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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2009

JANUARY 25 THROUGH MAY 12, 2010

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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*JUSTICE STEVENS announced his retirement on April 9, 2010, effective "the next day after the Court rises for the summer recess."

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 August 17, 2009, 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, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, 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.

August 17, 2009.

(For next previous allotment, see 557 U. S., Pt. 2, p. iv.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2006 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The opinion reported on page 1301 *et seq.* is that written in chambers by an individual Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2009

HEMI GROUP, LLC, ET AL. *v.* CITY OF NEW YORK, NEW YORK

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

No. 08–969. Argued November 3, 2009—Decided January 25, 2010

Respondent New York City (City) taxes the possession of cigarettes. Petitioner Hemi Group, based in New Mexico, sells cigarettes online to residents of the City. Neither state nor city law requires out-of-state sellers such as Hemi to charge, collect, or remit the City's tax; instead, the City must recover its tax on out-of-state sales directly from the purchasers. But the Jenkins Act, 15 U. S. C. §§ 375–378, requires out-of-state sellers to submit customer information to the States into which they ship cigarettes, and New York State has agreed to forward that information to the City. That information helps the City track down cigarette purchasers who do not pay their taxes. Against that backdrop, the City filed this lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that Hemi's failure to file the Jenkins Act reports with the State constituted mail and wire fraud, which are defined as "racketeering activit[ies]," 18 U. S. C. § 1961(1), subject to enforcement under civil RICO, § 1964(c). The District Court dismissed the claims, but the Second Circuit vacated the judgment and remanded. Among other things, the Court of Appeals held that the City's asserted injury—lost tax revenue—came about "by reason of" the predicate mail and wire frauds. It accordingly determined that the City had stated a valid RICO claim.

Syllabus

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

541 F. 3d 425, reversed and remanded.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court in part, concluding that because the City cannot show that it lost tax revenue "by reason of" the alleged RICO violation, it cannot state a RICO claim. Pp. 5–18.

(a) To establish that an injury came about "by reason of" a RICO violation, a plaintiff must show that a predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268. Proximate cause for RICO purposes should be evaluated in light of its common-law foundations; it thus requires "some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* A link that is "too remote," "purely contingent," or "indirec[t]" is insufficient. *Id.*, at 271, 274.

The City's causal theory cannot satisfy RICO's direct relationship requirement. Indeed, the causal link here is far more attenuated than the one the Court rejected as "purely contingent" and "too remote" in *Holmes*. *Id.*, at 271. According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, it could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected. As the Court reiterated in *Holmes*, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step," *id.*, at 271–272, and that "general tendency" applies with full force to proximate cause inquiries under RICO, *e. g.*, *ibid.* Because the City's causation theory requires the Court to move well beyond the first step, that theory cannot satisfy RICO's direct relationship requirement.

The City's claim suffers from the same defect as the RICO claim rejected in *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 458–461, where the conduct directly causing the harm was distinct from the conduct giving rise to the fraud, see *id.*, at 458. Indeed, the disconnect between the asserted injury and the alleged fraud in this case is even sharper. In *Anza*, the same party had both engaged in the harmful conduct and committed the fraudulent act. Here, the City's theory of liability rests not just on separate *actions*, but separate actions carried out by sepa-

rate *parties*. The City's theory thus requires that the Court extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation was to file Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. The Court has never before stretched the causal chain of a RICO violation so far, and declines to do so today. See, *e. g.*, *id.*, at 460–461. Pp. 8–12.

(b) The City attempts to avoid this conclusion by characterizing the violation not merely as Hemi's failure to file Jenkins Act reports with the State, but as a more general systematic scheme to defraud the City of tax revenue. But if the City could escape the proximate cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct, the Court's RICO proximate cause precedent would become a mere pleading rule. That precedent makes clear that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" *Anza*, *supra*, at 457. Because the only fraudulent *conduct* alleged here is a violation of the Jenkins Act, the City must, but cannot, show that Hemi's failure to file the Jenkins Act reports led directly to its injuries.

The City also errs in relying on *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639. There, the plaintiffs' causation theory was "straightforward": The causal link in *Bridge* involved a direct and easily identifiable connection between the fraud at issue and the plaintiffs' injury, *id.*, at 647, 658; the plaintiffs there "were the *only* parties injured by petitioners' misrepresentations," *id.*, at 658; and there were "no independent factors that account[ed] for [the] injury," *ibid.* The City's theory in this case is anything but straightforward: Multiple steps separate the alleged fraud from the asserted injury. And in contrast to *Bridge*, where there were "no independent factors that account[ed] for [the plaintiffs'] injury," *ibid.*, here there certainly were: The City's theory of liability rests on the independent actions of third and even fourth parties. Pp. 13–17.

ROBERTS, C. J., delivered the opinion of the Court in part, in which SCALIA, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, J., joined in part. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 18. BREYER, J., filed a dissenting opinion, in which STEVENS and KENNEDY, JJ., joined, *post*, p. 19. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Randolph H. Barnhouse argued the cause and filed briefs for petitioners.

Leonard J. Koerner argued the cause for respondent. With him on the brief were *Michael A. Cardozo*, *Elizabeth Susan Natrella*, *Eric Proshansky*, and *Gail P. Rubin*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court in part.

The city of New York (City) taxes the possession of cigarettes. Hemi Group, based in New Mexico, sells cigarettes online to residents of the City. Neither state nor city law requires Hemi to charge, collect, or remit the tax, and the purchasers seldom pay it on their own. Federal law, however, requires out-of-state vendors such as Hemi to submit customer information to the States into which they ship the cigarettes.

Against that backdrop, the City filed this lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that Hemi failed to file the required customer information with the State. That failure, the City argues, constitutes mail and wire fraud, which caused it to lose tens of millions of dollars in unrecovered cigarette taxes. Because the City cannot show that it lost the tax revenue

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*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 L. Hagan* and *Ashley E. Tatman*, Deputy Attorneys General, by *G. Robert Blakey*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Richard Cordray* of Ohio, *Tom Corbett* of Pennsylvania, *Henry McMaster* of South Carolina, *Mark L. Shurtleff* of Utah, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; and for the Campaign for Tobacco-Free Kids by *Peter C. Canfield* and *Michael Kovaka*.

"by reason of" the alleged RICO violation, 18 U. S. C. § 1964(c), we hold that the City cannot state a claim under RICO. We therefore reverse the Court of Appeals' decision to the contrary.

I

A

This case arises from a motion to dismiss, and so we accept as true the factual allegations in the City's second amended complaint. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993).

New York State authorizes the City of New York to impose its own taxes on cigarettes. N. Y. Unconsol. Law Ann. § 9436(1) (West Supp. 2009). Under that authority, the City has levied a $1.50 per pack tax on each standard pack of cigarettes possessed within the City for sale or use. N. Y. C. Admin. Code § 11–1302(a) (2008); see also Record A1016. When purchasers buy cigarettes from in-state vendors, the seller is responsible for charging, collecting, and remitting the tax. N. Y. Tax Law Ann. § 471(2) (West Supp. 2009). Out-of-state vendors, however, are not. *Ibid.*; see *New York* v. *Smokes-Spirits.com, Inc.*, 541 F. 3d 425, 432–433 (CA2 2008). Instead, the City is responsible for recovering, directly from the customers, use taxes on cigarettes sold outside New York. That can be difficult, as those customers are often reluctant to pay and tough to track down. One way the City can gather information that would assist it in collecting the back taxes is through the Jenkins Act, ch. 699, 63 Stat. 884, as amended by 69 Stat. 627. That Act requires out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents. 15 U. S. C. §§ 375–378.

New York State and the City have executed an agreement under which both parties undertake to "cooperate fully with

each other and keep each other fully and promptly informed with reference to any person or transaction subject to both State and City cigarette taxes including [i]nformation obtained which may result in additional cigarette tax revenue to the State or City provided that the disclosure of that information is permissible under existing laws and agreements." Record A1003. The City asserts that under that agreement, the State forwards Jenkins Act information to the City. *Id.*, at A998; Second Amended Compl. ¶ 54. That information helps the City track down purchasers who do not pay their taxes. *Id.*, ¶¶ 58–59.

Hemi Group is a New Mexico company that sells cigarettes online. Hemi, however, does not file Jenkins Act information with the State. The City alleges that this failure has cost it "tens if not hundreds of millions of dollars a year in cigarette excise tax revenue." Record A996. Based on Hemi's failure to file the information with the State, the City filed this federal RICO claim.

B

RICO provides a private cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U. S. C. § 1964(c). Section 1962, in turn, contains RICO's criminal provisions. Specifically, § 1962(c), which the City invokes here, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." "[R]acketeering activity" is defined to include a number of so-called predicate acts, including the two at issue in this case—mail and wire fraud. See § 1961(1).

The City alleges that Hemi's "interstate sale of cigarettes and the failure to file Jenkins Act reports identifying those sales" constitute the RICO predicate offenses of mail and

wire fraud in violation of § 1962(c), for which § 1964(c) provides a private cause of action. Record A980. Invoking that private cause of action, the City asserts that it has suffered injury in the form of lost tax revenue—its "business or property" in RICO terms—"by reason of" Hemi's fraud.

Hemi does not contest the City's characterization of the Jenkins Act violations as predicate offenses actionable under § 1964(c). (We therefore assume, without deciding, that failure to file Jenkins Act material can serve as a RICO predicate offense.) Instead, Hemi argues that the City's asserted injury—lost tax revenue—is not "business or property" under RICO, and that the City cannot show that it suffered any injury "by reason of" the failure to file Jenkins Act reports.

The District Court dismissed the City's RICO claims, determining that Hemi owner and officer Kai Gachupin did not have an individual duty to file Jenkins Act reports, and thus could not have committed the alleged predicate acts. *New York* v. *Nexicon, Inc.*, No. 03 CV 383 (DAB), 2006 WL 647716, *7–*8 (SDNY, Mar. 15, 2006). The District Court therefore held that the City could not establish that Hemi and Gachupin formed an "enterprise" as required to establish RICO liability. *Id.*, at *7–*10. Because it dismissed on that ground, the District Court did not address whether the City's loss of tax revenue constitutes an injury to its "business or property" under § 1964, or whether that injury was caused "by reason of" Hemi's failure to file the Jenkins Act reports.

The Second Circuit vacated the District Court's judgment and remanded for further proceedings. The Court of Appeals held that the City had established that Gachupin and Hemi operated as an "enterprise" and that the enterprise committed the predicate RICO acts of mail and wire fraud, based on the failure to file the Jenkins Act material with the State. 541 F. 3d, at 447–448. The court also determined that the City's asserted injury, lost tax revenue, was "busi-

ness or property" under RICO. *Id.*, at 444–445. And that injury, the court concluded, came about "by reason of" the predicate mail and wire frauds. *Id.*, at 440–444. The City thus had stated a viable RICO claim. Judge Winter dissented on the ground that the alleged RICO violation was not the proximate cause of the City's injury. *Id.*, at 458–461.

Hemi filed a petition for certiorari, asking this Court to determine whether the City had been "directly injured in its 'business or property'" by reason of the alleged mail and wire frauds. Pet. for Cert. i. We granted that petition. 556 U. S. 1220 (2009).

II

Though framed as a single question, Hemi's petition for certiorari raises two distinct issues: First, whether a loss in tax revenue is "business or property" under 18 U. S. C. § 1964(c); and second, whether the City's asserted injury came about "by reason of" the allegedly fraudulent conduct, as required by § 1964(c). We determine that the City cannot satisfy the causation requirement—that any injury the City suffered must be "by reason of" the alleged frauds—and therefore do not decide whether the City's allegations of lost tax revenue constitute an injury to its "business or property."

A

In *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258 (1992), we set forth the standard of causation that applies to civil RICO claims. In that case, we addressed a RICO claim brought by Securities Investor Protection Corporation (SIPC) against defendants whom SIPC alleged had manipulated stock prices. *Id.*, at 262–263. SIPC had a duty to reimburse customers of certain registered broker-dealers in the event the broker-dealers were unable to meet their financial obligations. *Id.*, at 261. When the conspiracy by the stock manipulators was detected, stock prices collapsed, and two broker-dealers were unable to meet

their obligations to their customers. SIPC, as insurer against that loss, ultimately was on the hook for nearly $13 million to cover the customers' claims. The Court held that SIPC could not recover against the conspirators because it could not establish that it was injured "by reason of" the alleged fraud, as that phrase is used in RICO.

We explained that, to state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.*, at 268. Proximate cause for RICO purposes, we made clear, should be evaluated in light of its common-law foundations; proximate cause thus requires "some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* A link that is "too remote," "purely contingent," or "indirec[t]" is insufficient. *Id.*, at 271, 274.

Applying that standard, we rejected SIPC's RICO claim. The alleged conspiracy, we held, directly harmed only the broker-dealers; SIPC's injury, on the other hand, was "purely contingent" on that harm. *Id.*, at 271. The connection between the alleged conspiracy and SIPC's injury was therefore "too remote" to satisfy RICO's direct relationship requirement. *Ibid.*

The City's causal theory is far more attenuated than the one we rejected in *Holmes*. According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, the City could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected. See Record A996.

But as we reiterated in *Holmes*, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." 503 U. S., at 271–272 (quoting *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 534 (1983), in turn quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918); internal quotation marks omitted). Our cases confirm that the "general tendency" applies with full force to proximate cause inquiries under RICO. *Holmes*, *supra*, at 271–272; see also *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 657–659 (2008); *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 460–461 (2006). Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.

Our decision in *Anza*, *supra*, confirms that the City's theory of causation is far too indirect. There we considered a RICO claim brought by Ideal Steel Supply against its competitor, National Steel Supply. Ideal alleged that National had defrauded New York State by failing to charge and remit sales taxes, and that National was thus able to undercut Ideal's prices. The lower prices offered by National, Ideal contended, allowed National to attract customers at Ideal's expense. *Id.*, at 458.

Finding the link between the fraud alleged and injury suffered to be "attenuated," we rejected Ideal's claim. *Id.*, at 459. "The direct victim of this conduct," we held, was "the State of New York, not Ideal." *Id.*, at 458. "It was the State that was being defrauded and the State that lost tax revenue as a result." *Ibid.* We recognized that Ideal had asserted "its own harms when [National] failed to charge customers for the applicable sales tax." *Ibid.* But the cause of Ideal's harm was "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Ibid.* The alleged violation therefore had not "led directly to the plaintiff's injuries," and Ideal accordingly had failed to meet RICO's "requirement of a di-

rect causal connection" between the predicate offense and the alleged harm. *Id.*, at 460–461.

