. S. 806.]

No. D–2814. In re Disbarment of Tarshis. Disbarment entered. [For earlier order herein, see 574 U. S. 806.]

No. D–2815. In re Disbarment of Spector. Disbarment entered. [For earlier order herein, see 574 U. S. 806.]

No. D–2816. In re Disbarment of Council. Disbarment entered. [For earlier order herein, see 574 U. S. 971.]

No. D–2817. In re Disbarment of Daugerdas. Disbarment entered. [For earlier order herein, see 574 U. S. 971.]

No. D–2818. In re Disbarment of Lewis. Disbarment entered. [For earlier order herein, see 574 U. S. 971.]

No. D–2819. In re Disbarment of Cooper. Disbarment entered. [For earlier order herein, see 574 U. S. 1022.]

No. D–2820. In re Disbarment of Berger. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2821. In re Disbarment of Scher. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2822. In re Disbarment of Jackson. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2823. In re Disbarment of Hill. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2824. In re Disbarment of Purcell. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2826. In re Disbarment of Worsham. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. 14M129. McDowell *v.* Commissioner of Internal Revenue. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 14–990. Shapiro et al. *v.* Mack, Chairman, Maryland State Board of Elections, et al. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1003.] Motion of petitioners to dispense with printing joint appendix granted.

No. 14–7802. In re Holloway. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1190] denied.

No. 14–7899. PERRY *v.* EDD ET AL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 909] denied.

No. 14–8081. DAKER *v.* ROBINSON ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 932] denied.

No. 14–8082. DAKER *v.* DAWES ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 932] denied.

No. 14–9396. JUDY *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 10th Cir.; and

No. 14–9747. MACAK *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 13, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9972. IN RE JAVIER BARAJAS; and

No. 14–9974. IN RE AYERS. Petitions for writs of habeas corpus denied.

No. 14–1254. IN RE POTTS. Petition for writ of mandamus denied.

No. 14–9840. IN RE MATTHEWS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Certiorari Granted

No. 14–916. KINGDOMWARE TECHNOLOGIES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted. Reported below: 754 F. 3d 923.

Certiorari Denied

No. 14–448. GOOGLE, INC. *v.* VEDERI, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 744 F. 3d 1376.

No. 14–602. RAMIREZ UMANA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 750 F. 3d 320.

No. 14–1006. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 503.

No. 14–1037. NYAMBAL *v.* INTERNATIONAL MONETARY FUND. C. A. D. C. Cir. Certiorari denied. Reported below: 772 F. 3d 277.

No. 14–1069. ZAYAC *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 3d 112.

No. 14–1085. FORD MOTOR CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 768 F. 3d 580.

No. 14–1103. BOLDEN ET AL. *v.* CITY OF EUCLID, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 464.

No. 14–1118. RUGIERO *v.* NATIONSTAR MORTGAGE, LLC, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 376.

No. 14–1131. ZHENLI YE GON *v.* AYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 3d 207.

No. 14–1138. ARANSAS PROJECT *v.* SHAW, CHAIRMAN OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 3d 641.

No. 14–1189. SCHWALIER *v.* CARTER, SECRETARY OF DEFENSE, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 3d 832.

No. 14–1190. FCA US LLC, FKA CHRYSLER GROUP LLC *v.* FOX HILLS MOTOR SALES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 3d 411.

No. 14–1204. SIMPSON *v.* FEUERSTEIN. C. A. 3d Cir. Certiorari denied. Reported below: 582 Fed. Appx. 93.

No. 14–1205. KORO AR, S. A. *v.* UNIVERSAL LEATHER, LLC. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 3d 553.

No. 14–1231. LAM ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 565 Fed. Appx. 641.

No. 14–1240. ZURICH AMERICAN INSURANCE CO. ET AL. *v.* TENNESSEE; NORTHERN INSURANCE COMPANY OF NEW YORK ET AL. *v.* TENNESSEE; AMERICAN HOME ASSURANCE CO. ET AL. *v.* TENNESSEE; and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK *v.* TENNESSEE. Ct. App. Tenn. Certiorari denied.

No. 14–1241. LAWRENCE *v.* GWINNETT COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 864.

No. 14–1246. GORSKI *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 929.

No. 14–1247. HARTIGAN *v.* UTAH TRANSIT AUTHORITY. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 779.

No. 14–1253. CLADAKIS *v.* MILLER. Ct. App. Miss. Certiorari denied. Reported below: 155 So. 3d 181.

No. 14–1257. MOORHEAD ET AL. *v.* FIRST TENNESSEE BANK N. A. Ct. App. Tenn. Certiorari denied.

No. 14–1258. LEYVA *v.* WELLS FARGO BANK, N. A. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 155 So. 3d 359.

No. 14–1263. CORBETT *v.* TRANSPORTATION SECURITY ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 3d 1171.

No. 14–1267. POTTS *v.* AMERICAN BOTTLING CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 540.

No. 14–1274. TZE WUNG CONSULTANTS, LTD. *v.* BANK OF BARODA. C. A. 2d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 33.

No. 14–1289. WEIDMAN *v.* EXXON MOBIL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 3d 214.

No. 14–1293. HAYASHI *v.* ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION. Sup. Ct. Ill. Certiorari denied. Reported below: 2014 IL 116023, 25 N. E. 3d 570.

No. 14–1304. APOTEX INC. ET AL. *v.* UCB, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 763 F. 3d 1354.

No. 14–1329. WILSON *v.* CLEVELAND CLINIC FOUNDATION. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 392.

No. 14–1340. LUCREE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 596 Fed. Appx. 922.

No. 14–1345. ACEVEDO-PEREZ ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 768 F. 3d 51.

No. 14–1347. GAON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 1250.

No. 14–1349. ESPARZA DE RUBIO *v.* LYNCH, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 14–1355. SALADO-ALVA *v.* LYNCH, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 700.

No. 14–1369. RAMON TARANGO, AKA TARANGO *v.* LYNCH, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 293.

No. 14–1390. ALLEGHENY FORD TRUCK SALES, INC., ET AL. *v.* FORD MOTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 607 Fed. Appx. 203.

No. 14–8305. CATHEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 451 S. W. 3d 1.

No. 14–8964. SELVAN-CUPIL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 242.

No. 14–8969. FRAZIER *v.* JENKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 3d 485.

No. 14–9349. SERRANO *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 355 Ore. 172, 324 P. 3d 1274.

No. 14–9355. SKLYARSKY *v.* MEANS-KNAUS PARTNERS, L. P., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 892.

No. 14–9357. HEFFERNAN *v.* ARLINGTON COUNTY DEPARTMENT OF HUMAN SERVICES. Sup. Ct. Va. Certiorari denied.

No. 14–9358. SPELLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–9362. PEARSON *v.* HAAS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9367. DUNCAN *v.* SHELDON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9369. GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9374. STEEDLEY *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 103.

No. 14–9375. YUAN *v.* GREEN CENTURY DEVELOPMENT, LLC, ET AL. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 14–9376. TOMASELLI ET AL. *v.* BEAULIEU ET AL. C. A. 1st Cir. Certiorari denied.

No. 14–9381. HAMPTON *v.* TRIBLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9382. GREENE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 171.

No. 14–9383. FREEMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9388. SIMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 130840–U.

No. 14–9389. CHANH MINH DANG *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 385.

No. 14–9391. LIMA CASTRO *v.* TANNER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–9393. SMITH *v.* MURRAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 807.

No. 14–9394. CANADA *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2015 Ark. 8.

No. 14–9395. CRISBASAN *v.* COLLINS, JUDGE, CIRCUIT COURT OF ILLINOIS, 17TH JUDICIAL CIRCUIT; CRISBASAN *v.* O'NEAL; CRISBASAN *v.* PAYNE; and CRISBASAN *v.* SWEENEY ET AL. Sup. Ct. Ill. Certiorari denied.

No. 14–9401. HODGE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 147 So. 3d 1029.

No. 14–9402. CABRERA-FLORES *v.* OATES. C. A. 4th Cir. Certiorari denied. Reported below: 566 Fed. Appx. 279.

No. 14–9411. FENNELL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 828.

No. 14–9412. HESSMER *v.* WILSON COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–9413. FAYSON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 771.

No. 14–9414. GATEWOOD *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–9415. PATTON *v.* BRYANT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 242.

No. 14–9420. ROSS *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2011–1668 (La. App. 4 Cir. 6/4/14), 144 So. 3d 1118.

No. 14–9421. MAZIN *v.* TOWN OF NORWOOD, MASSACHUSETTS, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 85 Mass. App. 1128, 10 N. E. 3d 672.

No. 14–9422. KARGBO *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 14–9427. TKACHYSHYN *v.* NEW YORK COMMISSIONER OF LABOR. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 109 App. Div. 3d 1071, 972 N. Y. S. 2d 350.

No. 14–9430. BABB *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2014 ME 129, 104 A. 3d 878.

No. 14–9435. SIMMONS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–9439. PATTERSON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 90, 356 Wis. 2d 326, 855 N. W. 2d 491.

No. 14–9447. THOMAS *v.* MCCULLOCH, DIRECTOR, SAND RIDGE SECURE TREATMENT FACILITY. C. A. 7th Cir. Certiorari denied.

No. 14–9531. SUTTON *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied.

No. 14–9549. SANTIAGO *v.* COLLINS ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9572. DOWLING *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 105 A. 3d 787.

No. 14–9581. HENSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 42.

No. 14–9585. GAMBLE *v.* BULLARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 563 Fed. Appx. 259.

No. 14–9604. RICHARDSON *v.* HUNTER, SUPERINTENDENT, PIEDMONT REGIONAL JAIL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 57.

No. 14–9613. RANGREJ *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 717.

No. 14–9614. LAVENDER *v.* CARROLL, SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9615. MABLE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9623. YUSOV *v.* LYNCH, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–9644. MACHEN *v.* RACKLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9657. PATTERSON *v.* BRODERICK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 622.

No. 14–9664. COLLINS *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9677. JOHNSON *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 443.

No. 14–9705. WHITE *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 14–9709. SIMPSON *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–9714. SHOEMAKER *v.* FREEMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 979.

No. 14–9715. PEREZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 402.

No. 14–9716. BELLON *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9722. MESSERE ET AL. *v.* WHITE ET AL. C. A. 1st Cir. Certiorari denied.

No. 14–9735. THOMAS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 593 Fed. Appx. 988.

No. 14–9775. DONELSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9788. MATTOX *v.* PRYOR, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 833.

No. 14–9800. FLOYD *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 63.

No. 14–9808. BURNS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 781 F. 3d 688.

No. 14–9818. RAMIREZ-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 368.

No. 14–9830. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 117.

No. 14–9832. ELLISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 266.

No. 14–9839. JOHNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 163.

No. 14–9842. JOUBERT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 247.

No. 14–9857. MERCER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 111 A. 3d 647.

No. 14–9859. LANDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 255.

No. 14–9868. SUSINKA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9871. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9874. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 251.

No. 14–9890. KOCH *v.* THOMAS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9892. LARACUENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 347.

No. 14–9896. VARNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9898. BAILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9900. WATFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9901. LUMPKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9912. KOPP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 3d 986.

No. 14–9913. MCGEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 90.

No. 14–9915. DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 247.

No. 14–9917. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 396.

No. 14–9918. BURNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 3d 536.

No. 14–9935. ESPINDOLA-PINEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 Fed. Appx. 161.

No. 14–9940. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 Fed. Appx. 770.

No. 14–9942. SANCHEZ-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9944. RABANALES-CASIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 690.

No. 14–9950. NOLASCO-PERAZA ET AL. *v.* UNITED STATES (Reported below: 606 Fed. Appx. 175); GONZALEZ CAAL, AKA MANUEL GONZALEZ *v.* UNITED STATES (605 Fed. Appx. 403); and QUINTERO-FLORES *v.* UNITED STATES (605 Fed. Appx. 389). C. A. 5th Cir. Certiorari denied.