The City's claim suffers from the same defect as the claim in *Anza*. Here, the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act reports. Thus, as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud. See *id.*, at 458.

Indeed, the disconnect between the asserted injury and the alleged fraud in this case is even sharper than in *Anza*. There, we viewed the point as important because the same party—National Steel—had both engaged in the harmful conduct and committed the fraudulent act. We nevertheless found the distinction between the relevant acts sufficient to defeat Ideal's RICO claim. Here, the City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*.

The City's theory thus requires that we extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation was to file the Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. We have never before stretched the causal chain of a RICO violation so far, and we decline to do so today. See *id.*, at 460–461; cf. *Associated Gen. Contractors*, *supra*, at 541, n. 46 (finding no proximate cause in the antitrust context where the plaintiff's "harm stems most directly from the conduct of persons who are not victims of the conspiracy").

One consideration we have highlighted as relevant to the RICO "direct relationship" requirement is whether better

situated plaintiffs would have an incentive to sue. See *Holmes*, *supra*, at 269–270. The State certainly is better situated than the City to seek recovery from Hemi. And the State has an incentive to sue—the State imposes its own $2.75 per pack tax on cigarettes possessed within the State, nearly double what the City charges. N. Y. Tax Law Ann. § 471(1) (West Supp. 2009). We do not opine on whether the State could bring a RICO action for any lost tax revenue. Suffice it to say that the State would have concrete incentives to try. See *Anza*, *supra*, at 460 ("Ideal accuses the Anzas of defrauding the State of New York out of a substantial amount of money. If the allegations are true, the State can be expected to pursue appropriate remedies").

The dissent would have RICO's proximate cause requirement turn on foreseeability, rather than on the existence of a sufficiently "direct relationship" between the fraud and the harm. It would find that the City has satisfied that requirement because "the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to prevent." *Post*, at 24 (opinion of BREYER, J.). If this line of reasoning sounds familiar, it should. It is precisely the argument lodged against the majority opinion in *Anza*. There, the dissent criticized the majority's view for "permit[ting] a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior." 547 U. S., at 470 (THOMAS, J., concurring in part and dissenting in part). But the dissent there did not carry the day, and no one has asked us to revisit *Anza*.

The concepts of direct relationship and foreseeability are of course two of the "many shapes [proximate cause] took at common law," *Holmes*, 503 U. S., at 268. Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm. Indeed, *Anza* and *Holmes* never even mention the concept of foreseeability.

B

The City offers a number of responses. It first challenges our characterization of the violation at issue. In the City's view, the violation is not merely Hemi's failure to file Jenkins Act information with the State, but a more general "systematic scheme to defraud the City of tax revenue." Brief for Respondent 42. Having broadly defined the violation, the City contends that it has been directly harmed by reason of that systematic scheme. *Ibid.*

But the City cannot escape the proximate cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct. Otherwise our RICO proximate cause precedent would become a mere pleading rule. In *Anza*, for example, Ideal alleged that National's scheme "was to give National a competitive advantage over Ideal." 547 U. S., at 454–455. But that allegation did not prevent the Court from concluding that National's fraud directly harmed only the State, not Ideal. As the Court explained, Ideal could not "circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Id.*, at 460.[1]

Our precedent makes clear, moreover, that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.' " *Id.*, at 457 (quoting *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 497 (1985)). In its RICO statement, the City alleged that Hemi's failure to file Jenkins Act reports constituted the predicate act of mail and wire fraud. Record A980. The City went on to

[1] Even if we were willing to look to Hemi's intent, as the dissent suggests we should, the City would fare no better. Hemi's aim was not to defraud the City (or the State, for that matter) of tax revenue, but to sell more cigarettes. Hemi itself neither owed taxes nor was obliged to collect and remit them. This all suggests that Hemi's alleged fraud was aimed at Hemi's competitors, not the City. But *Anza* teaches that the competitors' injuries in such a case are too attenuated to state a RICO claim.

allege that this predicate act "directly caused" its harm, *id.*, at A996, but that assertion is a legal conclusion about proximate cause—indeed, the very legal conclusion before us. The only fraudulent *conduct* alleged here is a violation of the Jenkins Act. See 541 F. 3d, at 459 (Winter, J., dissenting). Thus, the City must show that Hemi's failure to file the Jenkins Act reports with the State led directly to its injuries. This it cannot do.

The City also relies on *Bridge*, 553 U. S. 639. *Bridge* reaffirmed the requirement that there must be "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." *Id.*, at 657. The case involved competing bidders at a county tax-lien auction. Because the liens were profitable even at the lowest possible bid, multiple bidders offered that low bid. (The bidding took the form of the percentage tax penalty the bidder would require the property owner to pay, so the lowest possible bid was 0%.) To decide which bidder would be awarded the lien, the county devised a plan to allocate the liens "on a rotational basis." *Id.*, at 643 (internal quotation marks omitted). But as we noted in that case, this created a "perverse incentive": "Bidders who, in addition to bidding themselves, sen[t] agents to bid on their behalf [would] obtain a disproportionate share of liens." *Ibid.* The county therefore prohibited bidders from using such agents. *Ibid.*

A losing bidder alleged that a competitor had defrauded the county by employing shadow bidders to secure a greater proportion of liens than it was due. We held that the bidder-plaintiff had met RICO's causation requirement. Distinguishing that claim from the one at issue in *Anza*, we noted that the plaintiff's theory of causation in *Bridge* was "straightforward": Because of the zero-sum nature of the auction, and because the county awarded bids on a rotational basis, each time a fraud-induced bid was awarded, a particular legitimate bidder was necessarily passed over. 553 U. S., at 647, 658. The losing bidders, moreover, "were the *only*

parties injured by petitioners' misrepresentations." *Id.*, at 658. The county was not; it received the same revenue regardless of which bidder prevailed.

The City's theory in this case is anything but straightforward: Multiple steps, as we have detailed, separate the alleged fraud from the asserted injury. And in contrast to *Bridge*, where there were "no independent factors that account[ed] for [the plaintiff's] injury," *ibid.*, here there certainly were: The City's theory of liability rests on the independent actions of third and even fourth parties.

The City at various points during the proceedings below described its injury as the lost "opportunity to tax" rather than "lost tax revenue." It is not clear that there is a substantive distinction between the two descriptions. In any event, before this Court, the City's argument turned on lost revenue, not a lost opportunity to collect it. See, *e. g.*, Brief for Respondent *i* ("Counter-Question Presented[:] Does the City of New York have standing under RICO because lost tax revenue constitutes a direct injury to the City's 'business or property' in accord with the statute, 18 U. S. C. § 1964(c), and this Court's authority?"); *id.*, at 40 ("[T]he City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations"). Indeed, in its entire brief on the merits, the City never uses the word "opportunity" (or anything similar) to describe its injury.

Perhaps the City articulated its argument in terms of the lost revenue itself to meet Hemi's contention that an injury to the mere "opportunity to collect" taxes fell short of RICO's injury to "property" requirement. Brief for Petitioners 25 ("The opportunity to collect taxes from those who did owe them . . . falls within a class of expectation interests that do not qualify as injury to business or property and therefore do not confer civil RICO standing" (internal quotation marks omitted)); see *Cleveland* v. *United States*, 531 U. S. 12, 15 (2000) ("It does not suffice . . . that the object of the fraud may become property in the recipient's hands; for

purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim").

That is not to say, however, that the City would fare any better on the causation question had it framed its argument in terms of a lost opportunity. Hemi's filing obligation would still be to the State, and any harm to the City would still be caused directly by the customers' failure to pay their taxes. See 541 F. 3d, at 461 (Winter, J., dissenting). Whatever the City's reasons for framing its merits arguments as it has, we will not reformulate them for it now.[2]

In a final effort to save its claim, the City has shifted course before this Court. In its second amended complaint and RICO statement, the City relied solely on Hemi's failure to file Jenkins Act reports with the State to form the basis of the predicate act mail and wire frauds. See Second Amended Compl. ¶¶ 99, 101, 118, 125; Record A980–A982. Before this Court, however, the City contends that Hemi made affirmative misrepresentations to city residents, which, the City now argues, comprise part of the RICO predicate mail and wire frauds. See Brief for Respondent 42–43. The City's counsel pressed the point at oral argument, asserting that the City's injury was "caused by the seller's misrepresentation, which encourages the purchasers not to pay taxes." Tr. of Oral Arg. 44.

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[2] The dissent recognizes that its position poses the troubling specter of turning RICO into a tax collection statute. *Post*, at 29 (opinion of BREYER, J.). The dissent's answer looks largely to prosecution policy set forth in the Federal Department of Justice Guidelines, which are, of course, not only changeable, but have no applicability whatever to state or local governments. Under the decision below and the dissent's position, RICO could be used as a tax collection device based solely on the failure to file reports under the Jenkins Act, which itself provides quite limited remedies. See 15 U. S. C. § 377 (providing that a violation of the Jenkins Act may be punished as a misdemeanor with a fine up to $1,000 and imprisonment for no more than six months). And that device would be available not only to the State, to which the reports were due, but also to the City, to which Hemi owed no duty under the Act and to which it owed no taxes.

The City, however, affirmatively disavowed below any reliance on misrepresentations to form the predicate RICO violation. The alleged false statements, the City there stated, "are evidence of the scheme to defraud, but are not part of the fraud itself. . . . [T]he scheme to defraud would exist even absent the statements." Record A980. The City reiterated the point: "The scheme consists of the interstate sale of cigarettes and the failure to file Jenkins Act reports identifying those sales." *Ibid.* "Related to the fraud, but not a circumstance 'constituting' the fraud, the defendants inform customers that [their] purchases will be concealed, and also seek to convince their customers that no taxes are owed by claiming, falsely, that the sales are tax-free." *Id.*, at A982. Not only did the City disclaim any reliance upon misrepresentations to the customers to form the predicate acts under RICO, but the City made clear in its second amended complaint that its two RICO claims rested solely on the Jenkins Act violations as the predicate acts. See Second Amended Compl. ¶¶ 118, 125. Because the City defined the predicate act before the District Court as Hemi's failure to file the Jenkins Act reports, and expressly disavowed reliance on the alleged misrepresentations themselves as predicate acts, we decline to consider Hemi's alleged misstatements as predicate acts at this late stage.

* * *

It bears remembering what this case is about. It is about the RICO liability of a company for lost taxes it had no obligation to collect, remit, or pay, which harmed a party to whom it owed no duty. It is about imposing such liability to substitute for or complement a governing body's uncertain ability or desire to collect taxes directly from those who owe them. And it is about the fact that the liability comes with treble damages and attorney's fees attached. This Court has interpreted RICO broadly, consistent with its terms, but we have also held that its reach is limited by the "require-

ment of a direct causal connection" between the predicate wrong and the harm. *Anza*, 547 U. S., at 460. The City's injuries here were not caused directly by the alleged fraud, and thus were not caused "by reason of" it. The City, therefore, has no RICO claim.

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

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

As the Court points out, this is a case "about the RICO liability of a company for lost taxes it had no obligation to collect, remit, or pay." *Ante,* at 17. New York City (or City) cannot, consistent with the Commerce Clause, compel Hemi Group, an out-of-state seller, to collect a City sales or use tax. See *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 301 (1992); *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, 758 (1967). Unable to impose its tax on Hemi Group, or to require Hemi Group to collect its tax, New York City is attempting to use the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964(c), in combination with the Jenkins Act, 15 U. S. C. §§ 375–378, to overcome that disability.

Hemi Group committed fraud only insofar as it violated the Jenkins Act by failing to report the names and addresses of New York purchasers to New York State. There is no other grounding for the City's charge that it was defrauded by Hemi Group. "Absent the Jenkins Act, [Hemi Group] would have owed no duty to disclose [its] sales to anyone, and [its] failure to disclose could not conceivably be deemed fraud of any kind." *New York* v. *Smokes-Spirits.com, Inc.*,

541 F. 3d 425, 460 (CA2 2008) (Winter, J., dissenting in part and concurring in part).

Because "the alleged fraud is based on violations of . . . the Jenkins Act, . . . the nature and consequences of the fraud are [properly] determined solely by the scope of that Act." *Id.*, at 459. But "conspicuously absent from the City's pleadings is any claim brought pursuant to the Jenkins Act itself, rather than RICO, seeking enforcement of the Jenkins Act." *Id.*, at 460. The City thus effectively admits that its claim is outside the scope of the very statute on which it builds its RICO suit.

I resist reading RICO to allow the City to end-run its lack of authority to collect tobacco taxes from Hemi Group or to reshape the "quite limited remedies" Congress has provided for violations of the Jenkins Act, see *ante*, at 16, n. 2. Without subscribing to the broader range of the Court's proximate cause analysis, I join the Court's opinion to the extent it is consistent with the above-stated view, and I concur in the Court's judgment.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, dissenting.

In my view, the Hemi Group's failure to provide New York State with the names and addresses of its New York City cigarette customers proximately caused New York City to lose tobacco tax revenue. I dissent from the Court's contrary holding.

I

A

Although the ultimate legal issue is a simple one, the statutory framework within which it arises is complex. As the majority points out, *ante*, at 6, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, provides a private cause of action (and treble damages) to "[a]ny person injured in" that person's "business or property *by reason of*" conduct that involves a "pattern of racketeer-

ing activity." §§ 1964(c) (emphasis added), 1962. RICO defines "racketeering activity" to include violations of various predicate criminal statutes including mail and wire fraud. § 1961(1). The "pattern of racketeering" at issue here consists of repeated instances of mail fraud, which in turn consist largely of violations of the federal Jenkins Act, 15 U. S. C. §§ 375–378. That Act seeks to help States collect tobacco taxes by requiring out-of-state cigarette sellers, such as Hemi, to file reports with state tobacco tax administrators identifying the names and addresses of in-state customers and the amounts they purchased. The violations consist of Hemi's intentional failure to do so.

As the majority points out, we must assume for present purposes that an intentional failure to file Jenkins Act reports counts as mail fraud (at least where the failure is part of a scheme that includes use of the mails). *Ante*, at 7. Lower courts have sometimes so held. See *United States* v. *Melvin*, 544 F. 2d 767, 773–777 (CA5 1977); *United States* v. *Brewer*, 528 F. 2d 492, 497–498 (CA4 1975). The Court of Appeals here so held. *New York* v. *Smokes-Spirits.com, Inc.*, 541 F. 3d 425, 446 (CA2 2008). And no one has challenged that holding.

We must also assume that Hemi's "intentiona[l] conceal-[ment]" of the name/address/purchase information, Second Amended Compl. ¶¶ 103, 104, is the legal equivalent of an affirmative representation that Hemi had no New York City customers. See 3 Restatement (Second) of Torts § 551, p. 119 (1976) (a person "who fails to disclose . . . a fact" may be "subject to . . . liability" as if "he had represented the nonexistence of the matter that he has failed to disclose"); cf. *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383, 388 (1888) (concealment or suppression of material fact equivalent to a false representation). On these assumptions, the question before us is whether New York City's loss of tax revenues constitutes an injury to its "business or property by reason of" Hemi's Jenkins Act misrepresentations.

B

The case arises as a result of the District Court's dismissal of New York City's RICO complaint. Fed. Rule Civ. Proc. 12(b)(6). Hence we must answer the question in light of the facts alleged, taking as true the facts pleaded in the complaint (along with the "RICO statement" submitted pursuant to the District Court's rule). *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 642, n. 1 (2008). Those facts (as I interpret them) include the following:

1. New York State (or State) and New York City (or City) both impose tobacco taxes on New York cigarette buyers. Second Amended Compl. ¶ 37.
2. Both City and State normally collect the taxes from in-state cigarette sellers, who, in turn, charge retail customers. *Id.*, ¶¶ 4, 6.
3. Hemi, an out-of-state company, sells cigarettes over the Internet to in-state buyers at prices that are lower than in-state cigarette prices. The difference in price is almost entirely attributable to the fact that Hemi's prices do not include any charge for New York taxes. Hemi advertises its cigarettes as "tax free" and often adds that it "does not report any sales activity to any State taxing authority." *Id.*, ¶¶ 2, 6, 108b (emphasis deleted).
4. New York State normally receives Jenkins Act reports from out-of-state sellers. It is contractually obliged to pass the information on to New York City (and I assume it normally does so). *Id.*, ¶¶ 8–9, 11, 54–57.
5. When it receives Jenkins-Act-type information, New York City writes letters to resident customers asking them to pay the tobacco tax they owe. As a result, New York City collects about 40% of the tax due. (By doing so, in 2005 the City obtained $400,000 out of $1 million owed.) *Id.*, ¶¶ 58–59.
6. Hemi has consistently and intentionally failed to file Jenkins Act reports in order to prevent both State and

City from collecting the tobacco taxes that Hemi's in-state customers owe and which otherwise many of those customers would pay. *Id.*, ¶¶ 13, 24, 58.

II

A

The majority asks whether New York City stated a valid cause of action in alleging that it lost tobacco tax revenue "by reason of" Hemi's unlawful misrepresentations. The facts just set forth make clear that we must answer that question affirmatively. For one thing, no one denies that Hemi's misrepresentation was a "but-for" condition of New York City's loss. In the absence of the misrepresentation, *i. e.*, had Hemi told New York State the truth about its New York City customers, New York City would have written letters to the purchasers and obtained a significant share of the tobacco taxes buyers owed.

For another thing, New York City's losses are "reasonably foreseeable" results of the misrepresentation. It is foreseeable that, without the name/address/purchase information, New York City would not be able to write successful dunning letters, and it is foreseeable that, with that information, it would be able to write successful dunning letters. Indeed, that is a natural inference from, among other things, the complaint's assertion that Hemi advertised that it did not "report" sales information to "State taxing authorit[ies]." See, *e. g.*, *Smith* v. *Bolles*, 132 U. S. 125, 130 (1889) (for causation purposes, "'those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract'" (quoting *Crater* v. *Binninger*, 33 N. J. L. 513, 518 (Ct. Errors and Appeals 1869))); see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 110, p. 767 (5th ed. 1984) (hereinafter Prosser and Keeton); 3 S. Speiser, C. Krause, & A. Gans, The American Law of Torts § 11:3, p. 68 (2008) ("By far the most treated and most

discussed aspect of the law of proximate or legal cause is the so-called doctrine of foreseeability"). But cf. *ante*, at 12 ("The dissent would have RICO's proximate cause requirement turn on foreseeability . . . ").

Further, Hemi misrepresented the relevant facts *in order to* bring about New York City's relevant loss. It knew the loss would occur; it *intended* the loss to occur; one might even say it *desired* the loss to occur. It is difficult to find common-law cases denying liability for a wrongdoer's intended consequences, particularly where those consequences are also foreseeable. Cf. *Bridge*, *supra*, at 649–650 ("[S]uppose an enterprise that wants to get rid of rival businesses mails representations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business 'by reason of' a pattern of mail fraud . . . "); *N. M. ex rel. Caleb* v. *Daniel E.*, 2008 UT 1, ¶ 7, n. 3, 175 P. 3d 566, 569, n. 3 ("[I]f an unskilled marksman were to shoot a single bullet at a distant individual with the intent of killing her, that individual's injury or death may not be the natural and probable consequence of the [shooter's] act[,] . . . [but] the harm would not be an accident because the shooter intended the harm, even though the likelihood of success was improbable"); 1 F. Harper & F. James, Law of Torts § 7.13, p. 584 (1956) (explaining that, ordinarily, "all intended consequences" of an intentional act "are proximate").

In addition, New York City's revenue loss falls squarely within the bounds of the kinds of harms that the Jenkins Act (essentially the predicate statute) seeks to prevent. The statute is entitled "AN ACT To assist States in collecting sales and use taxes on cigarettes." Ch. 699, 63 Stat. 884. I have no reason to believe the Act intends any different result with respect to collection of a city's tobacco tax assessed under the authority of state law. See N. Y. Unconsol. Law Ann. § 9436(1) (West Supp. 2009) (authorizing cities with

over 1 million inhabitants to impose their own cigarette taxes). The Restatement (Second) of Torts explains that where

> "a statute requires information to be furnished . . . for the protection of a particular class of persons, one who makes a fraudulent misrepresentation . . . is subject to liability to the persons for pecuniary loss . . . in a transaction of the kind in which the statute is intended to protect them." 3 Restatement § 536, at 77 (1976).

See also 4 *id.*, § 536, Appendix (citing supporting cases in the Reporter's Note).

Finally, we have acknowledged that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws," and we have therefore looked to those laws as an interpretive aid in RICO cases. *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 267, 268 (1992). I can find no antitrust analogy that suggests any lack of causation here, nor has the majority referred to any such analogical antitrust circumstance.

The upshot is that the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to prevent. Neither antitrust analogy nor any statutory policy of which I am aware precludes a finding of "proximate cause." I recognize that some of our opinions may be read to suggest that the words "by reason of" in RICO do not perfectly track common-law notions of proximate cause. See, *e. g.*, *Bridge*, 553 U. S., at 655–657. But where so much basic common law argues in favor of such a finding, how can the Court avoid that conclusion here?

B

The majority bases its contrary conclusion upon three special circumstances and its reading of two of this Court's prior cases. In my view, none of the three circumstances precludes finding causation (indeed two are not even rele-

vant to the causation issue). Nor can I find the two prior cases controlling.

The three circumstances are the following: First, the majority seems to argue that the intervening voluntary acts of third parties, namely, the customers' own independent failures to pay the tax, cuts the causal chain. *Ante*, at 11 ("[T]he City's harm was directly caused by the customers, not Hemi"); see *Saugerties Bank* v. *Delaware & Hudson Co.*, 236 N. Y. 425, 430, 141 N. E. 904, 905 (1923) (third party's forgery of a bill of lading an intervening cause); Prosser and Keeton § 44, at 313–314 (collecting cases on intervening intentional or criminal acts). But an intervening third-party act, even if criminal, does not cut a causal chain where the intervening act is foreseeable and the defendant's conduct *increases* the risk of its occurrence. See *Lillie* v. *Thompson*, 332 U. S. 459, 462 (1947) *(per curiam); Horan* v. *Watertown*, 217 Mass. 185, 186, 104 N. E. 464, 465 (1914); see also 2 Restatement (Second) of Torts § 435A, at 454 (1963–1964) (intentional tortfeasor liable for intended harm "except where the harm results from an outside force the risk of which is not increased by the defendant's act"). Hemi's act here did increase the risk that New York City would not be paid; and not only was the risk foreseeable, but Hemi's advertising strongly suggests that Hemi actually knew nonreporting would likely bring about this very harm.

The majority claims that "directness," rather than foreseeability, should be our guide in assessing proximate cause, and that the lack of a "direct" relationship in this case precludes a finding of proximate causation. *Ante*, at 12. But courts used this concept of directness in tort law to expand liability (for direct consequences) *beyond* what was foreseeable, not to eliminate liability for what was foreseeable. Thus, under the "directness" theory of proximate causation, there is liability for both "all 'direct' (or 'directly traceable') consequences *and those indirect consequences that are foreseeable.*" Prosser and Keeton § 42, at 273 (emphasis added);

see also *id.*, § 43, at 294, and n. 17 (citing *Nunan* v. *Bennett*, 184 Ky. 591, 212 S. W. 570 (1919)). I do not read this Court's opinions in *Holmes* or *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451 (2006), to invoke anything other than this traditional understanding.

Second, the majority correctly points out that Hemi misrepresented the situation to the State, not to the City—a circumstance which, the majority believes, significantly separates misrepresentation from harm. *Ante*, at 11. But how could that be so? New York State signed a contract promising to relay relevant information to the City. In respect to that relevant information, the State is a conduit, indeed roughly analogous to a postal employee. This Court has recognized specifically that "under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud." *Tanner* v. *United States*, 483 U. S. 107, 129 (1987). The treatises say the same. See, *e. g.*, Prosser and Keeton § 107, at 743–745; 26 C. J. S., Fraud § 47, p. 1121 (1921) (collecting cases); see also Prosser, Misrepresentation and Third Parties, 19 Vand. L. Rev. 231, 240–241, and nn. 56–59, 62–64 (1966) (collecting cases). This Court has never suggested the contrary, namely, that a defendant is *not* liable for (foreseeable) harm (intentionally) caused to the target of a scheme to defraud *simply because* the misrepresentation was transmitted via a third (or even a fourth or fifth) party. Cf. Terry, Intent To Defraud, 25 Yale L. J. 87, 93 (1915) ("When a representation is communicated through one person to another in such circumstances that it can be deemed to be directed to the latter, it makes no difference through how many persons or by how circuitous a route it reaches the latter . . . ").

Third, the majority places great weight upon its view that Hemi tried to defraud the State, not the City. *Ante*, at 11. Hemi, however, sought to defraud both. Third Amended RICO Statement ¶ d (explaining that "[e]very other State or local government that imposes a use tax on cigarettes and

whose residents purchase cigarettes" from Hemi is a victim of its scheme to defraud). Hemi sought to prevent the State from collecting state taxes; and it sought to prevent the City from collecting city taxes. Here we are concerned only with the latter. In respect to the latter, the State was an information conduit. The fact that state taxes were also involved is beside the point.

The two Supreme Court cases to which the majority refers involve significantly different causal circumstances. *Ante*, at 8–11. The predicate acts in *Holmes*—the defendant's acts that led to the plaintiff's harm—consisted of securities frauds. The defendant misrepresented the prospects of one company and misled the investing public into falsely believing that it could readily buy and sell the stock of another. When the truth came out, stock prices fell, investors (specifically, stockbrokers) lost money, and since the stockbrokers could not pay certain creditors, those creditors also lost money. 503 U. S., at 262–263. Claiming subrogation to stand in the shoes of the creditors, the Securities Investor Protection Corporation sued. *Id.*, at 270–271.

Since the creditors had not bought the securities, there was little reason to believe the defendant intended their harm. And the securities statutes seek, first and foremost, to protect investors, not creditors of those who sell stock to those investors. The latter harm (a broker's creditor's loss) differs in kind from the harm that the "predicate act" statute primarily seeks to avoid and that its violation would ordinarily cause (namely, investors' stock-related monetary losses). As Part II–A, *supra*, points out, neither of these circumstances is present here.

In *Anza*, the plaintiff was a business competitor of the defendants. The plaintiff claimed that the defendants falsely told state officials that they did not owe sales tax. The plaintiff added that, had the defendants paid the tax they owed, the defendants would have had less money available to run their business, and the plaintiff consequently would

have been able to compete against them more effectively. 547 U. S., at 454, 457–458.

Again, in *Anza* the *kind of harm* that the plaintiff alleged is not the *kind of harm* that the tax statutes primarily seek to prevent. Rather, it alleged a kind of harm (competitive injury) that tax violations do not ordinarily cause and which ordinarily flows from the regular operation of a competitive marketplace. Thus, in both *Holmes* and *Anza*, unlike the present case, plaintiffs alleged special harm, neither squarely within the class of harms at which the relevant statutes were directed, nor of a kind that typical violators would intend or even foresee.

Bridge, which the majority seeks to distinguish, *ante*, at 14–15, is a more closely analogous case. The defendants in that case directed agents to misrepresent to a county that they qualified as independent bidders at a county-run property auction. They consequently participated in the auction. And the plaintiffs, facing additional bidders, lost some of the property that they otherwise would have won—all to their financial disadvantage. 553 U. S., at 643–644. The harm was foreseeable; it was intended; and it was precisely the kind of harm that the county's bidding rules sought to prevent. Thus this Court held that the harm was "a foreseeable and natural consequence of [the defendants'] scheme." *Id.*, at 658.

In sum, the majority recognizes that "[p]roximate cause for RICO purposes . . . should be evaluated in light of its common-law foundations," *ante*, at 9, but those foundations do not support the majority's view. Moreover, the majority's rationale would free from RICO liability defendants who would appear to fall within its intended scope. Consider, for example, a group of defendants who use a marketing firm (in RICO terms, an "enterprise") to perpetrate a variation on a "pump and dump" scheme. See, *e. g.*, *United States* v. *Salmonese*, 352 F. 3d 608, 612 (CA2 2003). They deliberately and repeatedly make egregiously fraudulent misrepre-

sentations to inflate the price of securities that, unbeknownst to investors, they own. After the stock price rises, the defendants sell at an artificial profit. When the fraud is revealed, the price crashes, to the investors' detriment. Suppose the defendants have intentionally spoken directly only to intermediaries who simply *repeated* the information to potential investors, and have not had any contact with the investors themselves. Under the majority's reasoning, these defendants apparently did not proximately cause the investors' losses and are not liable under RICO.