No. 14–9951. LEDEZMA-RODRIGUEZ ET AL. *v.* UNITED STATES (Reported below: 595 Fed. Appx. 435); GARCIA-ZELAYA, AKA GARCIA, AKA GARCIA ZELAYA *v.* UNITED STATES (600 Fed. Appx. 268); CHICOJ-MEJIA *v.* UNITED STATES (605 Fed. Appx. 391); and FRANCO-ALARCON, AKA ADAN FRANCO, AKA FRANCO ALARCON, AKA FRANCO *v.* UNITED STATES (600 Fed. Appx. 266). C. A. 5th Cir. Certiorari denied.

No. 14–9952. LUNA-SOTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 323.

No. 14–1128. SECURITIES INVESTOR PROTECTION CORP. *v.* IDA FISHMAN REVOCABLE TRUST ET AL. C. A. 2d Cir. Motions of Academics; Certain "Net Loser" Customers; and National Association of Bankruptcy Trustees for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 773 F. 3d 411.

No. 14–1129. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC *v.* IDA FISHMAN REVOCABLE TRUST ET AL. C. A. 2d Cir. Motions of National Association of Bankruptcy Trustees; Kenneth Krys, as Liquidator and Foreign Representative of Fairfield Sentry Limited; Academics; and Certain "Net Loser" Customers for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 773 F. 3d 411.

No. 14–1371. PENNEY, AKA PENNY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 14–8740. CARLTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 346.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, respecting the denial of certiorari.

The District Court enhanced petitioner Roy Carlton's sentence based on a factual inaccuracy introduced into the sentencing record by the Government. The United States Court of Appeals for the Fifth Circuit refused to review Carlton's appellate challenge to the enhancement, relying on Circuit precedent holding that factual errors are never cognizable on plain-error review. For the reasons that follow, I believe the Fifth Circuit's precedent is misguided.

Carlton was convicted by a jury of possessing marijuana while incarcerated. The Probation Office prepared a presentence report recommending a two-level enhancement of Carlton's base offense level because the ultimate aim of his crime was the distribution of a controlled substance in a prison. See United States Sentencing Commission, Guidelines Manual §2D1.1(b)(4) (Nov. 2014). The foundation for this enhancement was the Government's representation that Carlton's girlfriend, Whitney Anderson, had testified at trial that Carlton intended to use the marijuana to pay off a debt owed to another inmate. In fact,

Anderson said no such thing. The Government nevertheless repeated its faulty assertion at sentencing, and the District Court, which shared a similar misimpression of Anderson's testimony, imposed the enhancement and sentenced Carlton to 27 months' imprisonment.

Carlton challenged the sentencing enhancement before the Fifth Circuit, citing the inaccuracy regarding Anderson's testimony. The Government conceded its error, but the Fifth Circuit rejected Carlton's claim anyway. 593 Fed. Appx. 346 (2014) (*per curiam*). In light of defense counsel's failure to object at sentencing to the Government's characterization of the record, the court reviewed Carlton's argument under the plain-error standard. *Id.*, at 348. The Fifth Circuit acknowledged that the record "unambiguously" showed "Anderson never testified that Carlton needed the marijuana to repay a prison debt," and that the District Court had therefore erred in supporting the enhancement with her imagined statement. *Ibid.* The court explained, however, that the District Court's mistake was a mistake of fact. And under the Fifth Circuit's decision in *United States* v. *Lopez*, 923 F. 2d 47 (1991) (*per curiam*), such a factual error "'can never constitute plain error'" because it "could have been cured by bringing it to the district court's attention at sentencing." 593 Fed. Appx., at 349 (quoting *Lopez*, 923 F. 2d, at 50).

Judge Prado issued a concurring opinion. Although he agreed that *Lopez* controlled Carlton's case, Judge Prado wrote separately to reiterate his view that *Lopez* was wrongly decided. 593 Fed. Appx., at 349–352 (specially concurring opinion).

I agree with Judge Prado. This Court has long held that "[i]n exceptional circumstances, especially in criminal cases, appellate courts . . . may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936). The doctrine of plain error follows from the recognition that a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice." *United States* v. *Olano*, 507 U. S. 725, 732 (1993) (internal quotation marks omitted). And in all the years since the doctrine arose, we have

never suggested that plain-error review should apply differently depending on whether a mistake is characterized as one of fact or one of law. To the contrary, "[w]e have emphasized that a *per se* approach to plain-error review is flawed." *Puckett* v. *United States*, 556 U. S. 129, 142 (2009) (internal quotation marks omitted). The Fifth Circuit's wooden rule that factual mistakes cannot constitute plain error runs counter to these teachings.

Federal Rule of Criminal Procedure 52(b), which codifies the common-law plain-error rule, similarly draws no distinction between factual errors and legal errors. It states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Not "a plain *legal* error," or "a plain error *other than a factual error*"; all plain errors fall within the Rule's ambit. Courts must apply the Federal Rules as they are written, see *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993), and no basis is apparent for reading into Rule 52(b) an exception for factual errors.

Given its inconsistency with the governing text and longstanding precedent, it is little wonder that no other court of appeals has adopted the *per se* rule outlined by the Fifth Circuit in Lopez.* This lack of uniformity can have important consequences for criminal defendants. Indeed, Carlton's case illustrates the potential inequity caused by the Fifth Circuit's outlier

---

*See, *e. g.*, *United States* v. *Thomas*, 518 Fed. Appx. 610, 612–613 (CA11 2013) (*per curiam*) (applying plain-error review to asserted factual error); *United States* v. *Griffiths*, 504 Fed. Appx. 122, 126–127 (CA3 2012) (same); *United States* v. *Durham*, 645 F. 3d 883, 899–900 (CA7 2011) (same); *United States* v. *Sahakian*, 446 Fed. Appx. 861, 863 (CA9 2011) (same); *United States* v. *Romeo*, 385 Fed. Appx. 45, 50 (CA2 2010) (same); *United States* v. *Gonzalez-Castillo*, 562 F. 3d 80, 83–84 (CA1 2009) (same); *United States* v. *Sargent*, 19 Fed. Appx. 268 (CA6 2001) (*per curiam*) (same); *United States* v. *Wells*, 163 F. 3d 889, 900 (CA4 1998) (same); *United States* v. *Saro*, 24 F. 3d 283, 291 (CADC 1994) (same). Of the remaining Courts of Appeals, it appears that only the Tenth Circuit has articulated a rule for unraised factual errors anything like the Fifth Circuit's. See *United States* v. *Overholt*, 307 F. 3d 1231, 1253 (2002) (where defendant "fail[s] to raise his factual challenge at sentencing," court will "consider the issue waived and will not find plain error"). But even the Tenth Circuit's rule is subject to an exception in cases, like this one, where "the appellant can establish the certainty of a favorable finding on remand." *United States* v. *Dunbar*, 718 F. 3d 1268, 1280 (2013) (internal quotation marks omitted).

position on plain error: All agree the District Court improperly relied on testimony Anderson never gave. But in the Fifth Circuit—and only the Fifth Circuit—that mistake cannot be reviewed and possibly corrected. As a result, Carlton may spend several additional months in jail simply because he was sentenced in Alexandria, Louisiana, instead of Alexandria, Virginia.

For all these reasons, I conclude that *Lopez*'s categorical rule is unjustified. Nevertheless, I reluctantly agree with the Court's decision to deny certiorari in this case. The Solicitor General informs us that the Fifth Circuit is at times inconsistent in its adherence to *Lopez*. Compare *United States* v. *Akinosho*, 285 Fed. Appx. 128, 130 (2008) (*per curiam*) (applying *Lopez*), with *United States* v. *Stevenson*, 97 Fed. Appx. 468, 470 (2004) (*per curiam*) (ignoring *Lopez*); see also *United States* v. *Rodriguez*, 15 F. 3d 408, 416, n. 10 (1994) (questioning whether *Lopez* survived this Court's decision in *Olano*). When that sort of internal division exists, the ordinary course of action is to allow the court of appeals the first opportunity to resolve the disagreement. I hope the Fifth Circuit will use that opportunity to rethink its approach to plain-error review.

Rehearing Denied

No. 14–950. Schafler *v.* HSBC Bank USA et al., 575 U. S. 951;

No. 14–1046. Flander *v.* Texas Department of Public Safety et al., 575 U. S. 985;

No. 14–1105. Dean *v.* Slade et al., 575 U. S. 985;

No. 14–7316. Wheetley *v.* Tennessee, 575 U. S. 916;

No. 14–7688. Olten *v.* United States, 575 U. S. 986;

No. 14–8338. Williams *v.* Circuit Court of Wisconsin, Racine County, et al., 575 U. S. 965;

No. 14–8367. Perry *v.* Entertainment One et al., 575 U. S. 965;

No. 14–8429. Toney *v.* Hakala et al., 575 U. S. 967;

No. 14–8513. Ragin *v.* Circuit Court of Virginia, City of Newport News, 575 U. S. 986;

No. 14–8722. Boykin *v.* United States, 575 U. S. 971;

No. 14–8727. L. B. *v.* San Diego County Health and Human Services Agency, 575 U. S. 1001;

No. 14–8735. Cunningham *v.* Department of Justice, 575 U. S. 1001;

No. 14–8786. Okeayainneh *v.* United States, 575 U. S. 972;
No. 14–8834. Sayers *v.* Virginia, 575 U. S. 1014;
No. 14–8927. Casciola *v.* Jones, Secretary, Florida Department of Corrections, et al., 575 U. S. 1001; and
No. 14–9027. Wright *v.* Williamsburg Area Medical Assistance Corp., aka Olde Towne Medical Center, 575 U. S. 1002. Petitions for rehearing denied.

No. 14–7102. Kearney *v.* Graham, Superintendent, Auburn Correctional Facility, 574 U. S. 1132. Petition for rehearing denied. Justice Sotomayor took no part in the consideration or decision of this petition.

June 29, 2015

Certiorari Granted—Vacated and Remanded

No. 13–1305. Coventry Health Care of Missouri, Inc., fka Group Health Plan, Inc. *v.* Nevils. Sup. Ct. Mo. Reported below: 418 S. W. 3d 451; and
No. 13–1467. Aetna Life Insurance Co. *v.* Kobold. Ct. App. Ariz. Reported below: 233 Ariz. 100, 309 P. 3d 924. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of new regulations promulgated by the Office of Personnel Management (OPM). See OPM, Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery, 80 Fed. Reg. 29203 (May 21, 2015) (5 CFR § 890.106).

No. 14–35. Berger, President Pro Tempore of the North Carolina Senate, et al. *v.* American Civil Liberties Union of North Carolina et al. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, *ante*, p. 200. Reported below: 742 F. 3d 563.

No. 14–428. Thayer et al. *v.* City of Worcester, Massachusetts. C. A. 1st Cir. Motion of Homeless Empowerment Project for leave to file brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *Town of Gilbert*, *ante*, p. 155. Reported below: 755 F. 3d 60.

No. 14–430. Kelly, Warden *v.* McCarley. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Davis* v. *Ayala*, *ante*, p. 257. Reported below: 759 F. 3d 535.

No. 14–783. WAGNER *v.* CITY OF GARFIELD HEIGHTS, OHIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *Town of Gilbert*, *ante*, p. 155. Reported below: 577 Fed. Appx. 488.

No. 14–983. HOOKS, WARDEN *v.* LANGFORD. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *Ayala*, *ante*, p. 257. Reported below: 593 Fed. Appx. 422.

No. 14–1160. CARDSOFT, LLC *v.* VERIFONE, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318 (2015). Reported below: 769 F. 3d 1114.

No. 14–1201. CENTRAL RADIO CO. INC. ET AL. *v.* CITY OF NORFOLK, VIRGINIA. C. A. 4th Cir. Motions of Six Law Professors et al. and Neighborhood Enterprises, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *Town of Gilbert*, *ante*, p. 155. Reported below: 776 F. 3d 229.