III

If there is causation, we must decide whether, for RICO purposes, the City's loss of tax revenue is " 'business or property' under 18 U. S. C. § 1964(c)." *Ante*, at 8 (acknowledging, but not reaching, this second issue). The question has led to concern among the lower courts. Some fear that an affirmative answer would turn RICO into a tax collection statute, permitting States to bring RICO actions and recover treble damages for behavior that amounts to no more than a failure to pay taxes due. See, *e. g.*, *Michigan, Dept. of Treasury, Revenue Div.* v. *Fawaz*, No. 86–1809, 1988 WL 44736, *2 (CA6 1988) (holding that tax revenue is not RICO "property" lest district courts become "collection agencies for unpaid state taxes"); *Illinois Dept. of Revenue* v. *Phillips*, 771 F. 2d 312, 316, 312 (CA7 1985) (holding, "reluctantly," that "a state's Department of Revenue may file suit in federal court for treble damages under [RICO] against a retailer who files fraudulent state sales tax returns").

In a related context, however, the Department of Justice has taken steps to avoid the "tax collection agency" problem without reading all tax-related frauds out of similar federal criminal statutes. The Department's prosecution guidelines require prosecutors considering a tax-related mail fraud or wire fraud or bank fraud prosecution (or a related RICO prosecution) to obtain approval from high-level Department

officials. And those guidelines specify that the Department will grant that approval only where there is at issue "a large fraud loss or a substantial pattern of conduct" and will not do so, absent "unusual circumstances," in cases involving simply "one person's tax liability." Dept. of Justice, United States Attorneys' Manual § 6–4.210(A) (2007), online at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title6/4mtax.htm (as visited Jan. 20, 2010, and available in Clerk of Court's case file); see also § 6–4.210(B) (explaining that the Department "will not authorize the use of mail, wire or bank fraud charges to convert routine tax prosecutions into RICO . . . cases").

This case involves an extensive pattern of fraudulent conduct, large revenue losses, and many different unrelated potential taxpayers. The Department's guidelines would appear to authorize prosecution in these circumstances. And limiting my consideration to these circumstances, I would find that this RICO complaint asserts a valid harm to "business or property." I need not and do not express a view as to how or whether RICO's civil action provisions apply to simpler instances of individual tax liability.

This conclusion is virtually compelled by *Pasquantino* v. *United States*, 544 U. S. 349 (2005), a case that we decided only five years ago. We there pointed out that the right to uncollected taxes is an "entitlement to collect money . . . , the possession of which is 'something of value.' " *Id.*, at 355 (quoting *McNally* v. *United States*, 483 U. S. 350, 358 (1987)). Such an entitlement "has long been thought to be a species of property." 544 U. S., at 356 (citing 3 W. Blackstone, Commentaries on the Laws of England 153–155 (1768)). And "fraud at common law included a scheme to deprive a victim of his entitlement to money." 544 U. S., at 356. We observed that tax evasion "inflict[s] an economic injury no less than" the "embezzle[ment] [of] funds from the . . . treasury." *Ibid.* And we consequently held that "Canada's right to uncollected excise taxes on the liquor petitioners imported into

Canada" is "'property'" within the terms of the mail fraud statute. *Id.*, at 355.

Hemi points in reply to our decision in *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. 251 (1972). But that case involved not a loss of tax revenues, but "injury to the general economy of a State"—insofar as it was threatened by violations of antitrust law. *Id.*, at 260. Hawaii's interest, both more general and derivative of harm to individual businesses, differs significantly from the particular tax loss at issue in *Pasquantino* and directly at issue here.

We have previously made clear that the compensable injury for RICO purposes is the harm caused by the predicate acts. See generally *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495–496 (1985); cf. *Cleveland* v. *United States*, 531 U. S. 12, 25 (2000). I can find no convincing reason in the context of this case to distinguish in the circumstances present here between "property" as used in the mail fraud statute and "property" as used in RICO. Hence, I would postpone for another day the question whether RICO covers instances where little more than the liability of an individual taxpayer is at issue. And I would find in the respondent's favor here.

With respect, I dissent.

Syllabus

BRISCOE ET AL. *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 07–11191. Argued January 11, 2010—Decided January 25, 2010

275 Va. 283, 657 S. E. 2d 113, vacated and remanded.

Richard D. Friedman argued the cause for petitioners. With him on the briefs were *Joseph D. King*, *Thomas B. Shuttleworth*, and *Charles B. Lustig*.

Stephen R. McCullough, State Solicitor General of Virginia, argued the cause for respondent. With him on the brief were *William C. Mims*, Attorney General, *Martin L. Kent*, Chief Deputy Attorney General, *Eugene Murphy*, Senior Assistant Attorney General, *Alice T. Armstrong*, Assistant Attorney General II, and *William E. Thro*.

Leondra R. Kruger argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *David E. Hollar*.*

**Timothy P. O'Toole*, *Sandra K. Levick*, *Catharine F. Easterly*, and *Jeffrey L. Fisher* filed a brief for the Public Defender Service for the District of Columbia et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Stephen R. Creason*, *Heather L. Hagan*, and *Ashley E. Tatman*, Deputy Attorneys General, by *Martha Coakley*, Attorney General of Massachusetts, and *James J. Arguin* and *David S. Friedman*, Assistant Attorneys General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Peter J. Nickles* of the District of Columbia, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Tom Miller* of Iowa, *Steve Six* of Kansas, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio,

PER CURIAM.

We vacate the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009).

It is so ordered.

W. A. Drew Edmondson of Oklahoma, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming.

Per Curiam

WILKINS *v.* GADDY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08–10914. Decided February 22, 2010

Petitioner Wilkins filed a 42 U. S. C. § 1983 suit, alleging that a correctional officer used excessive force against him in violation of the Eighth Amendment. The District Court dismissed his claim, concluding that Wilkins could not state an excessive force claim because his alleged injuries, consisting of a bruised heel, back pain, and headaches, were *de minimis.* The Fourth Circuit affirmed.

Held: The District Court's decision, affirmed on appeal, is at odds with the clear holding of *Hudson* v. *McMillan,* 503 U. S. 1, that the "core judicial inquiry" in an excessive force case is not whether a certain quantum of injury was sustained, but rather "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm," *id.,* at 7. By concluding that the absence of "some arbitrary quantity of injury" required automatic dismissal of Wilkins' claim, the District Court improperly bypassed the *Hudson* inquiry.

Certiorari granted; 308 Fed. Appx. 696, reversed and remanded.

PER CURIAM.

In *Hudson* v. *McMillian,* 503 U. S. 1, 4 (1992), this Court held that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury." In this case, the District Court dismissed a prisoner's excessive force claim based entirely on its determination that his injuries were "*de minimis.*" Because the District Court's approach, affirmed on appeal, is at odds with *Hudson*'s direction to decide excessive force claims based on the nature of the force rather than the extent of the injury, the petition for certiorari is granted, and the judgment is reversed.

I

In March 2008, petitioner Jamey Wilkins, a North Carolina state prisoner, filed suit in the United States District Court

for the Western District of North Carolina pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983. Wilkins' *pro se* complaint alleged that, on June 13, 2007, he was "maliciously and sadistically" assaulted "[w]ithout any provocation" by a corrections officer, respondent Gaddy.[1] App. to Pet. for Cert. C–4. According to the complaint, Gaddy, apparently angered by Wilkins' request for a grievance form, "snatched [Wilkins] off the ground and slammed him onto the concrete floor." *Ibid.* Gaddy "then proceeded to punch, kick, knee and choke [Wilkins] until another officer had to physically remove him from [Wilkins]." *Ibid.* Wilkins further alleged that, "[a]s a result of the excessive force used by [Gaddy], [he] sustained multiple physical injuries including a bruised heel, lower back pain, increased blood pressure as well as migraine headaches and dizziness" and "psychological trauma and mental anguish including depression, panic attacks and nightmares of the assault." *Ibid.*

The District Court, on its own motion and without a response from Gaddy, dismissed Wilkins' complaint for failure to state a claim. Citing Circuit precedent, the court stated that, "[i]n order to state an excessive force claim under the Eighth Amendment, a plaintiff must establish that he received more than a *de minimus [sic]* injury." No. 3:08–cv–00138 (WDNC, Apr. 16, 2008), pp. 1, 2 (footnote omitted; citing *Taylor* v. *McDuffie*, 155 F. 3d 479, 483 (CA4 1998); *Riley* v. *Dorton*, 115 F. 3d 1159, 1166 (CA4 1997) (en banc)). According to the court, Wilkins' alleged injuries were no more severe than those deemed *de minimis* in the Circuit's *Taylor* and *Riley* decisions. Indeed, the court noted, Wilkins nowhere asserted that his injuries had required medical attention.

In a motion for reconsideration, Wilkins stated that he was unaware that the failure to allege medical treatment might prejudice his claim. He asserted that he had been pre-

[1] The materials in the record do not disclose Gaddy's full name.

scribed, and continued to take, medication for his headaches and back pain, as well as for depression. And he attached medical records purporting to corroborate his injuries and course of treatment.

Describing reconsideration as "'an extraordinary remedy,'" the court declined to revisit its previous ruling. No. 3:08–cv–00138 (WDNC, Aug. 25, 2008), p. 1. The medical records, the court observed, indicated that some of Wilkins' alleged injuries "were pre-existing conditions." *Id.*, at 3. Wilkins had sought treatment for high blood pressure and mental health issues even before the assault. The court acknowledged that Wilkins received an X ray after the incident "to examine his 'bruised heel,'" but it "note[d] that bruising is generally considered a *de minimus [sic]* injury." *Id.*, at 4. The court similarly characterized as *de minimis* Wilkins' complaints of back pain and headaches. The court denied Wilkins leave to amend his complaint. In a summary disposition, the Court of Appeals affirmed "for the reasons stated by the district court." 308 Fed. Appx. 696, 697 (CA4 2009) *(per curiam)*.

II

In requiring what amounts to a showing of significant injury in order to state an excessive force claim, the Fourth Circuit has strayed from the clear holding of this Court in *Hudson*. Like Wilkins, the prisoner in *Hudson* filed suit under § 1983 alleging that corrections officers had used excessive force in violation of the Eighth Amendment. Evidence indicated that the officers had punched Hudson in the mouth, eyes, chest, and stomach without justification, resulting in "minor bruises and swelling of his face, mouth, and lip" as well as loosened teeth and a cracked partial dental plate. 503 U. S., at 4. A Magistrate Judge entered judgment in Hudson's favor, but the Court of Appeals for the Fifth Circuit reversed, holding that an inmate must prove "a significant injury" in order to state an excessive force claim. *Hudson* v. *McMillian*, 929 F. 2d 1014, 1015 (1990)

(per curiam). According to the Court of Appeals, Hudson's injuries, which had not required medical attention, were too "minor" to warrant relief. *Ibid.*

Reversing the Court of Appeals, this Court rejected the notion that "significant injury" is a threshold requirement for stating an excessive force claim. The "core judicial inquiry," we held, was not whether a certain quantum of injury was sustained, but rather "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." 503 U. S., at 7; see also *Whitley* v. *Albers*, 475 U. S. 312, 319–321 (1986). "When prison officials maliciously and sadistically use force to cause harm," the Court recognized, "contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Hudson*, 503 U. S., at 9; see also *id.*, at 13–14 (Blackmun, J., concurring in judgment) ("The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with 'significant injury,' *e. g.*, injury that requires medical attention or leaves permanent marks").

This is not to say that the "absence of serious injury" is irrelevant to the Eighth Amendment inquiry. *Id.*, at 7 (opinion of the Court). "[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation." *Ibid.* (quoting *Whitley*, *supra*, at 321). The extent of injury may also provide some indication of the amount of force applied. As we stated in *Hudson*, not "every malevolent touch by a prison guard gives rise to a federal cause of action." 503 U. S., at 9. "The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de mini-*

mis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id.*, at 9–10 (some internal quotation marks omitted). An inmate who complains of a "'push or shove'" that causes no discernible injury almost certainly fails to state a valid excessive force claim. *Id.*, at 9 (quoting *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2 1973)).

Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury. Accordingly, the Court concluded in *Hudson* that the supposedly "'minor'" nature of the injuries "provide[d] no basis for dismissal of [Hudson's] §1983 claim" because "the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes." 503 U. S., at 10.

The allegations made by Wilkins in this case are quite similar to the facts in *Hudson*, and the District Court's analysis closely resembles the approach *Hudson* disavowed. Wilkins alleged that he was punched, kicked, kneed, choked, and body slammed "maliciously and sadistically" and "[w]ithout any provocation." Dismissing Wilkins' action *sua sponte*, the District Court did not hold that this purported assault, which allegedly left Wilkins with a bruised heel, back pain, and other injuries requiring medical treatment, involved *de minimis* force. Instead, the court concluded that Wilkins had failed to state a claim because "he simply has not alleged that he suffered anything more than a de minimus *[sic]* injury." No. 3:08–cv–00138 (WDNC, Apr. 16, 2008), at 2.

In giving decisive weight to the purportedly *de minimis* nature of Wilkins' injuries, the District Court relied on two Fourth Circuit cases. See *Riley*, 115 F. 3d, at 1166–1168; *Taylor*, 155 F. 3d, at 483–485. Those cases, in turn, were based upon the Fourth Circuit's earlier decision in *Norman* v. *Taylor*, 25 F. 3d 1259 (1994) (en banc), which approved the

practice of using injury as a proxy for force. According to the Fourth Circuit, *Hudson* "does not foreclose and indeed is consistent with [the] view . . . that, absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is *de minimis*." 25 F. 3d, at 1263.

The Fourth Circuit's strained reading of *Hudson* is not defensible. This Court's decision did not, as the Fourth Circuit would have it, merely serve to lower the injury threshold for excessive force claims from "significant" to "non-*de minimis*"—whatever those ill-defined terms might mean. Instead, the Court aimed to shift the "core judicial inquiry" from the extent of the injury to the nature of the force—specifically, whether it was nontrivial and "was applied . . . maliciously and sadistically to cause harm." 503 U. S., at 7. To conclude, as the District Court did here, that the absence of "some arbitrary quantity of injury" requires automatic dismissal of an excessive force claim improperly bypasses this core inquiry. *Id.*, at 9.[2]

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[2] Most Circuits to consider the issue have rejected the Fourth Circuit's *de minimis* injury requirement. See, *e. g.*, *Wright* v. *Goord*, 554 F. 3d 255, 269–270 (CA2 2009) ("[O]ur Court has reversed summary dismissals of Eighth Amendment claims of excessive force even where the plaintiff's evidence of injury was slight . . . . [T]he absence of any significant injury to [the plaintiff] does not end the Eighth Amendment inquiry, for our standards of decency are violated even in the absence of such injury if the defendant's use of force was malicious or sadistic"); *Smith* v. *Mensinger*, 293 F. 3d 641, 648–649 (CA3 2002) ("[T]he Eighth Amendment analysis must be driven by the extent of the force and the circumstances in which it is applied; not by the resulting injuries. . . . *[D]e minimis* injuries do not necessarily establish *de minimis force*"); *Oliver* v. *Keller*, 289 F. 3d 623, 628 (CA9 2002) (rejecting the view "that to support an Eighth Amendment excessive force claim a prisoner must have suffered from the excessive force a more than *de minimis* physical injury" (internal quotation marks omitted)); *United States* v. *LaVallee*, 439 F. 3d 670, 687 (CA10 2006) (same).

The Fifth Circuit has sometimes used language indicating agreement with the Fourth Circuit's approach. See, *e. g.*, *Gomez* v. *Chandler*, 163 F. 3d 921, 924 (1999) ("[T]o support an Eighth Amendment excessive force

In holding that the District Court erred in dismissing Wilkins' complaint based on the supposedly *de minimis* nature of his injuries, we express no view on the underlying merits of his excessive force claim. In order to prevail, Wilkins will ultimately have to prove not only that the assault actually occurred but also that it was carried out "maliciously and sadistically" rather than as part of "a good-faith effort to maintain or restore discipline." *Id.*, at 7. Moreover, even if Wilkins succeeds, the relatively modest nature of his alleged injuries will no doubt limit the damages he may recover.

* * *

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I agree with the Court that the Fourth Circuit's Eighth Amendment analysis is inconsistent with *Hudson* v. *McMil-*

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claim a prisoner must have suffered from the excessive force a more than *de minimis* physical injury"). But see *Brown* v. *Lippard*, 472 F. 3d 384, 386 (2006) ("This Court has never directly held that injuries must reach beyond some arbitrary threshold to satisfy an excessive force claim"). Even in the Fifth Circuit, however, Wilkins likely would have survived dismissal for failure to state a claim because that court's precedents have classified the sort of injuries alleged here as non-*de minimis*. See, *e. g.*, *ibid.* (permitting a prisoner's Eighth Amendment excessive force claim to proceed to trial where evidence indicated that the prisoner suffered "one-centimeter abrasions on both his left knee and left shoulder, pain in his right knee, and tenderness around his left thumb," as well as "back problems"); *Gomez*, *supra*, at 922 (refusing to grant summary judgment on *de minimis* injury grounds where the prisoner alleged "physical pain [and] bodily injuries in the form of cuts, scrapes, [and] contusions to the face, head, and body").

lian, 503 U. S. 1 (1992). But I continue to believe that *Hudson* was wrongly decided. *Erickson* v. *Pardus*, 551 U. S. 89, 95 (2007) (dissenting opinion); *Farmer* v. *Brennan*, 511 U. S. 825, 858 (1994) (opinion concurring in judgment); *Helling* v. *McKinney*, 509 U. S. 25, 37 (1993) (dissenting opinion); *Hudson*, *supra*, at 17 (dissenting opinion).

"At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime." *Helling*, *supra*, at 38 (THOMAS, J., dissenting). The Court adhered to this understanding until 1976, when it declared in *Estelle* v. *Gamble*, 429 U. S. 97, that the Cruel and Unusual Punishments Clause also extends to prison conditions not imposed as part of a criminal sentence. See generally *Hudson*, *supra*, at 18–20 (THOMAS, J., dissenting); *Farmer*, *supra*, at 861 (THOMAS, J., concurring in judgment). To limit this abrupt expansion of the Clause, the Court specified that its new interpretation of the Eighth Amendment should not extend to every deprivation a prisoner suffers, but instead should apply "*only* [to] that narrow class of deprivations involving 'serious' injury inflicted by prison officials acting with a culpable state of mind." *Hudson*, *supra*, at 20 (THOMAS, J., dissenting) (citing *Estelle*, *supra*, at 106); see generally *Wilson* v. *Seiter*, 501 U. S. 294, 298 (1991).

Hudson, however, discarded the requirement of serious injury. Building upon *Estelle*'s mislaid foundation, the Court concluded that force, rather than injury, is the relevant inquiry, and that a prisoner who alleges excessive force at the hands of prison officials and suffers nothing more than *de minimis* injury can state a claim under the Eighth Amendment. *Hudson* thus turned the Eighth Amendment into "a National Code of Prison Regulation," 503 U. S., at 28 (THOMAS, J., dissenting); *Farmer*, 511 U. S., at 859 (THOMAS, J., concurring in judgment), with "federal judges [acting as] superintendents of prison conditions nationwide," *id.*, at 860.

Although neither the Constitution nor our precedents require this result, no party to this case asks us to overrule *Hudson*. Accordingly, I concur in the Court's judgment.

Syllabus

THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* HAYNES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09–273. Decided February 22, 2010

During *voir dire* at respondent's murder trial, one Texas state judge presided over the questioning of prospective jurors, while another presided when peremptory challenges were exercised. As relevant here, the second judge found that respondent made out a prima facie case that the prosecution's strike of African-American juror Owens violated *Batson* v. *Kentucky*, 476 U. S. 79, but the judge then accepted the prosecution's race-neutral, demeanor-based explanation for the strike. Respondent was convicted and sentenced to death. In affirming, the Texas Court of Criminal Appeals found that it was not clearly erroneous for a judge who had not witnessed the actual *voir dire* to accept the prosecutor's explanation for striking Owens. Subsequently, the Federal District Court denied respondent habeas relief, observing that the state court's demeanor determination was due deference under the federal habeas statute, see 28 U. S. C. § 2254(d)(1). The Fifth Circuit reversed. Citing both *Batson* and *Snyder* v. *Louisiana*, 552 U. S. 472, it concluded that this Court's decisions had clearly established the rule that a judge considering a *Batson* objection must reject a demeanor-based explanation for a peremptory challenge if the judge did not observe or cannot recall the juror's demeanor.

Held: The Fifth Circuit erred in assessing the demeanor evidence. No decision of this Court clearly establishes a categorical rule that a judge ruling on a *Batson* challenge must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. By apparently concluding that either *Batson* or *Snyder* clearly established such a rule, the Fifth Circuit read far too much into those decisions. This does not mean that respondent's *Batson* claim is rejected. On remand, the Fifth Circuit may consider whether the Texas Court of Criminal Appeals' determination may be overcome under the federal habeas statute's standard for reviewing a state court's resolution of questions of fact.

Certiorari granted; 561 F. 3d 535, reversed and remanded.

PER CURIAM.

This case presents the question whether any decision of this Court "clearly establishes" that a judge, in ruling on an objection to a peremptory challenge under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. The Court of Appeals appears to have concluded that either *Batson* itself or *Snyder* v. *Louisiana*, 552 U. S. 472 (2008), clearly established such a rule, but the Court of Appeals read far too much into those decisions, and its holding, if allowed to stand, would have important implications. We therefore grant the petition for certiorari, grant respondent's motion to proceed *in forma pauperis*, and reverse the judgment of the Court of Appeals.

I

Respondent was tried in a Texas state court for the murder of a police officer, and the State sought the death penalty. During *voir dire*, two judges presided at different stages. Judge Harper presided when the attorneys questioned the prospective jurors individually, but Judge Wallace took over when peremptory challenges were exercised. When the prosecutor struck an African-American juror named Owens, respondent's attorney raised a *Batson* objection. Judge Wallace determined that respondent had made out a prima facie case under *Batson*, and the prosecutor then offered a race-neutral explanation that was based on Owens' demeanor during individual questioning. Specifically, the prosecutor asserted that Owens' demeanor had been "somewhat humorous" and not "serious" and that her "body language" had belied her "true feeling." App. to Pet. for Cert. 187. Based on his observations of Owens during questioning by respondent's attorney, the prosecutor stated, he believed that she "had a predisposition" and would not look at the possibility of imposing a death sentence "in a neutral fashion." *Id.*, at

188. Respondent's attorney did not dispute the prosecutor's characterization of Owens' demeanor, but he asserted that her answers on the jury questionnaire "show[ed] that she was a juror who [was] leaning towards the State's case." *Ibid.* After considering the prosecutor's explanation and the arguments of defense counsel, Judge Wallace stated that the prosecutor's reason for the strike was "race-neutral" and denied the *Batson* objection without further explanation. App. to Pet. for Cert. 189.

The case proceeded to trial, respondent was convicted and sentenced to death, and the Texas Court of Criminal Appeals affirmed the conviction. Rejecting respondent's argument that "a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge," *id.*, at 173, the Court of Criminal Appeals wrote:

> "There are many factors which a trial judge—even one who did not preside over the voir dire examinations—can consider in determining whether the opponent of the peremptory strikes has met his burden. These include the nature and strength of the parties' arguments during the *Batson* hearing and the attorneys' demeanor and credibility. And, when necessary, a trial judge who has not witnessed the voir dire may refer to the record," *id.*, at 173–174 (footnote omitted).

With respect to the strike of juror Owens, the court held that Judge Wallace's acceptance of the prosecutor's explanation was not clearly erroneous and noted that "[t]he record does reflect that Owens was congenial and easygoing during voir dire and that her attitude was less formal than that of other veniremembers." *Id.*, at 172. This Court denied respondent's petition for a writ of certiorari. *Haynes* v. *Texas*, 535 U. S. 999 (2002).

After the Texas courts denied his application for state habeas relief, respondent filed a federal habeas petition. The District Court denied the petition and observed that this

Court had never held that the deference to state-court factual determinations that is mandated by the federal habeas statute is inapplicable when the judge ruling on a *Batson* objection did not observe the jury selection. App. to Pet. for Cert. 80, n. 10.

A panel of the Court of Appeals granted a certificate of appealability with respect to respondent's *Batson* objections concerning Owens and one other prospective juror. *Haynes* v. *Quarterman*, 526 F. 3d 189, 202 (CA5 2008). In its opinion granting the certificate, the panel discussed our opinion in *Snyder* at length and then concluded:

> "Under *Snyder*'s application of *Batson*, . . . an appellate court applying *Batson* arguably should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge." 526 F. 3d, at 199.

When the same panel later ruled on the merits of respondent's *Batson* claim regarding juror Owens,[1] the court adopted the rule that it had previously termed "arguabl[e]." See 526 F. 3d, at 199; *Haynes* v. *Quarterman*, 561 F. 3d 535, 541 (CA5 2009). The court concluded that the decisions of the state courts were not owed "AEDPA deference" in this case "because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor." *Ibid.* The court then held that

> "no court, including ours, can now engage in a proper adjudication of the defendant's demeanor-based *Batson* challenge as to prospective juror Owens because we will be relying solely on a paper record and would thereby contravene *Batson* and its clearly-established

[1] Because the panel held that the strike of Owens violated *Batson*, the panel did not rule on the legitimacy of the other strike as to which a certificate of appealability had been issued. *Haynes* v. *Quarterman*, 561 F. 3d 535, 541, n. 2 (CA5 2009).

'factual inquiry' requirement. *See, e. g., Snyder*, [552 U. S., at 477]; *Batson*, [476 U. S., at 95]." *Ibid.* (footnote omitted).

II

Respondent cannot obtain federal habeas relief under 28 U. S. C. § 2254(d)(1) unless he can show that the decision of the Texas Court of Criminal Appeals "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." A legal principle is "clearly established" within the meaning of this provision only when it is embodied in a holding of this Court. See *Carey* v. *Musladin*, 549 U. S. 70, 74 (2006); *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Under § 2254(d)(1), a habeas petitioner may obtain relief (1) "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts"; or (2) "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*, at 413.

III

In holding that respondent is entitled to a new trial, the Court of Appeals cited two decisions of this Court, *Batson* and *Snyder*, but neither of these cases held that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor.

The Court of Appeals appears to have concluded that *Batson* supports its decision because *Batson* requires a judge ruling on an objection to a peremptory challenge to " 'undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." ' " 561 F. 3d, at 540 (quoting *Batson*, 476 U. S., at 93, in turn quoting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429

U. S. 252, 266 (1977)). This general requirement, however, did not clearly establish the rule on which the Court of Appeals' decision rests. *Batson* noted the need for a judge ruling on an objection to a peremptory challenge to "tak[e] into account all possible explanatory factors in the particular case," 476 U. S., at 95 (internal quotation marks omitted). See also *Miller-El* v. *Dretke*, 545 U. S. 231, 239 (2005); *Johnson* v. *California*, 545 U. S. 162, 170 (2005). Thus, where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the *voir dire*. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.

Nor did we establish such a rule in *Snyder*.[2] In that case, the judge who presided over the *voir dire* also ruled on the *Batson* objections, and thus we had no occasion to consider how *Batson* applies when different judges preside over these two stages of the jury selection process. *Snyder*, 552 U. S., at 475–478. The part of *Snyder* on which the Court of Appeals relied concerned a very different problem. The prosecutor in that case asserted that he had exercised a peremptory challenge for two reasons, one of which was based on demeanor (*i. e.*, that the juror had appeared to be nervous), and the trial judge overruled the *Batson* objection without explanation. 552 U. S., at 478–479. We concluded that the record refuted the explanation that was not based on de-

[2] Even if *Snyder* did alter or add to *Batson*'s rule (as the Court of Appeals seems to have concluded), *Snyder* could not have constituted "clearly established Federal law as determined by" this Court for purposes of respondent's habeas petition because we decided *Snyder* nearly six years after his conviction became final and more than six years after the relevant state-court decision. See *Williams* v. *Taylor*, 529 U. S. 362, 390 (2000) (opinion for the Court by Stevens, J.); *id.*, at 412 (opinion for the Court by O'Connor, J.).

meanor and, in light of the particular circumstances of the case, we held that the peremptory challenge could not be sustained on the demeanor-based ground, which might not have figured in the trial judge's unexplained ruling. *Id.*, at 479–486. Nothing in this analysis supports the blanket rule on which the decision below appears to rest.

The opinion in *Snyder* did note that when the explanation for a peremptory challenge "invoke[s] a juror's demeanor," the trial judge's "firsthand observations" are of great importance. *Id.*, at 477. And in explaining why we could not assume that the trial judge had credited the claim that the juror was nervous, we noted that, because the peremptory challenge was not exercised until some time after the juror was questioned, the trial judge might not have recalled the juror's demeanor. *Id.*, at 479. These observations do not suggest that, in the absence of a personal recollection of the juror's demeanor, the judge could not have accepted the prosecutor's explanation. Indeed, *Snyder* quoted the observation in *Hernandez* v. *New York*, 500 U. S. 352, 365 (1991) (plurality opinion), that the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor. See 552 U. S., at 477.