Certiorari Dismissed

No. 14–9807. SINGLETON *v.* NELSON ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 589 Fed. Appx. 86.

Miscellaneous Orders

No. 14A1065. ZUBIK ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. Application for an order

recalling and staying issuance of the mandate of the Court of Appeals for the Third Circuit pending the filing and disposition of a petition for writ of certiorari, having been submitted to JUSTICE ALITO, and by him referred to the Court, denied. The application as presented is denied. The Court furthermore orders: If applicants ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility under 26 CFR § 54.9815–2713A(a) or 29 CFR § 2590.715–2713A(a) or 45 CFR § 147.131(b) (as applicable), respondents are enjoined from enforcing against applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of their petition for writ of certiorari. Nothing in this interim order affects the ability of applicants' or their organizations' employees to obtain, without cost, the full range of Food and Drug Administration approved contraceptives. Nor does this order preclude the Government from relying on the information provided by applicants, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act. See *Wheaton College* v. *Burwell*, 573 U. S. 958 (2014). This order should not be construed as an expression of the Court's views on the merits. *Ibid.* JUSTICE SOTOMAYOR would deny the application.

No. 14A1288. WHOLE WOMAN'S HEALTH ET AL. *v.* COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, granted, and the issuance of the mandate of the United States Court of Appeals for the Fifth Circuit in case No. 14–50928 is stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court. THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO would deny the application.

No. D–2828. IN RE DISCIPLINE OF SCHACHTER. Robert A. Schachter, of Valley Cottage, N. Y, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2829. IN RE DISCIPLINE OF EVOLA. Vito Matteo Evola, of Rosemount, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2830. IN RE DISCIPLINE OF FLYNN. Michael Lawrence Flynn, of LaGrange Park, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2831. IN RE DISCIPLINE OF SEGUIN. Robert S. Seguin, of Milltown, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2832. IN RE DISCIPLINE OF FELDMAN. Richard David Feldman, of Whitestone, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2833. IN RE DISCIPLINE OF DAMON. Geoffrey Parker Damon, of Independence, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2834. IN RE DISCIPLINE OF LAWTON. Ricky Lawton, of Fernley, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2835. IN RE DISCIPLINE OF COOPER. Jon Charles Cooper, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2836. IN RE DISCIPLINE OF FLEMING. Lawrence J. Fleming, of St. Louis, Mo., is suspended from the practice of law

in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 14M30. BLAND *v.* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ET AL.;

No. 14M131. TUBBS *v.* CAIN, WARDEN;

No. 14M136. PAPAS ET AL. *v.* PEOPLES MORTGAGE CO. ET AL.; and

No. 14M137. TOBIAS *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M132. DIXON *v.* 24TH DISTRICT COURT OF LOUISIANA ET AL.;

No. 14M133. WHITEHEAD *v.* WHITE & CASE LLP ET AL.; and

No. 14M138. WALKER *v.* UNITED STATES. Motions for leave to proceed as veterans denied.

No. 14M134. IN RE BEN-ARI. Motion for leave to file petition for writ of mandamus under seal with redacted copies for the public record granted.

No. 14M135. SUPPRESSED *v.* SUPPRESSED. Motion for leave to file petition for writ of certiorari under seal granted.

No. 143, Orig. MISSISSIPPI *v.* TENNESSEE ET AL. Motion for leave to file bill of complaint granted. Defendants are allowed 30 days within which to file an answer. [For earlier order herein, see 574 U. S. 957.]

No. 14–449. KANSAS *v.* CARR; and

No. 14–450. KANSAS *v.* CARR. Sup. Ct. Kan. [Certiorari granted, 575 U. S. 934]; and

No. 14–452. KANSAS *v.* GLEASON. Sup. Ct. Kan. [Certiorari granted, 575 U. S. 934.] Upon consideration of the joint motion of respondents for scheduling of argument and for divided argument, and of the motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument in Nos. 14–449 and 14–450, the following allocation of oral argument time is adopted. A total of one hour is allocated for oral argument in No. 14–452, and on Question 1 in Nos. 14–449 and 14–450, to be divided as follows: 30 minutes for petitioner, 20 minutes for respondents Jonathan D. Carr and Sidney J. Glea-

son, and 10 minutes for respondent Reginald D. Carr. A total of one hour is allocated for oral argument on Question 2 in Nos. 14–449 and 14–450, to be divided as follows: 20 minutes for petitioner, 10 minutes for the Solicitor General, 20 minutes for respondent Reginald D. Carr, and 10 minutes for respondent Jonathan D. Carr.

No. 14–8608. DAKER *v.* WARREN, SHERIFF, COBB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 981] denied.

No. 14–8970. LACROIX *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 1006] denied.

No. 14–9019. LAVERGNE *v.* DATELINE NBC ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 1006] denied.

No. 14–9817. MENDEZ *v.* UNITED STATES. C. A. Fed. Cir.; and No. 14–9981. POOLE *v.* UNITED STATES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 20, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–10119. IN RE RIVERA. Petition for writ of habeas corpus denied.

No. 14–9880. IN RE COX. Petition for writ of mandamus denied.

Certiorari Granted

No. 14–181. GOBEILLE, CHAIR OF THE VERMONT GREEN MOUNTAIN CARE BOARD *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 2d Cir. Certiorari granted. Reported below: 746 F. 3d 497.

No. 14–1095. MUSACCHIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 590 Fed. Appx. 359.

No. 14–1096. LUNA TORRES *v.* LYNCH, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari granted. Reported below: 764 F. 3d 152.

No. 14–981. FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL. C. A. 5th Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 758 F. 3d 633.

Certiorari Denied

No. 13–1379. ATHENA COSMETICS, INC. *v.* ALLERGAN, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 3d 1350.

No. 14–656. RJR PENSION INVESTMENT COMMITTEE ET AL. *v.* TATUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 4th Cir. Certiorari denied. Reported below: 761 F. 3d 346.

No. 14–920. CITY OF LOMITA, CALIFORNIA *v.* FORTYUNE. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 3d 1098.

No. 14–921. VAUGHN *v.* INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 765 F. 3d 1174.

No. 14–973. NGUYEN *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 2014 ND 211, 858 N. W. 2d 652.

No. 14–1025. ERICKSON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 3d 1341.

No. 14–1058. SAMPATHKUMAR *v.* LYNCH, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 573 Fed. Appx. 55.

No. 14–1072. MALLO ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 3d 1313.

No. 14–1082. RENZI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 3d 731.

No. 14–1083. SANDLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 3d 731.

No. 14–1142. BOUDREAUX *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 757.

No. 14–1145. WHITESIDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 3d 180.

No. 14–1164. KOBACH, KANSAS SECRETARY OF STATE, ET AL. *v.* UNITED STATES ELECTION ASSISTANCE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 772 F. 3d 1183.

No. 14–1167. ANADARKO PETROLEUM CORP. *v.* UNITED STATES; and

No. 14–1217. BP EXPLORATION & PRODUCTION INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 3d 570 and 772 F. 3d 350.

No. 14–1176. PINE TOP RECEIVABLES OF ILLINOIS, LLC *v.* BANCO DE SEGUROS DEL ESTADO. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 3d 980.

No. 14–1179. STANLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 314.

No. 14–1198. WIDMAR *v.* SUN CHEMICAL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 3d 457.

No. 14–1200. AMEDISYS, INC., ET AL. *v.* PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 3d 313.

No. 14–1216. ENOS ET AL. *v.* LYNCH, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 447.

No. 14–1225. FALCON EXPRESS INTERNATIONAL, INC. *v.* DHL EXPRESS (USA), INC. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 408 S. W. 3d 406.

No. 14–1251. SUN LIFE ASSURANCE COMPANY OF CANADA *v.* GROUP DISABILITY BENEFITS PLAN FOR GYNECOLOGIC ONCOLOGY ASSOCIATES PARTNERS, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 905.

No. 14–1265. MINGO *v.* CITY OF MOBILE, ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 793.

No. 14–1266. PINILLO *v.* HSBC BANK USA. Sup. Ct. Fla. Certiorari denied. Reported below: 157 So. 3d 1047.

No. 14–1270. WELTON *v.* ANDERSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 670.

No. 14–1277. JOHNSON *v.* BANK OF AMERICA, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 953.

No. 14–1281. GEICO GENERAL INSURANCE CO. *v.* GOULD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 901.

No. 14–1285. ANGHEL *v.* NEW YORK STATE DEPARTMENT OF HEALTH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 28.

No. 14–1290. CLARK *v.* CALLAHAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 1000.

No. 14–1294. MACKENZIE ET AL. *v.* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 223.

No. 14–1309. AJAELO *v.* LOS ANGELES COUNTY, CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 14–1310. EDWARDS *v.* LAKE ELSINORE UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. Reported below: 230 Cal. App. 4th 1532, 179 Cal. Rptr. 3d 626.

No. 14–1332. BROCKETT *v.* BROWN. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 133.

No. 14–1348. GLASSON *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 22 Neb. App. xx.

No. 14–1354. SACO ET AL. *v.* DEUTSCHE BANK NATIONAL TRUST CO. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 500.

No. 14–1356. ASSADINIA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 108 A. 3d 109.

No. 14–1360. DIX *v.* UNKNOWN TRANSPORTATION SECURITY ADMINISTRATION AGENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 499.

No. 14–1368. CATAHAMA, LLC *v.* FIRST COMMONWEALTH BANK. C. A. 3d Cir. Certiorari denied. Reported below: 601 Fed. Appx. 86.

No. 14–1370. LAGUETTE *v.* U. S. BANK, N. A., AS ALLEGED TRUSTEE OF SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006–BC4, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 936.

No. 14–1386. WILBORN *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 571.

No. 14–1387. MEYER *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 786.

No. 14–1392. ULTRAMERCIAL, LLC, ET AL. *v.* WILDTANGENT, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 772 F. 3d 709.

No. 14–1411. LORENZO JIMENEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 Fed. Appx. 46.

No. 14–1421. ISAACS *v.* DARTMOUTH HITCHCOCK MEDICAL CENTER ET AL. C. A. 1st Cir. Certiorari denied.

No. 14–8293. MARRON, AKA MU'MIN *v.* MILLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 69.

No. 14–8526. LARA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 935.

No. 14–8781. DAWSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–8916. ROSELLO *v.* FLOURNOY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 14–8980. GABE *v.* TERRIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9016. MIKE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 692.

No. 14–9041. TRINIDAD LOZA *v.* JENKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 3d 466.

No. 14–9056. MOORE *v.* SOUTH CAROLINA. Ct. Common Pleas of Spartanburg County, S. C. Certiorari denied.

No. 14–9064. HAYNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 473.

No. 14–9138. DE LA TORRE-DE LA TORRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 301.

No. 14–9148. HOLIDAY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 767.

No. 14–9154. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 270.

No. 14–9419. DYE *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 497 Mich. 952, 858 N. W. 2d 49.

No. 14–9432. BROWN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2014 IL App (2d) 121167, 11 N. E. 3d 882.

No. 14–9434. BAILEY *v.* FORD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9436. BLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 190 So. 3d 587.

No. 14–9440. PRICE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9442. LOWRY *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9450. BILLARD *v.* TANNER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 280.

No. 14–9452. CONLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–9455. DESPORT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 105 A. 3d 46.

No. 14–9459. LESTER *v.* HENTHORNE. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 239.

No. 14–9463. KEARNEY *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 45.

No. 14–9464. SALLEY *v.* DRAGOVICH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 594 Fed. Appx. 56.

No. 14–9465. EMERSON *v.* JAMES F. LINCOLN ARC WELDING FOUNDATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 522.

No. 14–9467. MCQUEEN *v.* AEROTEK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 836.

No. 14–9473. STEWART *v.* MCCOMBER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9483. SAVINO *v.* SAVINO. C. A. 2d Cir. Certiorari denied. Reported below: 590 Fed. Appx. 80.