Accordingly, we hold that no decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied, and we therefore reverse the judgment and remand the case for proceedings consistent with this opinion. Our decision does not mandate the rejection of respondent's *Batson* claim regarding juror Owens. On remand, the Court of Appeals may consider whether the Texas Court of Criminal Appeals' determination may be overcome under the federal habeas statute's standard for reviewing a state court's resolution of questions of fact.

It is so ordered.

Syllabus

FLORIDA *v.* POWELL

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 08–1175. Argued December 7, 2009—Decided February 23, 2010

In a pathmarking decision, *Miranda* v. *Arizona*, 384 U. S. 436, 471, this Court held that an individual must be "clearly informed," prior to custodial questioning, that he has, among other rights, "the right to consult with a lawyer and to have the lawyer with him during interrogation."

After arresting respondent Powell, but before questioning him, Tampa police read him their standard *Miranda* form, stating, *inter alia*: "You have the right to talk to a lawyer before answering any of our questions," and "[y]ou have the right to use any of these rights at any time you want during this interview." Powell then admitted he owned a handgun found in a police search. He was charged with possession of a weapon by a convicted felon in violation of Florida law. The trial court denied Powell's motion to suppress his inculpatory statements, which was based on the contention that the *Miranda* warnings he received did not adequately convey his right to the presence of an attorney during questioning. Powell was convicted of the gun-possession charge, but the intermediate appellate court held that the trial court should have suppressed the statements. The Florida Supreme Court agreed. It noted that both *Miranda* and the State Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning. The advice Powell received was misleading, the court believed, because it suggested that he could consult with an attorney only before the police started to question him and did not convey his entitlement to counsel's presence throughout the interrogation.

Held:

1. This Court has jurisdiction to hear this case. Powell contends that jurisdiction is lacking because the Florida Supreme Court relied on the State's Constitution as well as *Miranda*, hence the decision rested on an adequate and independent state ground. See *Coleman* v. *Thompson*, 501 U. S. 722, 729. Under *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041, however, when a state-court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and the adequacy and independence of any possible state-law ground is not clear from the face of its opinion, this Court presumes that federal law controlled the state court's decision. Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida court did not expressly assert that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda*. See *Long*,

463 U. S., at 1044. The state-court opinion consistently trained on what *Miranda* demands, rather than on what Florida law independently requires. This Court therefore cannot identify, "from the face of the opinion," a clear statement that the decision rested on a state ground separate from *Miranda*. See *Long*, 463 U. S., at 1041. Because the opinion does not "indicat[e] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds," *ibid.*, this Court has jurisdiction. Pp. 56–59.

2. Advice that a suspect has "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions," and that he can invoke this right "at any time . . . during th[e] interview," satisfies *Miranda*. Pp. 59–64.

(a) *Miranda* requires that a suspect "be warned prior to any questioning . . . that he has the right to the presence of an attorney." 384 U. S., at 479. This *Miranda* warning addresses the Court's particular concern that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators." *Id.*, at 469. Responsive to that concern, the Court stated, as "an absolute prerequisite to interrogation," that an individual held for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.*, at 471. While the warnings prescribed by *Miranda* are invariable, this Court has not dictated the words in which the essential information must be conveyed. See, *e. g.*, *California* v. *Prysock*, 453 U. S. 355, 359. In determining whether police warnings were satisfactory, reviewing courts are not required to "examine [them] as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth* v. *Eagan*, 492 U. S. 195, 203. Pp. 59–60.

(b) The warnings Powell received satisfy this standard. By informing Powell that he had "the right to talk to a lawyer before answering any of [their] questions," the Tampa officers communicated that he could consult with a lawyer before answering any particular question. And the statement that Powell had "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview" confirmed that he could exercise his right to an attorney while the interrogation was underway. In combination, the two warnings reasonably conveyed the right to have an attorney present, not only at the outset of interrogation, but at all times. To reach the opposite conclusion, *i. e.*, that the attorney would not be present throughout the interrogation, the suspect would have to imagine the counterintuitive and unlikely scenario that, in order to consult counsel, he would be obliged to exit and reenter the interrogation room between each query. Likewise unavailing is the

Syllabus

Florida Supreme Court's conclusion that the warning was misleading because the temporal language that Powell could "talk to a lawyer before answering any of [the officers'] questions" suggested he could consult with an attorney only before the interrogation started. In context, the term "before" merely conveyed that Powell's right to an attorney became effective before he answered any questions at all. Nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced. Powell suggests that today's holding will tempt law enforcement agencies to end-run *Miranda* by amending their warnings to introduce ambiguity. But, as the Federal Government explains, it is in law enforcement's own interest to state warnings with maximum clarity in order to reduce the risk that a court will later find the advice inadequate and therefore suppress a suspect's statement. The standard warnings used by the Federal Bureau of Investigation are admirably informative, but the Court declines to declare their precise formulation necessary to meet *Miranda*'s requirements. Different words were used in the advice Powell received, but they communicated the same message. Pp. 60–64.

998 So. 2d 531, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, ALITO, and SOTOMAYOR, JJ., joined, and in which BREYER, J., joined as to Part II. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined as to Part II, *post*, p. 64.

Joseph W. Jacquot, Deputy Attorney General of Florida, argued the cause for petitioner. With him on the briefs were *Bill McCollum*, Attorney General, *Carolyn M. Snurkowski*, Assistant Deputy Attorney General, *Ronald A. Lathan*, Deputy Solicitor General, *Scott D. Makar*, Solicitor General, *Robert J. Krauss*, Chief-Assistant Attorney General, and *Susan M. Shanahan*, Assistant Attorney General.

David A. O'Neil argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Daniel S. Goodman*.

Deborah Kucer Brueckheimer argued the cause for respondent. With her on the brief were *James Marion Moor-*

man, *Cynthia J. Dodge*, *Mara V. J. Senn*, *Anthony J. Franze*, and *Craig A. Stewart.**

JUSTICE GINSBURG delivered the opinion of the Court.

In a pathmarking decision, *Miranda* v. *Arizona*, 384 U. S. 436, 471 (1966), the Court held that an individual must be "clearly informed," prior to custodial questioning, that he has, among other rights, "the right to consult with a lawyer and to have the lawyer with him during interrogation." The question presented in this case is whether advice that a suspect has "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions," and that he can invoke this right "at any time . . . during th[e] interview," satisfies *Miranda*. We hold that it does.

I

On August 10, 2004, law enforcement officers in Tampa, Florida, seeking to apprehend respondent Kevin Dewayne Powell in connection with a robbery investigation, entered an apartment rented by Powell's girlfriend. 969 So. 2d 1060, 1063 (Fla. App. 2007). After spotting Powell coming from a bedroom, the officers searched the room and discovered a loaded nine-millimeter handgun under the bed. *Ibid.*

The officers arrested Powell and transported him to the Tampa police headquarters. *Ibid.* Once there, and before asking Powell any questions, the officers read Powell the standard Tampa Police Department Consent and Release Form 310. *Id.*, at 1063–1064. The form states:

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*Briefs of *amici curiae* urging affirmance were filed for the Florida Association of Criminal Defense Lawyers by *Sonya Rudenstine*, *Michael Ufferman*, and *D. Todd Doss;* for the National Association of Criminal Defense Lawyers et al. by *Linda T. Coberly*, *Gene C. Schaerr*, *Geoffrey P. Eaton*, *Jonathan D. Hacker*, and *Frances H. Pratt;* and for Richard A. Leo by *Christopher D. Man.*

Gary Lee Caldwell filed a brief for the Florida Public Defender Association, Inc., as *amicus curiae.*

> "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." App. 3. See also 969 So. 2d, at 1064.

Acknowledging that he had been informed of his rights, that he "underst[oo]d them," and that he was "willing to talk" to the officers, Powell signed the form. App. 3. He then admitted that he owned the handgun found in the apartment. Powell knew he was prohibited from possessing a gun because he had previously been convicted of a felony, but said he had nevertheless purchased and carried the firearm for his protection. See 969 So. 2d, at 1064; App. 29.

Powell was charged in state court with possession of a weapon by a prohibited possessor, in violation of Fla. Stat. Ann. § 790.23(1) (West 2007). Contending that the *Miranda* warnings were deficient because they did not adequately convey his right to the presence of an attorney during questioning, he moved to suppress his inculpatory statements. The trial court denied the motion, concluding that the officers had properly notified Powell of his right to counsel. 969 So. 2d, at 1064; App. 28. A jury convicted Powell of the gun-possession charge. 969 So. 2d, at 1064.

On appeal, the Florida Second District Court of Appeal held that the trial court should have suppressed Powell's statements. *Id.*, at 1067. The *Miranda* warnings, the appellate court concluded, did not "adequately inform [Powell] of his . . . right to have an attorney present throughout [the] interrogation." 969 So. 2d, at 1063. Considering the issue to be "one of great public importance," the court certified the following question to the Florida Supreme Court:

> "Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A) the right to talk to a lawyer 'before questioning' and (B) the 'right to use' the right to consult a lawyer 'at any time' during questioning?" *Id.*, at 1067–1068 (some internal quotation marks and some capitalization omitted).

Surveying decisions of this Court as well as Florida precedent, the Florida Supreme Court answered the certified question in the affirmative. 998 So. 2d 531, 532 (2008). "Both *Miranda* and article I, section 9 of the Florida Constitution,"[1] the Florida High Court noted, "require that a suspect be clearly informed of the right to have a lawyer present during questioning." *Id.*, at 542. The court found that the advice Powell received was misleading because it suggested that Powell could "only consult with an attorney before questioning" and did not convey Powell's entitlement to counsel's presence throughout the interrogation. *Id.*, at 541. Nor, in the court's view, did the final catchall warning—"[y]ou have the right to use any of these rights at any time you want during this interview"—cure the defect the court perceived in the right-to-counsel advice: "The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning," the court stated, for "a right that has never been expressed cannot be reiterated." *Ibid.*

Justice Wells dissented. He considered it "unreasonable to conclude that the broad, unqualified language read to Powell would lead a person of ordinary intelligence to believe that he or she had a limited right to consult with an attorney that could only be exercised before answering the *first* question posed by law enforcement." *Id.*, at 544. The final sentence of the warning, he stressed, "avoid[ed] the implica-

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[1] Article I, § 9 of the Florida Constitution states that "[n]o person shall . . . be compelled in any criminal matter to be a witness against oneself."

tion—unreasonable as it may [have] be[en]—that advice concerning the right of access to counsel *before* questioning conveys the message that access to counsel is foreclosed *during* questioning." *Ibid.* (internal quotation marks omitted). Criticizing the majority's "technical adherence to language . . . that has no connection with whether the person who confessed understood his or her rights," *id.*, at 545, he concluded that "[t]he totality of the warning reasonably conveyed to Powell his continuing right of access to counsel," *id.*, at 544.

We granted certiorari, 557 U. S. 918 (2009), and now reverse the judgment of the Florida Supreme Court.

II

We first address Powell's contention that this Court lacks jurisdiction to hear this case because the Florida Supreme Court, by relying not only on *Miranda* but also on the Florida Constitution, rested its decision on an adequate and independent state ground. Brief for Petitioner 15–23. See *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision . . . rests on a state law ground that is independent of the federal question and adequate to support the judgment."). "It is fundamental," we have observed, "that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557 (1940). "But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Ibid.*

To that end, we announced, in *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983), the following presumption:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of

> any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

At the same time, we adopted a plain-statement rule to avoid the presumption: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.*, at 1041.[2]

Under the *Long* presumption, we have jurisdiction to entertain this case. Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda.* See *Long*, 463 U. S., at 1044.

Beginning with the certified question—whether the advice the Tampa police gave to Powell "vitiate[d] *Miranda*," 998 So. 2d, at 532 (internal quotation marks and some capitalization omitted)—and continuing throughout its opinion, the Florida Supreme Court trained on what *Miranda* demands,

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[2] Dissenting in *Michigan* v. *Long*, 463 U. S. 1032, 1065 (1983), JUSTICE STEVENS did not urge, as he now does, inspection of state-court decisions to count the number of citations to state and federal provisions and opinions, or heroic efforts to fathom what the state court really meant. See *post*, at 66–70 (dissenting opinion). Instead, his preferred approach was as clear as the Court's. In lieu of "presuming that adequate state grounds are *not* independent unless it clearly appears otherwise," he would have "presum[ed] that adequate state grounds are independent unless it clearly appears otherwise." *Long*, 463 U. S., at 1066; see *post*, at 65–66, n. 1. Either presumption would avoid arduous efforts to detect, case by case, whether a state ground of decision is truly "independent of the [state court's] understanding of federal law." *Long*, 463 U. S., at 1066. Today, however, the dissent would require this Court to engage in just that sort of inquiry.

rather than on what Florida law independently requires. See, *e. g.*, 998 So. 2d, at 533 ("The issue before this Court is whether the failure to provide express advice of the right to the presence of counsel during custodial interrogation violates the principles espoused in *Miranda v. Arizona*, 384 U. S. 436."); *id.*, at 538 ("[T]he issue of [what] *Miranda* requires . . . has been addressed by several of the Florida district courts of appeal."); *id.*, at 542 (Powell received a "narrower and less functional warning than that required by *Miranda*.").[3] We therefore cannot identify, "from the face of the opinion," a clear statement that the decision rested on a state ground separate from *Miranda*. See *Long*, 463 U. S., at 1041 (the state court "need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached").[4] "To avoid misunderstanding, the [Florida] Supreme Court

[3] JUSTICE STEVENS suggests that these statements refer to *Miranda* only in a "generic" sense to mean "the warnings suspects must be given before interrogation." *Post*, at 70. This explanation fails to account for the Florida Supreme Court's repeated citations to the *opinion* in *Miranda*. In context, it is obvious that the court was attempting to home in on what that opinion—which, of course, interpreted only the Federal Constitution and not Florida law—requires. See, *e. g.*, 998 So. 2d 531, 533, 534, 537, 538, 539, 540, 541, 542 (2008).