No. 14–9484. K. T. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 20 N. E. 3d 928.

No. 14–9490. ARCHER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 151 So. 3d 1223.

No. 14–9491. ALLAH *v.* D'ILIO, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 572 Fed. Appx. 73.

No. 14–9497. SMOTHERS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 14–9509. MCCLINTON *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–9523. CROSS *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9526. GRAHAM ET AL. *v.* HARRINGTON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 714.

No. 14–9566. HAMILTON *v.* NEGI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 346.

No. 14–9582. GONZALEZ-GUZMAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 178 Wash. App. 1017.

No. 14–9598. TALLEY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9628. ULLRICH *v.* YORDY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9636. BELLAMY *v.* PLUMLEY, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–9647. BARRINER *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 604 Fed. Appx. 801.

No. 14–9690. MIDGYETT *v.* DENNEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9706. SALDIVAR *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 693.

No. 14–9733. KING *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 110, 357 Wis. 2d 721, 855 N. W. 2d 903.

No. 14–9744. DAWSON *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 584.

No. 14–9746. RICHARDSON *v.* JANDA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9749. PENDERGRASS *v.* BARKSDALE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 242.

No. 14–9758. EHLER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2015 Ark. 107.

No. 14–9765. GLENN *v.* DANFORTH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 14–9784. DISALVO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 24 N. Y. 3d 1138, 27 N. E. 3d 425.

No. 14–9790. WILSON *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 49 Kan. App. 2d xxxv, 314 P. 3d 900.

No. 14–9802. RICE *v.* BLANKENSHIP ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 521.

No. 14–9862. BOSWELL *v.* LOUISIANA ATTORNEY DISCIPLINARY BOARD. Sup. Ct. La. Certiorari denied. Reported below: 2015–0548 (La. 4/17/15), 168 So. 3d 391.

No. 14–9876. WILCOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9877. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 450.

No. 14–9881. RICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 481.

No. 14–9882. COPELAND *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9883. BENSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9884. IBN AHMAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 870.

No. 14–9905. GARGANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9906. HATFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9907. HATFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9908. BAKER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 165.

No. 14–9910. ALEJANDRO-MONTANEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 352.

No. 14–9919. BARBARY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 3d 1234.

No. 14–9921. THOMPSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 162 So. 3d 994.

No. 14–9922. THEARA YEM *v.* PEERY, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9927. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 324.

No. 14–9928. CAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 840.

No. 14–9929. CELESTINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 271.

No. 14–9932. CRAWFORD *v.* PARRIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9947. COX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 3d 145.

No. 14–9948. SILVER *v.* RESCAP BORROWER CLAIMS TRUST. C. A. 2d Cir. Certiorari denied.

No. 14–9953. ESCOBAR-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 173.

No. 14–9955. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9957. ESCOBAR-MENDOZA *v.* UNITED STATES (Reported below: 606 Fed. Appx. 159); ESPINOZA-BARRON *v.* UNITED STATES (606 Fed. Appx. 160); APONTE-CARRASCO *v.* UNITED STATES (606 Fed. Appx. 181); and GARCIA-MEJIA, AKA ALBERTO LOPEZ *v.* UNITED STATES (605 Fed. Appx. 387). C. A. 5th Cir. Certiorari denied.

No. 14–9958. RIGGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 523.

No. 14–9963. AGUILERA-ENCHAUTEGUI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9966. OILER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 165.

No. 14–9968. NICKLESS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 Fed. Appx. 222.

No. 14–9969. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 781.

No. 14–9970. BONILLA *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–9975. SHEPARD-FRASER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 784 F. 3d 11.

No. 14–9976. WULF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–9979. WASHINGTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 688.

No. 14–9982. MONTGOMERY *v.* BRENNAN, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 638.

No. 14–9984. CASSIUS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 777 F. 3d 1093.

No. 14–9986. VIAUD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 833.

No. 14–9987. TAYLOR *v.* JAMES, SECRETARY OF THE AIR FORCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 381.

No. 14–9990. PRATER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 210.

No. 14–9991. MILLINER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 3d 836.

No. 14–9993. ATWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9999. GARCIA-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 182.

No. 14–10000. PRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 3d 700.

No. 14–10002. SANCHEZ-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 3d 300.

No. 14–10006. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 64.

No. 14–10010. VERRUSIO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 762 F. 3d 1.

No. 14–10015. LAWSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 605 Fed. Appx. 785.

No. 14–10018. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 245.

No. 14–10019. SANZ DE LA ROSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–10022. PAPPAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–10023. ORTIZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 649.

No. 14–10024. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–10026. PENA-GARAVITO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 424.

No. 14–10027. MORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 231.

No. 14–10028. MARTINEZ-JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 427.

No. 14–10030. VASQUEZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 264.

No. 14–10032. WALTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 3d 778.

No. 14–10034. VALDEZ-NOVOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 3d 906.

No. 14–10035. TRIPLETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–10039. BEGLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 622.

No. 14–10040. ALLAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–10043. SHAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 604 Fed. Appx. 473.

No. 14–10046. LUTCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–10052. MORRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–10053. O'NEILL-SERRANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–10054. DOMINGUEZ-GODINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 279.

No. 14–395. JOYNER, WARDEN *v.* BARNES (Reported below: 751 F. 3d 229); and JOYNER, WARDEN *v.* HURST (757 F. 3d 389). C. A. 4th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The U. S. Court of Appeals for the Fourth Circuit made the same error in these cases that we have repeatedly summarily reversed this Term. I see no reason why these cases, which involve capital sentences that the State of North Carolina has a strong interest in imposing, should be treated differently. We should be consistent and use our discretionary review authority to correct this error.

I

This petition arises from two cases, which involve two separate defendants and trials. I discuss each in turn.

A

On October 29, 1992, William Leroy Barnes accompanied two other men, Robert Lewis Blakney and Frank Junior Chambers,

to the home of B. P. Tutterow and his wife, Ruby, with the intent to rob them. *State* v. *Barnes*, 345 N. C. 184, 200, 481 S. E. 2d 44, 51 (1997). The three targeted the Tutterows because Chambers knew that B. P., a deputy sheriff who worked at a jail where he had been held, often carried a significant amount of cash in his wallet. In the course of the robbery, Barnes and Chambers shot and killed the Tutterows. They then went to the apartment of some friends, where Barnes and Chambers showed off the guns they had stolen from the Tutterows.

The three men were tried together on two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary. The jury found them guilty on all counts. During the penalty phase of the trial, Chambers' attorney warned the jurors as follows that they would answer for their vote before God:

> "All of us will stand in judgment one day. . . . [D]oes a true believer want to explain to God, yes, I did violate one of your commandments. Yes, I know they are not the ten suggestions. They are the ten commandments. I know it says, Thou shalt not kill, but I did it because the laws of man said I could. You can never justify violating a law of God by saying the laws of man allowed it. If there is a higher God and a higher law, I would say not." App. to Pet. for Cert. 172a.

The jury recommended that Barnes and Chambers be sentenced to death for each murder and that Blakney be sentenced to two mandatory terms of life imprisonment.

After the jury made these recommendations, defense counsel moved to question the jury based on allegations that a juror had called a minister to seek guidance about capital punishment. Defense counsel acknowledged that there was no evidence that the juror had discussed the facts of the case with the minister. The trial court denied his motion.

On direct appeal, the Supreme Court of North Carolina concluded that the trial court did not abuse its discretion in denying that motion. It explained that "[t]he trial court was faced with the mere unsubstantiated allegation that a juror called a minister to ask a question about the death penalty" and that there was "no evidence that the content of any such possible discussion prejudiced defendants or that the juror gained access to improper or

prejudicial matters and considered them with regard to th[e] case." *Barnes*, *supra*, at 228, 481 S. E. 2d, at 68.

After unsuccessfully seeking state collateral review, Barnes pursued federal relief, arguing that the Supreme Court of North Carolina had unreasonably applied clearly established federal law as determined by this Court when it denied relief on his juror misconduct claim, see 28 U. S. C. § 2254(d)(1). The U. S. District Court for the Middle District of North Carolina rejected that argument. The Court of Appeals reversed. 751 F. 3d 229 (CA4 2014). Over a dissent, the Court of Appeals concluded that the North Carolina court had unreasonably applied this Court's decision in *Remmer* v. *United States*, 347 U. S. 227 (1954), which held that "'any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial.'" 751 F. 3d, at 241 (quoting *Remmer*, *supra*, at 229; emphasis deleted). Although *Remmer* did not provide further guidance as to what constituted "the matter pending before the jury," the panel concluded, based on the Court of Appeals' own precedents, that the death penalty generally was "the matter pending before the jury." 751 F. 3d, at 248. The court remanded the case for the District Court to consider whether Barnes could show actual prejudice from the error under *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993).

B

On June 9, 2002, Jason Wayne Hurst—the second defendant involved in this petition—murdered Daniel Lee Branch after arranging to buy a pump-action shotgun from him. *State* v. *Hurst*, 360 N. C. 181, 184–186, 624 S. E. 2d 309, 314–315 (2006). As Hurst later recounted, "'[he] knew [he] was going to kill [Branch]'" as soon as they finished scheduling the sale. *Id.*, at 185, 624 S. E. 2d, at 315 (brackets in original). The two men met in a field, where Hurst asked if he could test fire the gun. As Branch walked into the field to set up some cans and bottles for that purpose, Hurst opened fire. Hurst shot Branch three times. His first shot struck Branch in the ribs or stomach, prompting him to yell, "'[N]o, no, don't shoot.'" *Ibid.* His second shot struck Branch in the side, causing him to fall. Hurst then walked over to Branch and shot him in the head, before taking his keys and driving off in Branch's car.

A jury convicted Hurst of first-degree murder and recommended that he be sentenced to death. The trial court adopted the recommendation. In a later petition for state collateral review, Hurst asserted that his constitutional rights were violated when a juror asked her father where she could look in the Bible for passages about the death penalty. He attached an affidavit from juror Christina Foster, in which she stated that she had "often had lunch with [her] father who worked near the courthouse" during the trial and, before deliberations, had asked him "where [she] could look in the Bible for help and guidance in making [her] decision for between life and death." App. in No. 13–6 (CA4), p. 441. Her father gave her "the section in the Bible where [she] could find 'an eye for an eye.'" *Ibid.*

The state court rejected Hurst's argument. It first noted that the U. S. Court of Appeals for the Fourth Circuit had "determined that the Bible does not constitute an improper external influence in a capital case." *Id.*, at 481–482. It then found that Hurst had "presented no evidence" that Foster's father either "knew what case juror Foster was sitting on" or "deliberately attempted to influence her vote by directing her to a specific passage in the Bible." *Id.*, at 482. The court therefore denied Hurst relief, and the Supreme Court of North Carolina summarily denied a petition for review.

Hurst then filed an application for federal relief, arguing, among other things, that the North Carolina court had unreasonably applied clearly established federal law as determined by this Court in rejecting his juror-influence claim. See § 2254(d)(1). As with Barnes' application, the U. S. District Court for the Middle District of North Carolina denied relief, but the Court of Appeals reversed. 757 F. 3d 389, 400 (CA4 2014). Although two judges on the panel expressed their misgivings in a concurrence, *ibid.* (opinion of Shedd, J., joined by Niemeyer, J.), the panel concluded that the earlier "holding in *Barnes* dictate[d] the same result" in Hurst's case, *id.*, at 398. The panel remanded for a further hearing on the matter to determine whether the juror's communication with her father actually prejudiced Hurst under *Brecht*, *supra*, at 637.

II

This Court should have granted a writ of certiorari to review the decisions below. In recognition of the serious disruption to state interests that occurs when a federal court collaterally re-

views a state-court judgment, the Antiterrorism and Effective Death Penalty Act of 1996 imposes strict limits on that review. Among those limits are the prohibitions found in § 2254(d), which dictates that a federal court may not grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—"

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

We have repeatedly explained that the § 2254(d) "standard is difficult to meet." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). Yet some courts continue to misapply this "part of the basic structure of federal habeas jurisdiction." *Id.*, at 103.