[4] JUSTICE STEVENS agrees that the Florida Supreme Court's decision is interwoven with federal law, *post*, at 70, and lacks the plain statement contemplated by *Long*, *post*, at 66. Nevertheless, he finds it possible to discern an independent state-law basis for the decision. As *Long* makes clear, however, "when . . . [the] state court decision fairly appears to . . . be interwoven with . . . federal law," the only way to avoid the jurisdictional presumption is to provide a plain statement expressing independent reliance on state law. 463 U. S., at 1040. It is this plain statement that makes "the adequacy and independence of any possible state law ground . . . clear from the face of the opinion." *Id.*, at 1040–1041. See also *Ohio* v. *Robinette*, 519 U. S. 33, 44 (1996) (GINSBURG, J., concurring in judgment) ("*Long* governs even when, all things considered, the more plausible reading of the state court's decision may be that the state court did not regard the Federal Constitution alone as a sufficient basis for its ruling.").

must itself speak with the clarity it sought to require of its State's police officers." *Ohio* v. *Robinette*, 519 U. S. 33, 45 (1996) (GINSBURG, J., concurring in judgment).

Powell notes that "'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" Brief for Respondent 19–20 (quoting *Arizona* v. *Evans*, 514 U. S. 1, 8 (1995)). See also, *e. g.*, *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975); *Cooper* v. *California*, 386 U. S. 58, 62 (1967). Powell is right in this regard. Nothing in our decision today, we emphasize, trenches on the Florida Supreme Court's authority to impose, based on the State's Constitution, any additional protections against coerced confessions it deems appropriate. But because the Florida Supreme Court's decision does not "indicat[e] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds," *Long*, 463 U. S., at 1041, we have jurisdiction to decide this case.

III

A

To give force to the Constitution's protection against compelled self-incrimination, the Court established in *Miranda* "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." *Duckworth* v. *Eagan*, 492 U. S. 195, 201 (1989). Intent on "giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow," 384 U. S., at 441–442, *Miranda* prescribed the following four now-familiar warnings:

> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney,

> and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479.

Miranda's third warning—the only one at issue here—addresses our particular concern that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators." *Id.*, at 469. Responsive to that concern, we stated, as "an absolute prerequisite to interrogation," that an individual held for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.*, at 471. The question before us is whether the warnings Powell received satisfied this requirement.

The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed. See *California* v. *Prysock*, 453 U. S. 355, 359 (1981) *(per curiam)* ("This Court has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." (internal quotation marks omitted)); *Rhode Island* v. *Innis*, 446 U. S. 291, 297 (1980) (safeguards against self-incrimination include "*Miranda* warnings . . . or their equivalent"). In determining whether police officers adequately conveyed the four warnings, we have said, reviewing courts are not required to examine the words employed "as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth*, 492 U. S., at 203 (quoting *Prysock*, 453 U. S., at 361).

B

Our decisions in *Prysock* and *Duckworth* inform our judgment here. Both concerned a suspect's entitlement to ade-

quate notification of the right to appointed counsel. In *Prysock*, an officer informed the suspect of, *inter alia*, his right to a lawyer's presence during questioning and his right to counsel appointed at no cost. 453 U. S., at 356–357. The Court of Appeals held the advice inadequate to comply with *Miranda* because it lacked an express statement that the appointment of an attorney would occur prior to the impending interrogation. See 453 U. S., at 358–359. We reversed. *Id.*, at 362. "[N]othing in the warnings," we observed, "suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the suspect is] questioned, . . . while [he is] being questioned, and all during the questioning." *Id.*, at 360–361 (internal quotation marks omitted).

Similarly, in *Duckworth*, we upheld advice that, in relevant part, communicated the right to have an attorney present during the interrogation and the right to an appointed attorney, but also informed the suspect that the lawyer would be appointed "if and when [the suspect goes] to court." 492 U. S., at 198 (emphasis deleted; internal quotation marks omitted). "The Court of Appeals thought th[e] 'if and when you go to court' language suggested that only those accused who can afford an attorney have the right to have one present before answering any questions." *Id.*, at 203 (some internal quotation marks omitted). We thought otherwise. Under the relevant state law, we noted, "counsel is appointed at [a] defendant's initial appearance in court." *Id.*, at 204. The "if and when you go to court" advice, we said, "simply anticipate[d]" a question the suspect might be expected to ask after receiving *Miranda* warnings, *i. e.*, "*when* [will he] obtain counsel." 492 U. S., at 204. Reading the "if and when" language together with the other information conveyed, we held that the warnings, "in their totality, satisfied *Miranda*." *Id.*, at 205.

We reach the same conclusion in this case. The Tampa officers did not "entirely omi[t]," *post*, at 72, any information *Miranda* required them to impart. They informed Powell that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview." App. 3. The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times.[5]

To reach the opposite conclusion, *i. e.*, that the attorney would not be present throughout the interrogation, the suspect would have to imagine an unlikely scenario: To consult counsel, he would be obliged to exit and reenter the interrogation room between each query. A reasonable suspect in a custodial setting who has just been read his rights, we believe, would not come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney's advice.[6] Instead, the suspect

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[5] JUSTICE STEVENS asserts that the Court today approves, for "the first time[,] . . . a warning which, if given its natural reading, entirely omitted an essential element of a suspect's rights." *Post*, at 72. See also *post*, at 75–76 ("[T]he warning entirely failed to inform [Powell] of the separate and distinct right 'to have counsel present during any questioning.'"). We find the warning in this case adequate, however, only because it communicated just what *Miranda* prescribed. JUSTICE STEVENS ascribes a different meaning to the warning Powell received, but he cannot credibly suggest that *the Court* regards the warning to have omitted a vital element of Powell's rights.

[6] It is equally unlikely that the suspect would anticipate a scenario of this order: His lawyer would be admitted into the interrogation room each time the police ask him a question, then ushered out each time the suspect responds.

would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time.[7]

The Florida Supreme Court found the warning misleading because it believed the temporal language—that Powell could "talk to a lawyer before answering any of [the officers'] questions"—suggested Powell could consult with an attorney only before the interrogation started. 998 So. 2d, at 541. See also Brief for Respondent 28–29. In context, however, the term "before" merely conveyed when Powell's right to an attorney became effective—namely, before he answered any questions at all. Nothing in the words used indicated that counsel's presence would be restricted after the questioning commenced. Instead, the warning communicated that the right to counsel carried forward to and through the interrogation: Powell could seek his attorney's advice before responding to "*any* of [the officers'] questions" and "*at any time* . . . *during* th[e] interview." App. 3 (emphasis added). Although the warnings were not the *clearest possible* formulation of *Miranda*'s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading.

Pursuing a different line of argument, Powell points out that most jurisdictions in Florida and across the Nation expressly advise suspects of the right to have counsel present both before and during interrogation. Brief for Respondent 41–44. If we find the advice he received adequate, Powell suggests, law enforcement agencies, hoping to obtain uninformed waivers, will be tempted to end-run *Miranda* by amending their warnings to introduce ambiguity. Brief for

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[7] Although it does not bear on our decision, Powell seems to have understood the warning this way. The following exchange between Powell and his attorney occurred when Powell testified at his trial:

"Q. You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?

"A. Yes." App. 80.

Respondent 50–53. But as the United States explained as *amicus curiae* in support of the State of Florida, "law enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations," Brief for United States 6; instead, it is "desirable police practice" and "in law enforcement's own interest" to state warnings with maximum clarity, *id.*, at 12. See also *id.*, at 11 ("By using a conventional and precise formulation of the warnings, police can significantly reduce the risk that a court will later suppress the suspect's statement on the ground that the advice was inadequate.").

For these reasons, "all . . . federal law enforcement agencies explicitly advise . . . suspect[s] of the full contours of each *[Miranda]* right, including the right to the presence of counsel during questioning." *Id.*, at 12. The standard warnings used by the Federal Bureau of Investigation are exemplary. They provide, in relevant part: "You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning." *Ibid.*, n. 3 (internal quotation marks omitted). This advice is admirably informative, but we decline to declare its precise formulation necessary to meet *Miranda*'s requirements. Different words were used in the advice Powell received, but they communicated the same essential message.

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For the reasons stated, the judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins as to Part II, dissenting.

Today, the Court decides a case in which the Florida Supreme Court held a local police practice violated the Florida

Constitution. The Court's power to review that decision is doubtful at best; moreover, the Florida Supreme Court has the better view on the merits.

I

In this case, the Florida Supreme Court concluded that "[b]oth *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning," and that the warnings given to Powell did not satisfy either the State or the Federal Constitution. 998 So. 2d 531, 542 (2008). In my view, the Florida Supreme Court held on an adequate and independent state-law ground that the warnings provided to Powell did not sufficiently inform him of the "'right to a lawyer's help'" under the Florida Constitution, *id.*, at 535. This Court therefore lacks jurisdiction to review the judgment below, notwithstanding the failure of that court to include some express sentence that would satisfy this Court's "plain-statement rule," *ante*, at 57.

The adequate-and-independent-state-ground doctrine rests on two "cornerstones": "[r]espect for the independence of state courts" and "avoidance of rendering advisory opinions." *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983). In *Long*, the Court adopted a novel presumption in favor of jurisdiction when the independence of a state court's state-law judgment is not clear. But we only respect the independence of state courts and avoid rendering advisory opinions if we limit the application of that presumption to truly ambiguous cases.[1] This is not such a case.

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[1] In my view, this Court would better respect the independence of state courts by applying the opposite presumption, as it did in the years prior to 1983. See *Long*, 463 U. S., at 1066–1067 (STEVENS, J., dissenting). But accepting *Long* as the law, we can limit its negative effects—unnecessary intrusion into the business of the state courts and unnecessary advisory opinions—only if we limit its application to cases in which the independence of the state-law ground is in serious doubt. See *Pennsylvania* v.

"[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945). In *Long*, we advised every state court of a formula by which it could assure us that our review would indeed amount to nothing more than an advisory opinion. The state court "need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." 463 U. S., at 1041. That advice has sometimes been misunderstood as a command that unless such a plain statement is included in a state-court opinion, the court's ruling cannot have rested on an adequate and independent state ground. But the real question is whether "the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion." *Id.*, at 1040–1041. Even if a state-court opinion does not include the magic words set forth in *Long*, or some similarly explicit sentence, we lack jurisdiction if it is nonetheless apparent that the decision is indeed supported by an adequate and independent state ground. Contrary to the assumption made by the Court, we have no power to assume jurisdiction that does not otherwise exist simply because the Florida Supreme Court did not include in its decision some express statement that its interpretation of state law is independent.

In my view, we can tell from the face of the Florida Supreme Court's opinion that "the decision rested on a state ground separate from *Miranda*," *ante*, at 58. This case is easily distinguished from *Long* in that regard. In *Long*, although the Michigan Supreme Court had twice cited the

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Labron, 518 U. S. 938, 950 (1996) (STEVENS, J., dissenting) ("[T]he unfortunate effects of [its] rule" are "exacerbate[d] . . . to a nearly intolerable degree" when the *Long* presumption is applied to cases in which "the state-law ground supporting th[e] judgmen[t] is so much clearer than has been true on most prior occasions").

Michigan Constitution in its opinion, it "relied *exclusively* on its understanding of *Terry* [v. *Ohio*, 392 U. S. 1 (1968),] and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional." 463 U. S., at 1043. There was, in short, nothing to "indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law." *Id.*, at 1044.

Other cases in which we have applied the *Long* presumption have been similarly devoid of independent state-law analysis. We typically apply the *Long* presumption when the state court's decision cited a state constitutional provision only a few times or not at all, and rested exclusively upon federal cases or upon state cases that themselves cited only federal law.[2] We have also applied *Long* when the

[2] See, *e. g.*, *Illinois* v. *Fisher*, 540 U. S. 544, 547, n. (2004) *(per curiam)* (describing decision below as relying upon the portion of a state precedent that solely discussed due process under the Federal Constitution); *Ohio* v. *Robinette*, 519 U. S. 33, 37 (1996) ("[T]he only cases [the opinion] discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution"); *Illinois* v. *Rodriguez*, 497 U. S. 177, 182 (1990) ("The opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution"); *Florida* v. *Riley*, 488 U. S. 445, 448, n. 1 (1989) (plurality opinion) (finding Florida Supreme Court mentioned the State Constitution three times but the discussion "focused exclusively on federal cases dealing with the Fourth Amendment"); *Michigan* v. *Chesternut*, 486 U. S. 567, 571, n. 3 (1988) (describing state court as resting its holding on two state cases that each relied upon federal law); *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 872–873, n. 4 (1986) ("Here, the New York Court of Appeals cited the New York Constitution only once, near the beginning of its opinion . . . [and] repeatedly referred to the 'First Amendment' and 'Fourth Amendment' during its discussion of the merits of the case"); *Oliver* v. *United States*, 466 U. S. 170, 175, n. 5 (1984) ("The Maine Supreme Judicial Court referred only to the Fourth Amendment . . . [and] the prior state cases that the court cited also construed the Federal Constitution").

state court's decision indicated that under state law, the relevant state constitutional provision is considered coextensive with the federal one.[3] This case shares none of those features.[4]

The Florida Supreme Court did not merely cite the Florida Constitution a time or two without state-law analysis.[5] Rather, the court discussed and relied on the separate rights provided under Art. I, § 9, of the Florida Constitution. For example, after a paragraph describing the general scope of

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[3] See, *e. g.*, *Fitzgerald* v. *Racing Assn. of Central Iowa*, 539 U. S. 103, 106 (2003) ("The Iowa Supreme Court's opinion . . . says that 'Iowa courts are to "apply the same analysis in considering the state equal protection clause as . . . in considering the federal equal protection claim"'"); *Pennsylvania* v. *Muniz*, 496 U. S. 582, 588, n. 4 (1990) (state court explained that relevant state constitutional provision "offers a protection against self-incrimination identical to that provided by the Fifth Amendment" (internal quotation marks omitted)); *Maryland* v. *Garrison*, 480 U. S. 79, 83–84 (1987) (state-court opinion relied on state cases but indicated "that the Maryland constitutional provision is construed *in pari materia* with the Fourth Amendment").

[4] I do not mean to suggest that this Court has never reached out beyond these bounds in order to decide a case. For example, in *Labron*, 518 U. S. 938, we found that a state-court decision resting on the "Commonwealth's jurisprudence of the automobile exception," *Commonwealth* v. *Labron*, 543 Pa. 86, 100, 669 A. 2d 917, 924 (1995), was not so clearly based on state law that the *Long* presumption did not apply, even though only "some" of the state cases discussed in the state court's opinion analyzed federal law. 518 U. S., at 939. The Court's analysis proved wrong; on remand, the Pennsylvania Supreme Court reaffirmed its prior holding and "explicitly note[d] that it was, in fact, decided upon independent state grounds, i. e., Article I, Section 8 of the Pennsylvania Constitution." *Commonwealth* v. *Labron*, 547 Pa. 344, 345, 690 A. 2d 228 (1997). That we have overreached before is no reason to repeat the mistake again.