One of the all too common errors that some federal courts make in applying § 2254(d) is to look to their own precedents as the source of "clearly established Federal law" for purposes of § 2254(d)(1), even though that provision expressly limits that category to Supreme Court precedents. See, *e. g.*, *Glebe* v. *Frost*, 574 U. S. 21, 24 (2014) (*per curiam*); *Lopez* v. *Smith*, 574 U. S. 1, 6 (2014) (*per curiam*); *White* v. *Woodall*, 572 U. S. 415, 420, n. 2 (2014).

The Fourth Circuit's decision in *Barnes*—upon which it relied in *Hurst*—committed the same error. That court reasoned that our decision in *Remmer* "created a rebuttable presumption of prejudice applying to communications or contact between a third party and a juror concerning the matter pending before the jury." 751 F. 3d, at 241. But *Remmer* offered no specific guidance on what constituted "the matter pending before the jury." 347 U. S., at 229. Nevertheless, the Court of Appeals turned to its *own* precedents to determine whether the moral and spiritual implications of the death penalty as a general matter constituted "the matter pending before the jury." It cited its earlier decisions in *Stockton* v. *Virginia*, 852 F. 2d 740 (CA4 1988), and *United States* v. *Cheek*, 94 F. 3d 136 (CA4 1996), as setting forth a "'minimal standard'" under which "[a]n unauthorized contact between a third party and a juror concerns the matter pending before the

jury when it is 'of such a character as to reasonably draw into question the integrity of the verdict.'" 751 F. 3d, at 248. Neither of those decisions is a precedent of this Court.

Remmer was the only proper source of "clearly established Federal law," and it provided no support for the Court of Appeals' decision. That case involved a third party who "remarked to [a juror] that he could profit by bringing in a verdict favorable to the [defendant]." 347 U. S., at 228. The third-party communication in Barnes' case involved nothing of the sort. Instead, it concerned a juror who asked her minister a question about the death penalty generally and did not discuss the facts of the case. No precedent of this Court holds that such a communication concerns "the matter pending before the jury." Accordingly, the state court reasonably concluded that the juror's question about the death penalty generally—not the case specifically—did not concern the matter pending before the jury. Barnes, therefore, was not entitled to relief under § 2254(d)(1).

Despite the obvious error in *Barnes*, that decision has already begun to distort the law of the Fourth Circuit. When presented with Hurst's claim that the North Carolina court violated clearly established federal law as determined by this Court when it denied his *Remmer* claim, § 2254(d)(1), the panel deemed itself bound by *Barnes*. Even acknowledging that the affidavits submitted to the state court "did not allege that Juror Foster discussed with her father the facts or evidence that had been presented in the trial, or the status of the jury's deliberations," and that Hurst presented no "evidence that Juror Foster's father expressed any opinion about the case or attempted to influence her vote," the panel concluded that the "holding in *Barnes* dictate[d] the same result in [Hurst's] case." 757 F. 3d, at 398. That conclusion was just as erroneous as the one in *Barnes* itself.

* * *

I would have granted the writ of certiorari to review these cases. The Court of Appeals deviated from the requirements of federal law, declared two reasonable decisions of state courts "unreasonable," and put the State to the burden of two wholly unnecessary *Brecht* hearings. It committed an error that we have repeatedly corrected, including multiple times this Term. See *supra*, at 1069. Because I see no reason why these cases should be treated differently from the many others that we have

reviewed for the same error, I would have granted the petition for a writ of certiorari.

No. 14–410. GOOGLE, INC. *v.* ORACLE AMERICA, INC. C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 750 F. 3d 1339.

No. 14–1098. WOLFF, TRUSTEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 773 F. 3d 583.

No. 14–8035. JORDAN *v.* FISHER, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 3d 395.

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

Three times, the same prosecutor sought and obtained a death sentence against petitioner Richard Jordan. And each time, a court vacated that sentence. After Jordan's third successful appeal, the prosecutor entered into a plea agreement whereby Jordan would receive a sentence of life without the possibility of parole. When the Mississippi Supreme Court later invalidated that agreement, Jordan requested that the prosecutor reinstate the life-without-parole deal through a new plea. The prosecutor refused. Jordan was then retried and again sentenced to death.

Jordan applied for federal habeas corpus relief on the ground that the prosecutor's decision to seek the death penalty after having agreed to a lesser sentence was unconstitutionally vindictive. The District Court denied Jordan's petition, and the Court of Appeals for the Fifth Circuit, in a divided decision, denied Jordan's request for a certificate of appealability (COA). Because the Fifth Circuit clearly misapplied our precedents regarding the issuance of a COA, I would grant Jordan's petition and summarily reverse the Fifth Circuit's judgment.

I

A

In 1976, Jordan was arrested for the abduction and murder of Edwina Marter. Jackson County Assistant District Attorney Joe

Sam Owen led the prosecution. The jury convicted Jordan of capital murder, and, under then-applicable Mississippi law, he automatically received a sentence of death. After Jordan's sentence was imposed, however, the Mississippi Supreme Court held that automatic death sentences violated the Eighth Amendment. See *Jackson* v. *State*, 337 So. 2d 1242, 1251–1253 (1976) (citing *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Jordan was accordingly granted a new trial.

Owen continued to serve as the lead prosecutor at Jordan's second trial. Jordan was again convicted of capital murder and sentenced to death. The Fifth Circuit later determined, however, that the jury had been improperly instructed on the imposition of the death penalty. *Jordan* v. *Watkins*, 681 F. 2d 1067 (1982). The court therefore set aside Jordan's sentence.

Jordan's new sentencing trial was held in 1983. By this point, Owen had left the district attorney's office for private practice. But at the behest of Marter's family, Owen agreed to represent the State as a special prosecutor. A jury once more sentenced Jordan to death, but this Court subsequently vacated the decision upholding that sentence and remanded for reconsideration in light of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). See *Jordan* v. *Mississippi*, 476 U. S. 1101 (1986).

Rather than pursue yet another sentencing trial, Owen entered into a plea agreement with Jordan: Jordan would be sentenced to life without the possibility of parole in exchange for his promise not to challenge that sentence. In support of the agreement, Owen stipulated to several mitigating circumstances, including Jordan's remorse, his record of honorable service and disability incurred in the military during the Vietnam War, his good behavior in prison, and his significant contributions to society while incarcerated. 1 Postconviction Record 20–21. The trial court accepted the plea and, in December 1991, Jordan was sentenced to life without parole.

As it turned out, this sentence, too, was defective. At the time the parties reached their plea agreement, Mississippi's sentencing statutes authorized a term of life without parole only for those defendants who—unlike Jordan—had been found to be habitual offenders. Citing this statutory gap, the Mississippi Supreme Court held in an unrelated case that a plea agreement materially identical to Jordan's violated Mississippi public policy. *Lanier* v. *State*, 635 So. 2d 813 (1994). Such agreements, the court ex-

plained, were "void *ab initio*," and thus the parties were "placed back in the positions which they occupied prior to entering into the agreement." *Id.*, at 816–817.

Following the decision in *Lanier*, Jordan filed a *pro se* motion with the trial court seeking to remedy his unlawful sentence by changing its term from life without parole to life with the possibility of parole. While the motion was pending, the Mississippi Legislature amended the State's criminal code to permit sentences of life without parole for all capital murder convictions. See 1994 Miss. Laws p. 851 (amending Miss. Code Ann. § 97–3–21). The Mississippi Supreme Court ultimately agreed with Jordan that his sentence was invalid under *Lanier* and remanded the case for resentencing. *Jordan* v. *State*, 697 So. 2d 1190 (1997) (table).

On remand, Jordan asked Owen (reprising his role as special prosecutor) to reinstate their earlier life-without-parole agreement based on the recent amendment to Mississippi law. Jordan, in return, would agree to waive his right to challenge the retroactive application of that amendment to his case. Jordan had good reason to believe that his request would be granted: Three other Mississippi capital defendants had successfully petitioned to have their plea agreements invalidated under the logic of *Lanier*. Each had committed crimes at least as serious as Jordan's,[1] and each had received a life sentence after their successful appeals. Yet Owen refused to enter into the same agreement he had previously accepted, instead seeking the death penalty at a new sentencing trial. Owen later explained that he had declined to negotiate because he felt Jordan had violated their original agreement by asking the trial court to modify his sentence. See *Jordan* v. *State*, 786 So. 2d 987, 1000 (Miss. 2001).

Jordan filed a motion contending that Owen had sought the death penalty as retaliation for Jordan's exercise of his legal right to seek resentencing under *Lanier*. See *Blackledge* v. *Perry*, 417 U. S. 21, 28–29 (1974) (recognizing the Due Process Clause's prohibition of prosecutorial vindictiveness). The trial court denied the motion, and Jordan received a death sentence.

---

[1] See *Lanier* v. *State*, 635 So. 2d 813, 815 (Miss. 1994) (assaulting, kidnaping, and murdering a police officer); *Stevenson* v. *State*, 674 So. 2d 501, 502 (Miss. 1996) (stabbing to death a prison deputy); *Patterson* v. *State*, 660 So. 2d 966, 967 (Miss. 1995) (kidnaping and murder).

Jordan continued to pursue his prosecutorial vindictiveness claim on direct appeal to the Mississippi Supreme Court. That court rejected Jordan's argument, noting, among other things, that its previous decision in Jordan's case had left open the possibility that Owen could seek the death penalty. *Jordan* v. *State*, 786 So. 2d, at 1001. Justice Banks dissented, contending that Jordan's allegations were sufficiently troubling to merit an evidentiary hearing. *Id.*, at 1031–1032.

B

After exhausting his postconviction remedies in the state courts, Jordan initiated a federal habeas corpus proceeding in the Southern District of Mississippi. The District Court denied relief on each of the claims in Jordan's petition, including his vindictiveness claim. *Jordan* v. *Epps*, 740 F. Supp. 2d 802, 819 (2010). With respect to that claim, the District Court opined that Owen could not have been vindictive because he "did not substitute a different charge for the charge that was originally imposed, nor did he seek a different penalty than that originally sought." *Ibid.* The District Court also declined to issue a COA. App. to Pet. for Cert. 149a.

Jordan renewed his efforts to obtain a COA on his vindictiveness claim in an application to the Fifth Circuit, but the court denied the request. *Jordan* v. *Epps*, 756 F. 3d 395 (2014). The Fifth Circuit held that Jordan had "fail[ed] to prove" actual vindictiveness by Owen because "it is not vindictive for a prosecutor to follow through on a threat made during plea negotiations." *Id.*, at 406 (citing *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363–364 (1978)). The court further held that its decision in *Deloney* v. *Estelle*, 713 F. 2d 1080 (1983), precluded it from applying a presumption of vindictiveness. *Deloney*, the court reasoned, stood for the proposition that there could be no claim for prosecutorial vindictiveness "absent an increase in charges beyond those raised in the original indictment." 756 F. 3d, at 408.

In rejecting Jordan's legal arguments, the Fifth Circuit acknowledged that the Ninth Circuit, sitting en banc, had granted habeas relief to a capital defendant raising a similar vindictiveness claim. See *id.*, at 411, n. 5 (citing *Adamson* v. *Ricketts*, 865 F. 2d 1011 (1988)). "While the Ninth Circuit may have taken a different approach to this question," the Fifth Circuit maintained

that it was bound by its contrary precedent. 756 F. 3d, at 411, n. 5.

Judge Dennis filed an opinion dissenting in relevant part. He began by stressing that the court was "not called upon to make a decision on the ultimate merits of Jordan's claim of prosecutorial vindictiveness." *Id.*, at 416 (opinion concurring in part and dissenting in part). Judge Dennis went on to explain why, as he saw it, Jordan had "shown sufficient merit to the prosecutorial vindictiveness claim to warrant his appeal being considered on the full merits." *Id.*, at 422.

II

A

In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court. Under the Antiterrorism and Effective Death Penalty Act of 1996, a would-be habeas appellant must first obtain a COA. 28 U. S. C. § 2253(c)(1).

The COA statute permits the issuance of a COA only where a petitioner has made "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Our precedents give form to this statutory command, explaining that a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893, n. 4 (1983); some internal quotation marks omitted). Satisfying that standard, this Court has stated, "does not require a showing that the appeal will succeed." *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003). Instead, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.*, at 338 (internal quotation marks omitted).

We have made equally clear that a COA determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.*, at 336. This insistence on limited review is more than a formality: The statute mandates that, absent a COA, "an appeal may not be taken to the court of appeals." § 2253(c)(1). Thus, "until

a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.*, at 336.

B

Although the Fifth Circuit accurately recited the standard for issuing a COA, its application of that standard in this case contravened our precedents in two significant respects.

To start, the Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of Jordan's habeas petition. Two judges—first Justice Banks, and later Judge Dennis—found Jordan's vindictiveness claim highly debatable. And the en banc Ninth Circuit, presented with a similar claim in a comparable procedural posture, had granted relief. Those facts alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of Jordan's claim. Cf. Rule 22.3 (CA3 2011) ("[I]f any judge on the panel is of the opinion that the applicant has made the showing required by 28 U. S. C. § 2253, the certificate will issue"); *Jones* v. *Basinger*, 635 F. 3d 1030, 1040 (CA7 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine").

The Fifth Circuit nevertheless rejected Jordan's vindictiveness argument, finding the claim foreclosed by its prior decision in *Deloney*, 713 F. 2d 1080. As Judge Dennis' dissent shows, however, *Deloney* (and the restrictive gloss it placed on this Court's *Blackledge* decision) is susceptible of more than one reasonable interpretation. The defendant there entered into a plea agreement that reduced the charges against him. Later, the defendant not only backed out of his agreement with prosecutors, he insisted on proceeding to trial, undermining the entire purpose of the earlier plea-bargaining process. 713 F. 2d, at 1081. When that trial resulted in a conviction, the defendant alleged that the prosecutor had no right to try him on the original, pre-plea-bargain charges. *Id.*, at 1085. Unsurprisingly, the Fifth Circuit disagreed; it held that the defendant could not "bootstrap" his earlier efforts to obtain a lesser sentence into a vindictiveness claim. *Ibid.*

Jordan's situation is materially different. No one disputes that Jordan, like Deloney, attempted to alter the terms of his plea agreement. But he did so only because the Mississippi Supreme

Court's decision in *Lanier* rendered invalid his life-without-parole sentence. In light of *Lanier*, either Jordan or Owen should have asked to vacate Jordan's invalid sentence; Jordan simply moved first. Moreover, and again in contrast to the defendant in *Deloney*, Jordan never attempted to deprive the State of the benefit of its earlier bargain. Once Mississippi law changed, Jordan was willing to return to the *status quo ante*: He offered to accept the same sentence of life without parole. It was Owen, the prosecutor, who demanded a fourth trial. On these facts, it is far from certain that *Deloney* precludes Jordan from asserting a claim of prosecutorial vindictiveness.

In any event, Jordan's reading of the Fifth Circuit's case law need not be the best one to allow him to obtain further review. "[M]eritorious appeals are a subset of those in which a certificate should issue," *Thomas* v. *United States*, 328 F. 3d 305, 308 (CA7 2003), not the full universe of such cases. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Miller-El*, 537 U. S., at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that the petitioner will not prevail." *Id.*, at 338. The possibility that Jordan's claim may falter down the stretch should not necessarily bar it from leaving the starting gate.

The Fifth Circuit's second, and more fundamental, mistake was failing to "limit its examination to a threshold inquiry." *Id.*, at 327. "[A] COA ruling is not the occasion for a ruling on the merit of [a] petitioner's claim." *Id.*, at 331. It requires only "an overview of the claims in the habeas petition and a general assessment of their merits." *Id.*, at 336.

Here, the Fifth Circuit engaged in precisely the analysis *Miller-El* and the COA statute forbid: conducting, across more than five full pages of the Federal Reporter, a detailed evaluation of the merits and then concluding that because Jordan had "fail[ed] to prove" his constitutional claim, 756 F. 3d, at 407, a COA was not warranted. But proving his claim was not Jordan's burden. When a court decides whether a COA should issue, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U. S., at 342. Where, as here, "a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA

based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.*, at 336–337.[2]

* * *

The barrier the COA requirement erects is important, but not insurmountable. In cases where a habeas petitioner makes a threshold showing that his constitutional rights were violated, a COA should issue. I believe Jordan has plainly made that showing. For that reason, I would grant Jordan's petition and summarily reverse the Fifth Circuit's judgment. I respectfully dissent from the denial of certiorari.

No. 14–9899. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 778 F. 3d 515.

Rehearing Denied

No. 14–1032. MEGGISON *v.* BAILEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT, 575 U. S. 951;

No. 14–8316. MCDONALD *v.* FOX RUN MEADOWS PUD, 575 U. S. 954;

No. 14–8365. LEARY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 575 U. S. 965;

No. 14–8480. BELTRAN *v.* MCDOWELL, ACTING WARDEN, 575 U. S. 968;

No. 14–8493. IN RE SESSON, 575 U. S. 982;

No. 14–8542. REED *v.* JOB COUNCIL OF THE OZARKS ET AL., 575 U. S. 987;

No. 14–8723. BERG *v.* UNITED STATES, 575 U. S. 972;

---

[2] This is not the first time the Fifth Circuit has denied a COA after engaging in an extensive review of the merits of a habeas petitioner's claims. See, *e. g.*, *Tabler* v. *Stephens*, 588 Fed. Appx. 297 (2014); *Reed* v. *Stephens*, 739 F. 3d 753 (2014); *Foster* v. *Quarterman*, 466 F. 3d 359 (2006); *Ruiz* v. *Quarterman*, 460 F. 3d 638 (2006); *Cardenas* v. *Dretke*, 405 F. 3d 244 (2005). Nor is it the first time the Fifth Circuit has denied a COA over a dissenting opinion. See, *e. g.*, *Tabler*, 588 Fed. Appx. 297; *Jackson* v. *Dretke*, 450 F. 3d 614 (2006). Although I do not intend to imply that a COA was definitely warranted in each of these cases, the pattern they and others like them form is troubling.

No. 14–8844. MILLER *v.* WALT DISNEY CO. ET AL., 575 U. S. 989;

No. 14–8846. MILLER *v.* ABC HOLDING CO., INC., ET AL., 575 U. S. 1014;

No. 14–8908. SEWELL *v.* HOWARD, 575 U. S. 1028;

No. 14–9007. BARBER *v.* UNITED STATES, 575 U. S. 1002;

No. 14–9168. TOLEN *v.* NORMAN, WARDEN, 575 U. S. 1017;

No. 14–9213. BURT *v.* COMMISSIONER OF INTERNAL REVENUE, 575 U. S. 1004; and

No. 14–9295. DE LA CRUZ *v.* QUINTANA, WARDEN, 575 U. S. 1020. Petitions for rehearing denied.

JUNE 30, 2015

Certiorari Granted—Vacated and Remanded

No. 14–460. HICKENLOOPER, GOVERNOR OF COLORADO *v.* KERR ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, *ante*, p. 787. Reported below: 744 F. 3d 1156.

No. 14–8768. PEOPLES *v.* UNITED STATES. C. A. 5th Cir.; and

No. 14–9487. HORNYAK *v.* UNITED STATES. C. A. 5th Cir. Reported below: 588 Fed. Appx. 384. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 591.

No. 13–8407. BROWN *v.* UNITED STATES. C. A. 8th Cir. Reported below: 734 F. 3d 824;

No. 14–5227. ARROYO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 562 Fed. Appx. 889;

No. 14–5229. ANDERSON *v.* UNITED STATES. C. A. 1st Cir. Reported below: 745 F. 3d 593;

No. 14–6510. MELVIN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 577 Fed. Appx. 179;

No. 14–7280. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Reported below: 754 F. 3d 608;

No. 14–7347. VINALES *v.* UNITED STATES. C. A. 11th Cir. Reported below: 564 Fed. Appx. 518;

No. 14–7445. MALDONADO *v.* UNITED STATES. C. A. 2d Cir. Reported below: 581 Fed. Appx. 19;

No. 14–7569. De La Cruz, aka Delacruz *v.* United States. C. A. 5th Cir. Reported below: 582 Fed. Appx. 327;

No. 14–7587. Smith *v.* United States. C. A. 6th Cir. Reported below: 582 Fed. Appx. 590;

No. 14–7653. Rolfer *v.* United States. C. A. 8th Cir.;

No. 14–7832. Denson *v.* United States. C. A. 11th Cir. Reported below: 569 Fed. Appx. 710;

No. 14–8151. Bernardini *v.* United States. C. A. 6th Cir. Reported below: 583 Fed. Appx. 544;

No. 14–8196. Cisneros *v.* United States. C. A. 9th Cir. Reported below: 763 F. 3d 1236;

No. 14–8258. Ball *v.* United States. C. A. 6th Cir. Reported below: 771 F. 3d 964;

No. 14–8333. Davis *v.* United States. C. A. 5th Cir. Reported below: 583 Fed. Appx. 473;

No. 14–8359. Bell *v.* United States. C. A. 6th Cir. Reported below: 575 Fed. Appx. 598;

No. 14–8427. Walker *v.* United States. C. A. 8th Cir.;

No. 14–8464. Smith *v.* United States. C. A. 11th Cir. Reported below: 742 F. 3d 949;

No. 14–8530. Langston *v.* United States. C. A. 8th Cir. Reported below: 772 F. 3d 560;

No. 14–8569. Prince *v.* United States. C. A. 9th Cir. Reported below: 772 F. 3d 1173;

No. 14–8680. Talmore *v.* United States. C. A. 9th Cir. Reported below: 585 Fed. Appx. 567;

No. 14–8848. Taste *v.* United States. C. A. 4th Cir. Reported below: 603 Fed. Appx. 139;

No. 14–8884. Cooper *v.* United States. C. A. 11th Cir. Reported below: 598 Fed. Appx. 682:

No. 14–8903. Jones *v.* United States. C. A. 9th Cir.;

No. 14–8989. Martinez *v.* United States. C. A. 9th Cir. Reported below: 771 F. 3d 672;

No. 14–9049. Aiken *v.* Pastrana, Warden. C. A. 11th Cir. Reported below: 595 Fed. Appx. 953;

No. 14–9062. Holder *v.* United States. C. A. 6th Cir. Reported below: 603 Fed. Appx. 368;

No. 14–9108. Castle *v.* United States. C. A. 6th Cir. Reported below: 596 Fed. Appx. 422;

No. 14–9227. Kirk *v.* United States. C. A. 11th Cir. Reported below: 767 F. 3d 1136;

No. 14–9229. LYNCH *v.* UNITED STATES. C. A. 11th Cir.;

No. 14–9335. DRIVER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 581 Fed. Appx. 829;

No. 14–9338. CONEY *v.* PASTRANA, WARDEN. C. A. 11th Cir. Reported below: 579 Fed. Appx. 848;

No. 14–9574. JONES *v.* UNITED STATES. C. A. 3d Cir.;

No. 14–9659. FALLINS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 777 F. 3d 296; and

No. 14–9750. NIPPER *v.* PASTRANA, WARDEN. C. A. 11th Cir. Reported below: 597 Fed. Appx. 581. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 591.

JUSTICE ALITO, concurring.

Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, *ante*, p. 591. In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act, 18 U. S. C. § 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Courts of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

No. 14–282. CHANDLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 591. Reported below: 743 F. 3d 648.

JUSTICE ALITO, concurring.

Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, *ante*, p. 591. In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career

Criminal Act, 18 U. S. C. § 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

No. 14–7390. BECKLES *v.* UNITED STATES. C. A. 11th Cir. Reported below: 579 Fed. Appx. 833;

No. 14–7975. GOODEN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 576 Fed. Appx. 252;

No. 14–9326. MAYER *v.* UNITED STATES. C. A. 9th Cir.; and

No. 14–9634. WYNN *v.* UNITED STATES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 591. JUSTICE KAGAN took no part in the consideration or decision of these motions and these petitions.

JUSTICE ALITO, concurring.

Following the recommendation of the Solicitor General, the Court has held the petitions in these and many other cases pending the decision in *Johnson* v. *United States*, *ante*, p. 591. In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act, 18 U. S. C. § 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Courts of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

Probable Jurisdiction Noted

No. 14–232. HARRIS ET AL. *v.* ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL. Appeal from D. C. Ariz. Probable jurisdiction noted. Reported below: 993 F. Supp. 2d 1042.

Certiorari Granted

No. 14–915. FRIEDRICHS ET AL. *v.* CALIFORNIA TEACHERS ASSN. ET AL. C. A. 9th Cir. Certiorari granted.

No. 14–510. MENOMINEE INDIAN TRIBE OF WISCONSIN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari granted limited to the following question: "Whether the D. C. Circuit misapplied this Court's *Holland* v. *Florida*, 560 U. S. 631 (2010), decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?" Reported below: 764 F. 3d 51.

No. 14–1132. MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. *v.* MANNING ET AL. C. A. 3d Cir. Motion of Securities Industry and Financial Markets Association for leave to file brief as *amicus curiae* granted. Certiorari granted. Reported below: 772 F. 3d 158.

No. 14–1175. FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT. Sup. Ct. Nev. Certiorari granted limited to Questions 2 and 3 presented by the petition. Reported below: 130 Nev. 662, 335 P. 3d 125.

Certiorari Denied

No. 14–765. OTTER, GOVERNOR OF IDAHO, ET AL. *v.* LATTA ET AL.; and

No. 14–788. IDAHO *v.* LATTA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 3d 456.

No. 14–1073. NEVADA ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 14–9223. ZINK ET AL. *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 783 F. 3d 1089.

No. 14–823. BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, ET AL. *v.* FISHER-BORNE ET AL. C. A. 4th Cir. Certiorari before judgment denied.

JULY 2, 2015

Miscellaneous Order

No. 14–232. HARRIS ET AL. *v.* ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL. D. C. Ariz. [Probable jurisdiction noted, *ante*, p. 1082.] Order noting probable jurisdiction amended

as follows: Probable jurisdiction noted limited to Questions 1 and 2 presented by the statement as to jurisdiction.

JULY 14, 2015

Miscellaneous Orders

No. 15A30. ZINK *v.* STEELE, WARDEN. Application for certificate of appealability, presented to JUSTICE ALITO, and by him referred to the Court, denied.

No. 15–5183 (15A60). IN RE ZINK. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 15–5057 (15A31). ZINK *v.* STEELE, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5159 (15A55). ZINK *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5160 (15A59). ZINK *v.* GRIFFITH, WARDEN, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5176 (15A63). ZINK *v.* STEELE, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5184 (15A62). ZINK *v.* STEELE, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

JULY 20, 2015

Miscellaneous Orders

No. 14A1194 (14–8628). WARE *v.* UNITED STATES, 575 U. S. 946. Application to file petition for rehearing in excess of page

limit, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this application.

No. 14A1225 (14–8767). ROEDER *v.* KANSAS. Sup. Ct. Kan. Application for stay, addressed to JUSTICE ALITO and referred to the Court, denied.

No. D–2828. IN RE SCHACHTER. Robert A. Schachter, of Valley Cottage, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on June 29, 2015 [*ante*, p. 1050], is discharged.

Rehearing Denied

No. 14–1169. GOLDBLATT *v.* CITY OF KANSAS CITY, MISSOURI, ET AL., 575 U. S. 1026;

No. 14–1173. JOHNSON *v.* ILLINOIS ET AL., 575 U. S. 1026;

No. 14–1269. MOORE *v.* LIGHTSTROM ENTERTAINMENT, INC., ET AL., 575 U. S. 1027;

No. 14–1334. IN RE VADDE, 575 U. S. 1036;

No. 14–6927. MOORE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL., 575 U. S. 985;

No. 14–7120. CARR *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 574 U. S. 1124;

No. 14–7567. LADEAIROUS *v.* HOLDER, ATTORNEY GENERAL, ET AL., 574 U. S. 1141;

No. 14–7629. HAGAN *v.* KENTUCKY, 574 U. S. 1171;

No. 14–7977. HUNT *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, 575 U. S. 965;

No. 14–8210. BROWN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 953;

No. 14–8435. IN RE SHIELDS BEY, 575 U. S. 961;

No. 14–8503. SPECKMAN *v.* TEXAS, 575 U. S. 969;

No. 14–8588. STEWART *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 970;

No. 14–8656. MILLSAP *v.* ARKANSAS, 575 U. S. 999;

No. 14–8671. BENTON *v.* CLARK COUNTY JAIL ET AL., 575 U. S. 970;

No. 14–8720. BUCKLEY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 575 U. S. 1000;

No. 14–8732. SIMMONS *v.* TEXAS, 575 U. S. 1001;

No. 14–8760. THOMAS *v.* ROCKBRIDGE REGIONAL JAIL, 575 U. S. 1012;

No. 14–8767. ROEDER *v.* KANSAS, 575 U. S. 1012;

No. 14–8799. COLEMAN *v.* SCHOLLMEYER, SPECIAL JUDGE, CIRCUIT COURT OF MISSOURI, COLE COUNTY, ET AL., 575 U. S. 1013;

No. 14–8823. CASHIOTTA *v.* DIVISION OF PARKS AND MAINTENANCE, CLEVELAND, OHIO, 575 U. S. 1013;

No. 14–8847. IN RE CUNNINGHAM, 575 U. S. 1008;

No. 14–8860. HAENDEL *v.* DIGIANTONIO ET AL., 575 U. S. 1015;

No. 14–8957. ANDRADE CALLES *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY, 575 U. S. 1029;

No. 14–8988. CAMPBELL *v.* MICHIGAN, 575 U. S. 1030;

No. 14–9031. BARASHKOFF *v.* CITY OF SEATTLE, WASHINGTON, ET AL., 575 U. S. 1031;

No. 14–9060. HEATHER S. *v.* CONNECTICUT COMMISSIONER OF CHILDREN AND FAMILIES, 575 U. S. 1016;

No. 14–9102. REY *v.* UNITED STATES, 575 U. S. 991;

No. 14–9123. BRADLEY *v.* MISSISSIPPI, 575 U. S. 1017;

No. 14–9211. ADKINS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, *ante*, p. 1007;

No. 14–9215. BUHL *v.* BERKEBILE, WARDEN, 575 U. S. 1017;

No. 14–9216. ASKEW *v.* UNITED STATES, 575 U. S. 1004;

No. 14–9329. JOHNSON *v.* UNITED STATES, 575 U. S. 1020;

No. 14–9365. GARREY *v.* MASSACHUSETTS, 575 U. S. 1032;

No. 14–9445. TRUFANT *v.* DEPARTMENT OF THE AIR FORCE, 575 U. S. 1033;

No. 14–9451. IN RE GREEN BEY, 575 U. S. 1008; and

No. 14–9456. BREWER *v.* UNITED STATES, 575 U. S. 1033. Petitions for rehearing denied.

No. 14–7681. COATES, AKA SIMMONS, AKA THOMAS *v.* HOLDER, ATTORNEY GENERAL, 574 U. S. 1173. Motion for leave to file petition for rehearing denied.

No. 14–9324. WARE *v.* UNITED STATES, 575 U. S. 1022. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JULY 24, 2015

Dismissal Under Rule 46

No. 14–1214. COALITION FOR THE PROTECTION OF MARRIAGE *v.* SEVCIK ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 771 F. 3d 456.

JULY 28, 2015

Dismissal Under Rule 46

No. 14–653. BANK OF AMERICA, N. A. *v.* LOPEZ. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 573 Fed. Appx. 922.

Miscellaneous Order

No. 14–613. GREEN *v.* BRENNAN, POSTMASTER GENERAL. C. A. 10th Cir. [Certiorari granted, 575 U. S. 983.] Catherine M. A. Carroll, Esq., of Washington, D. C., is invited to brief and argue this case as *amicus curiae* in support of the judgment below. Briefs for other *amici curiae* in support of the judgment below are to be filed within seven days of the filing of the brief for Court-appointed *amicus curiae.*

AUGUST 10, 2015

Miscellaneous Order

No. 15A16. COLLIE *v.* SOUTH CAROLINA COMMISSION ON LAWYER CONDUCT. Sup. Ct. S. C. Application to file petition for writ of certiorari in excess of the page limits, addressed to JUSTICE GINSBURG and referred to the Court, denied.

Rehearing Denied

No. 13–1428. DAVIS, ACTING WARDEN *v.* AYALA, *ante*, p. 257;

No. 14–1165. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE ET AL. *v.* BERCH, CHIEF JUSTICE, SUPREME COURT OF ARIZONA, ET AL., 575 U. S. 1026;

No. 14–1178. KAMPS *v.* BAYLOR UNIVERSITY ET AL., 575 U. S. 1038;

No. 14–1305. TROWBRIDGE *v.* UNITED STATES, *ante*, p. 1005;

No. 14–8491. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL., *ante*, p. 1023;

No. 14–8589. HITTSON *v.* CHATMAN, WARDEN, *ante*, p. 1028;

No. 14–8645. DICKERSON *v.* MURRAY ET AL., 575 U. S. 999;
No. 14–8783. MAY *v.* BARBER ET AL., 575 U. S. 1013;
No. 14–8826. TAYLOR *v.* VERIZON COMMUNICATIONS ET AL., 575 U. S. 1014;
No. 14–8831. DAVIS ET AL. *v.* CITY OF NEW HAVEN, CONNECTICUT, ET AL., 575 U. S. 1014;
No. 14–8869. MCNEILL *v.* WAYNE COUNTY, MICHIGAN, 575 U. S. 1015;
No. 14–8899. BUNCH *v.* CAIN, WARDEN, 575 U. S. 1015;
No. 14–9000. GIBBONS *v.* UNITED STATES, 575 U. S. 978;
No. 14–9004. BROUGHTON *v.* MERIT SYSTEMS PROTECTION BOARD, 575 U. S. 990;
No. 14–9156. NIXON *v.* ABBOTT, GOVERNOR OF TEXAS, *ante*, p. 1006;
No. 14–9172. DELK *v.* TEXAS, *ante*, p. 1007;
No. 14–9195. SANDS-WEDEWARD *v.* LOCAL 306, NATIONAL POSTAL MAIL HANDLERS UNION, *ante*, p. 1007;
No. 14–9197. MOATS *v.* WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, ET AL., *ante*, p. 1007;
No. 14–9257. SALARY *v.* NUSS ET AL., 575 U. S. 1041;
No. 14–9302. BROZ *v.* DEUTSCHE BANK NATIONAL TRUST CO., *ante*, p. 1008;
No. 14–9312. TEAGUE *v.* CALIFORNIA, *ante*, p. 1008;
No. 14–9340. JACKSON *v.* DOMZALSKI, 575 U. S. 1042;
No. 14–9390. COOPER *v.* VAROUXIS, EXECUTRIX OF THEODORE VAROUXIS ESTATE AND TRUST, 575 U. S. 1033;
No. 14–9571. MARCH *v.* MCALLISTER, WARDEN, *ante*, p. 1010;
No. 14–9651. VIOLA *v.* UNITED STATES, *ante*, p. 1012; and
No. 14–9705. WHITE *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 1041. Petitions for rehearing denied.

AUGUST 12, 2015

Certiorari Denied

No. 15–5141 (15A48). LOPEZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion for leave to proceed *in forma pauperis* denied. Certiorari denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would vote to grant the motion

for leave to proceed *in forma pauperis*. Reported below: 783 F. 3d 524.

AUGUST 13, 2015

Miscellaneous Order

No. 15A111 (14–1516). DUNCAN, WARDEN *v.* OWENS. C. A. 7th Cir. Application to recall and stay the mandate pending disposition of the petition for writ of certiorari, addressed to JUSTICE SCALIA, and by him referred to the Court, denied.

AUGUST 21, 2015

Miscellaneous Order

No. 15A137. MELLOULI *v.* LYNCH, ATTORNEY GENERAL. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, granted. Further proceedings in the Board of Immigration Appeals are stayed pending the timely filing of a petition for writ of certiorari, or of a petition for writ of mandamus and prohibition, and further order of this Court.

AUGUST 28, 2015

Miscellaneous Orders

No. 14A1154. ECKSTROM *v.* VALENZUELA, WARDEN. Application for certificate of appealability, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 15A96 (15–5289). ARAKJI *v.* HESS ET AL. Application for stay pending disposition of the petition for writ of certiorari, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 13–1067. OBB PERSONENVERKEHR AG *v.* SACHS. C. A. 9th Cir. [Certiorari granted, 574 U. S. 1133.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 14–520. HAWKINS ET AL. *v.* COMMUNITY BANK OF RAYMORE. C. A. 8th Cir. [Certiorari granted, 574 U. S. 1190.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 14–1096. LUNA TORRES *v.* LYNCH, ATTORNEY GENERAL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1053.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Denied

No. 14–983. Hooks, Warden *v.* Langford, *ante*, p. 1049;

No. 14–1215. Jones *v.* Jones, 575 U. S. 1038;

No. 14–1246. Gorski *v.* United States et al., *ante*, p. 1036;

No. 14–1310. Edwards *v.* Lake Elsinore Unified School District et al., *ante*, p. 1056;

No. 14–1360. Dix *v.* Unknown Transportation Security Administration Agent et al., *ante*, p. 1057;

No. 14–1369. Ramon Tarango, aka Tarango *v.* Lynch, Attorney General, *ante*, p. 1037;

No. 14–1386. Wilborn *v.* Johnson, Secretary of Homeland Security, *ante*, p. 1057;

No. 14–7955. Glossip et al. *v.* Gross et al., *ante*, p. 863;

No. 14–8932. In re Mitchell, 575 U. S. 1024;

No. 14–9052. Themeus *v.* Jones, Secretary, Florida Department of Corrections, et al., 575 U. S. 1039;

No. 14–9098. Dingle *v.* Virginia, 575 U. S. 1040;

No. 14–9136. Valenzuela, fka Mendez *v.* Corizon Health Care et al., 575 U. S. 1041;

No. 14–9163. Strahorn *v.* Florida, *ante*, p. 1006;

No. 14–9260. Marceaux *v.* United States Marine Corps, *ante*, p. 1008;

No. 14–9309. Yates *v.* Iowa, *ante*, p. 1024;

No. 14–9311. Turner *v.* Coleman, Warden, *ante*, p. 1024;

No. 14–9330. Furs-Julius *v.* Social Security Administration, *ante*, p. 1008;

No. 14–9375. Yuan *v.* Green Century Development, LLC, et al., *ante*, p. 1038;

No. 14–9376. Tomaselli et al. *v.* Beaulieu et al., *ante*, p. 1038;

No. 14–9415. Patton *v.* Bryant et al., *ante*, p. 1039;

No. 14–9421. Mazin *v.* Town of Norwood, Massachusetts, et al., *ante*, p. 1039;

No. 14–9463. Kearney *v.* New York State Department of Correctional Services et al., *ante*, p. 1059;

No. 14–9467. McQueen *v.* Aerotek et al., *ante*, p. 1059;

No. 14–9480. Craddock *v.* United States, 575 U. S. 1034;

No. 14–9509. McClinton *v.* Kelley, Director, Arkansas Department of Correction, *ante*, p. 1059;

No. 14–9527. Fairchild-Littlefield *v.* Cavazos, Warden, *ante*, p. 1009;

No. 14–9581. HENSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1040;

No. 14–9628. ULLRICH *v.* YORDY, WARDEN, *ante*, p. 1060;

No. 14–9881. RICE *v.* UNITED STATES, *ante*, p. 1061;

No. 14–9915. DOE *v.* UNITED STATES, *ante*, p. 1043;

No. 14–9919. BARBARY *v.* UNITED STATES, *ante*, p. 1062;

No. 14–9958. RIGGS *v.* UNITED STATES, *ante*, p. 1062;

No. 14–9982. MONTGOMERY *v.* BRENNAN, POSTMASTER GENERAL, *ante*, p. 1063; and

No. 14–10119. IN RE RIVERA, *ante*, p. 1053. Petitions for rehearing denied.

AUGUST 31, 2015

Miscellaneous Orders

No. 15A218. MCDONNELL *v.* UNITED STATES. Application for stay of mandate, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted, and the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 15–4019 is stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court.

No. 15A250. DAVIS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ROWAN COUNTY CLERK *v.* MILLER ET AL. D. C. E. D. Ky. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

SEPTEMBER 1, 2015

Miscellaneous Order

No. 15–5874 (15A260). IN RE NUNLEY. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 15–5605 (15A163). NUNLEY *v.* BOWERSOX. C. A. 8th Cir. Application for stay of execution of sentence of death, presented

to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 784 F. 3d 468.

No. 15–5808 (15A247). NUNLEY *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5851 (15A251). NUNLEY *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 2, 2015

Miscellaneous Order

No. 15A252. FIBROGEN, INC. *v.* AKEBIA THERAPEUTICS, INC. D. C. N. D. Cal. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The order heretofore entered by JUSTICE KENNEDY is vacated.

SEPTEMBER 14, 2015

Miscellaneous Orders

No. 14–280. MONTGOMERY *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 575 U. S. 911.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the parties and the Court-appointed *amicus curiae* for enlargement of time for oral argument and for divided argument granted, and the time is divided as follows: 15 minutes for the Court-appointed *amicus curiae*, 15 minutes for petitioner, 15 minutes for the Solicitor General, and 30 minutes for respondent. Court-appointed *amicus curiae* and petitioner will each be permitted to reserve time for rebuttal.

No. 14–940. EVENWEL ET AL. *v.* ABBOTT, GOVERNOR OF TEXAS, ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, 575 U. S. 1024.] Motion of appellants to dispense with printing joint appendix granted.

SEPTEMBER 28, 2015

Miscellaneous Orders

No. 14–840. FEDERAL ENERGY REGULATORY COMMISSION *v.* ELECTRIC POWER SUPPLY ASSN. ET AL.; and

No. 14–841. EnerNOC, Inc., et al. *v.* Electric Power Supply Assn. et al. C. A. D. C. Cir. [Certiorari granted, 575 U. S. 995.] Motion of the Solicitor General for divided argument granted. Justice Alito took no part in the consideration or decision of this motion.

No. 14–857. Campbell-Ewald Co. *v.* Gomez. C. A. 9th Cir. [Certiorari granted, 575 U. S. 1008.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 14–1504. Wittman et al. *v.* Personhuballah et al. Appeal from D. C. E. D. Va. The parties are directed to file supplemental briefs addressing the following question: "Whether appellants have standing under Article III of the United States Constitution." Briefs, not to exceed 15 pages each, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before Tuesday, October 13, 2015. Reply briefs, not to exceed 10 pages each, are to be filed with the Clerk and served upon opposing counsel on or before Tuesday, October 20, 2015.

September 29, 2015

Certiorari Denied

No. 15–6275 (15A331). Gissendaner *v.* Bryson, Commissioner, Georgia Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Justice Sotomayor would grant the application for stay of execution. Reported below: 794 F. 3d 1327.

No. 15–6327 (15A337). Gissendaner *v.* Chatman, Warden. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

No. 15–6336 (15A336). Gissendaner *v.* Bryson, Commissioner, Georgia Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 803 F. 3d 565.

SEPTEMBER 30, 2015

Certiorari Denied

No. 15–6340 (15A333). GLOSSIP *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE BREYER would grant the application for stay of execution.

OCTOBER 1, 2015

Dismissal Under Rule 46

No. 15–5019. OSBORNE ET AL. *v.* TULIS, AS CHAPTER 7 TRUSTEE FOR OSBORNE ET AL. (two judgments). C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 594 Fed. Appx. 34 (second judgment) and 39 (first judgment).

Miscellaneous Order

No. 15–6325 (15A334). IN RE PRIETO. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 14–770. BANK MARKAZI, AKA CENTRAL BANK OF IRAN *v.* PETERSON ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 758 F. 3d 185.

No. 14–1209. STURGEON *v.* FROST, ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 768 F. 3d 1066.

No. 14–1280. HEFFERNAN *v.* CITY OF PATERSON, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 777 F. 3d 147.

No. 14–1373. UTAH *v.* STRIEFF. Sup. Ct. Utah. Certiorari granted. Reported below: 2015 UT 2, 357 P. 3d 532.

No. 14–1382. AMERICOLD LOGISTICS, LLC, ET AL. *v.* CONAGRA FOODS, INC., ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 776 F. 3d 1175.

No. 14–1406. NEBRASKA ET AL. *v.* PARKER ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 774 F. 3d 1166.

No. 14–1458. MHN GOVERNMENT SERVICES, INC., ET AL. *v.* ZABOROWSKI ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 601 Fed. Appx. 461.

No. 14–1516. DUNCAN, WARDEN *v.* OWENS. C. A. 7th Cir. Certiorari granted. Reported below: 781 F. 3d 360.

No. 15–108. COMMONWEALTH OF PUERTO RICO *v.* SANCHEZ VALLE ET AL. Sup. Ct. P. R. Certiorari granted.

No. 14–6166. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 754 F. 3d 217.

No. 14–8913. MOLINA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 588 Fed. Appx. 333.

No. 15–138. RJR NABISCO, INC., ET AL. *v.* EUROPEAN COMMUNITY ET AL. C. A. 2d Cir. Motion of Washington Legal Foundation for leave to file brief as *amicus curiae* granted. Certiorari granted. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion and this petition. Reported below: 764 F. 3d 129.

No. 15–5040. WILLIAMS *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 629 Pa. 533, 105 A. 3d 1234.

Certiorari Denied

No. 15–6064 (15A304). PRIETO *v.* ZOOK, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 791 F. 3d 465.

OCTOBER 2, 2015

Dismissal Under Rule 46

No. 14–1511. GIRL SCOUTS OF MIDDLE TENNESSEE, INC. *v.* GIRL SCOUTS OF THE U. S. A. C. A. 6th Cir. Certiorari dis-

missed under this Court's Rule 46.1. Reported below: 770 F. 3d 414.

Miscellaneous Order

No. 15A343. PRIETO *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, dismissed as moot.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2012, 2013, AND 2014

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2012	**2013**	**2014**	**2012**	**2013**	**2014**	**2012**	**2013**	**2014**	**2012**	**2013**	**2014**
Number of cases on dockets	3	5	6	1,806	1,869	1,845	6,997	6,706	6,215	8,806	8,580	8,066
Number disposed of during term	0	0	1	1,503	1,568	1,552	6,099	5,979	5,453	7,602	7,547	7,006
Number remaining on dockets	3	5	5	303	301	293	898	727	762	1,204	1,033	1,060

	TERMS		
	2012	**2013**	**2014**
Cases argued during term	77	79	75
Number disposed of by full opinions	76	77	75
Number disposed of by per curiam opinions	1	2	0
Number set for reargument	0	0	1
Cases granted review this term	93	76	71
Cases reviewed and decided without oral argument	88	72	109
Total cases to be available for argument at outset of following term	45	40	33

JUNE 30, 2015

INDEX

(Vol. 576 U. S.)