[5] In examining what the state-court opinion said regarding state law, and whether the state precedent cited in the opinion relied upon state law, I am undertaking no effort more arduous than what the Court has typically undertaken in order to determine whether the *Long* presumption applies: examining how frequently a state-court opinion cited state law, whether state law is coextensive with federal law, and whether the cited state cases relied upon federal law. See nn. 2–3, *supra.*

Miranda warnings under federal law, the court explained the general scope of warnings under state law. 998 So. 2d, at 534–535 ("[T]o ensure the voluntariness of confessions as required by article I, section 9 of the Florida Constitution, this Court in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), outlined the . . . rights Florida suspects must be told of prior to custodial interrogation," which includes "'that they have a right to a lawyer's help'"). See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The court consistently referred to these state-law rights as separate and distinct from *Miranda*, noting that in its earlier cases, it had explained that "the requirements of both the Fifth Amendment, as explained in *Miranda*, and the Florida Constitution, as explained in *Traylor*," include "the requirement that a suspect be informed of the right to have counsel present during questioning." 998 So. 2d, at 537–538. And when applying the law to the specific facts of this case, the Florida Supreme Court again invoked the specific and distinct "right to [a] lawyer's help" under the Florida Constitution. *Id.*, at 540.

Moreover, the state cases relied upon by the Florida Supreme Court did not themselves rely exclusively on federal law. The primary case relied upon for the state-law holding, *Traylor*, rested exclusively upon state law. See 596 So. 2d, at 961. In that decision, the Florida Supreme Court embraced the principle that "[w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." *Id.*, at 962. Elaborating upon the meaning of Art. I, § 9, of the Florida Constitution, the Florida Supreme Court explained the roots of Florida's commitment to protecting its citizens from self-incrimination. Florida has long "required as a matter of state law that one charged with a crime be informed of his rights prior to rendering a confession." *Id.*, at 964. It has required warnings before some interrogations since at least

1889, and has for that long excluded confessions obtained in violation of those rules. *Ibid.* In sum, this case looks quite different from those cases in which we have applied the *Long* presumption in the past.

The Court concludes otherwise by relying primarily upon the formulation of the certified question and restatements of that question within the Florida Supreme Court's opinion. See *ante,* at 57–58. Yet while the certified question asks whether particular phrases "vitiate[d] *Miranda* warnings," 998 So. 2d, at 532 (internal quotation marks, capitalization, and footnote omitted), *Miranda* has become a generic term to refer to the warnings suspects must be given before interrogation, see Merriam-Webster's Collegiate Dictionary 792 (11th ed. 2003) (defining "Miranda" as "of, relating to, or being the legal rights of an arrested person to have an attorney and to remain silent so as to avoid self-incrimination"). Thus, its invocation of *Miranda* in the certified question and in its statement of the issue presented is entirely consistent with the fact that the state-law basis for its decision is fully adequate and independent.

That said, I agree with the Court that the decision below is interwoven with federal law. In reaching its state-law holding, the Florida Supreme Court found *Miranda* and our other precedents instructive.[6] But that alone is insufficient

[6] The Florida Supreme Court need not have decided that state-law sources "gave Powell rights . . . broader than . . . those delineated in *Miranda*," *ante,* at 57, in order for its judgment to have rested upon an independent state-law ground. The independence of a state-law ground may be especially clear when a state court explicitly finds that the state constitution is more protective of a certain right than the national charter, but a state constitutional provision is no less independent for providing the same protection in a given case as does the federal provision, so long as the content of the state-law right is not compelled by or dependent upon federal law. Unlike other provisions of Art. I of the Florida Constitution, § 9 does not contain an express proviso requiring that the right be construed in conformity with the analogous federal provision. Compare

to assure our jurisdiction, even under *Long*. In my view, the judgment—reversal of Powell's conviction—is supported by the Florida Supreme Court's independent and carefully considered holding that these warnings were inadequate under the Florida Constitution. See 998 So. 2d, at 534–535, 537–538, 540, 542.

The Court acknowledges that nothing in today's decision "trenches on the Florida Supreme Court's authority to impose, based on the State's Constitution, any additional protections against coerced confessions it deems appropriate." *Ante*, at 59. As the Florida Supreme Court has noted on more than one occasion, its interpretation of the Florida Constitution's privilege against self-incrimination need not track our construction of the parallel provision in the Federal Constitution. See *Rigterink* v. *State*, 2 So. 3d 221, 241 (2009) ("[T]he federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart"); *Traylor*, 596 So. 2d, at 961–963. In this very case, the Florida Supreme Court may reinstate its judgment upon remand. If the Florida Supreme Court does so, as I expect it will, this Court's opinion on the merits will qualify as the sort of advisory opinion that we should studiously seek to avoid.

II

The Court's decision on the merits is also unpersuasive. As we recognized in *Miranda*, "the right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege." 384 U. S., at 469. Furthermore, "the need for counsel to protect the Fifth

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Fla. Const., Art. I, § 9, with Fla. Const., Art. I, § 12. Furthermore, under Florida law the scope of Art. I, § 9, is clearly not dependent upon federal law. *Rigterink* v. *State*, 2 So. 3d 221, 241 (Fla. 2009); *Traylor* v. *State*, 596 So. 2d 957, 962 (Fla. 1992).

Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning." *Id.*, at 470. Because the "accused who does not know his rights and therefore does not make a request may be the person who most needs counsel," *id.*, at 470–471, a defendant "must be clearly informed" regarding two aspects of his right to consult an attorney: "the right to consult with a lawyer and to have the lawyer with him during interrogation," *id.*, at 471.

In this case, the form regularly used by the Tampa police warned Powell that he had "the right to talk to a lawyer before answering any of our questions." App. 3. This informed him only of the right to consult with a lawyer before questioning, the very right the *Miranda* Court identified as insufficient to protect the Fifth Amendment privilege. The warning did not say anything about the right to have counsel present during interrogation. Although we have never required "rigidity in the *form* of the required warnings," *California* v. *Prysock*, 453 U. S. 355, 359 (1981) *(per curiam)*, this is, I believe, the first time the Court has approved a warning which, if given its natural reading, entirely omitted an essential element of a suspect's rights.

Despite the failure of the warning to mention it, in the Court's view the warning "reasonably conveyed" to Powell that he had the right to a lawyer's presence during the interrogation. *Ante*, at 62. The Court cobbles together this conclusion from two elements of the warning. First, the Court assumes the warning regarding Powell's right "to talk to a lawyer before answering any of [the officers'] questions," App. 3, conveyed that "Powell could consult with a lawyer before answering any *particular* question," *ante*, at 62 (emphasis added).[7] Second, in the Court's view, the addition of

[7] This assumption makes it easier for the Court to conclude the warning conveyed a right to have a lawyer present. If a suspect is told he has the right to consult with an attorney before answering any particular question, the Court may be correct that he would reasonably conclude he has

a catchall clause at the end of the recitation of rights "confirmed" that Powell could use his right to consult an attorney "while the interrogation was underway." *Ibid.*

The more natural reading of the warning Powell was given, which (1) contained a temporal limit and (2) failed to mention his right to the presence of counsel in the interrogation room, is that Powell only had the right to consult with an attorney before the interrogation began, not that he had the right to have an attorney with him during questioning. Even those few Courts of Appeals that have approved warnings that did not expressly mention the right to an attorney's presence during interrogation[8] have found language of the sort used in Powell's warning to be misleading. For instance, petitioner cites the Second Circuit's decision in *United States* v. *Lamia*, 429 F. 2d 373 (1970), as an example of a court applying the properly flexible approach to *Miranda*. But in that case, the Second Circuit expressly dis-

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the right to a lawyer's presence because otherwise he would have to imagine he could consult his attorney in some unlikely fashion (*e. g.*, by leaving the interrogation room between every question).

[8] Several Courts of Appeals have held that warnings that did not expressly inform a suspect of his right to have counsel present during interrogation did not adequately inform a suspect of his *Miranda* rights. See, *e. g.*, *United States* v. *Tillman*, 963 F. 2d 137, 141 (CA6 1992); *United States* v. *Bland*, 908 F. 2d 471, 474 (CA9 1990); *United States* v. *Anthon*, 648 F. 2d 669, 672–673 (CA10 1981); *Windsor* v. *United States*, 389 F. 2d 530, 533 (CA5 1968). And most of the Circuits that have not required express mention of the right to an attorney's presence have approved only general warnings regarding the right to an attorney; that is, warnings which did not specifically mention the right to counsel's presence during interrogation but which also contained no limiting words that might mislead a suspect as to the broad nature of his right to counsel. See, *e. g.*, *United States* v. *Frankson*, 83 F. 3d 79, 82 (CA4 1996); *United States* v. *Caldwell*, 954 F. 2d 496, 502 (CA8 1992); *United States* v. *Adams*, 484 F. 2d 357, 361–362 (CA7 1973). I am doubtful that warning a suspect of his "right to counsel," without more, reasonably conveys a suspect's full rights under *Miranda*, but at least such a general warning does not include the same sort of misleading temporal limitation as in Powell's warning.

tinguished a warning that a suspect "'could consult an attorney prior to any question,'" which was "affirmatively misleading since it was thought to imply that the attorney could not be present during questioning." 429 F. 2d, at 377.[9] That even the Courts of Appeals taking the most flexible approach to *Miranda* have found warnings like Powell's misleading should caution the Court against concluding that such a warning reasonably conveyed Powell's right to have an attorney with him during the interrogation.

When the relevant clause of the warning in this case is given its most natural reading, the catchall clause does not meaningfully clarify Powell's rights. It communicated that Powell could exercise the previously listed rights at any time. Yet the only previously listed right was the "right to talk to a lawyer *before* answering any of [the officers'] questions." App. 3 (emphasis added). Informing Powell that he could exercise, at any time during the interview, the right to talk to a lawyer *before* answering any questions did not reasonably convey the right to talk to a lawyer *after* answering some questions, much less implicitly inform Powell of his right to have a lawyer with him at all times during interrogation. An intelligent suspect could reasonably conclude that all he was provided was a one-time right to consult

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[9] Petitioner also cites *Bridgers* v. *Dretke*, 431 F. 3d 853 (CA5 2005), in which the Fifth Circuit held the Texas Court of Criminal Appeals did not unreasonably apply clearly established federal law in finding adequate a warning in which a suspect was informed that "he had the right to the *presence* of an attorney before any questioning commenced." *Id.*, at 857 (internal quotation marks omitted). But even assuming that warning would sufficiently apprise an individual of his right to an attorney's presence *during* interrogation, the fact that the warning mentioned an attorney's presence materially distinguishes it from the warning Powell received. The Fifth Circuit quoted with approval the state court's assessment that warning a suspect solely that "he had the right to consult or speak to an attorney before questioning . . . might have created the [impermissible] impression that the attorney could not be present during interrogation." *Ibid.* (internal quotation marks omitted).

with an attorney, not a right to have an attorney present with him in the interrogation room at all times.[10]

The Court relies on *Duckworth* v. *Eagan*, 492 U. S. 195 (1989), and *Prysock*, 453 U. S. 355, but in neither case did the warning at issue completely omit one of a suspect's rights. In *Prysock*, the warning regarding the right to an appointed attorney contained no temporal limitation, see *id.*, at 360–361, which clearly distinguishes that case from Powell's. In *Duckworth*, the suspect was explicitly informed that he had the right "to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning," and that he had "this right to the advice and presence of a lawyer even if you cannot afford to hire one." 492 U. S., at 198 (emphasis deleted; internal quotation marks omitted). The warning thus conveyed in full the right to appointed counsel before and during the interrogation. Although the warning was arguably undercut by the addition of a statement that an attorney would be appointed "if and when you go to court," the Court found the suspect was informed of his full rights and the warning simply added additional, truthful information regarding when counsel would be appointed. *Ibid.* (emphasis deleted; internal quotation marks omitted). Unlike the *Duckworth* warning, Powell's warning did not convey his *Miranda* rights in full with the addition of some arguably misleading statement. Rather, the warning entirely failed to inform him of the separate and distinct right

[10] The Court supports its analysis by taking note of Powell's testimony at trial, given after the trial judge had overruled his lawyer's objection that the warning he received was inadequate. In my view, the testimony in context is not probative of what Powell thought the warnings meant. It did not explore what Powell understood the warnings to mean, but simply established, as a prelude to Powell's testimony explaining his prior statement, that he had waived his rights. Regardless, the testimony is irrelevant, as the Court acknowledges. "No amount of circumstantial evidence that the person may have been aware of [the right to have a lawyer with him during interrogation] will suffice to stand" in the stead of an adequate warning. *Miranda* v. *Arizona*, 384 U. S. 436, 471–472 (1966).

"to have counsel present during any questioning." *Miranda*, 384 U. S., at 470.

In sum, the warning at issue in this case did not reasonably convey to Powell his right to have a lawyer with him during the interrogation. "The requirement of warnings . . . [is] fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Id.*, at 476. In determining that the warning implied what it did not say, it is the Court "that is guilty of attaching greater importance to the form of the *Miranda* ritual than to the substance of the message it is intended to convey." *Prysock*, 453 U. S., at 366 (STEVENS, J., dissenting).

III

Whether we focus on Powell's particular case, or the use of the warning form as the standard used in one jurisdiction, it is clear that the form is imperfect. See *ante*, at 63. As the majority's decision today demonstrates, reasonable judges may well differ over the question whether the deficiency is serious enough to violate the Federal Constitution. That difference of opinion, in my judgment, falls short of providing a justification for reviewing this case when the judges of the highest court of the State have decided the warning is insufficiently protective of the rights of the State's citizens. In my view, respect for the independence of state courts, and their authority to set the rules by which their citizens are protected, should result in a dismissal of this petition.

I respectfully dissent.

Syllabus

HERTZ CORP. *v.* FRIEND ET AL.

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

No. 08–1107. Argued November 10, 2009—Decided February 23, 2010

Respondents, California citizens, sued petitioner Hertz Corporation in a California state court for claimed state-law violations. Hertz sought removal to the Federal District Court under 28 U. S. C. §§ 1332(d)(2), 1441(a), claiming that because it and respondents were citizens of different States, §§ 1332(a)(1), (c)(1), the federal court possessed diversity-of-citizenship jurisdiction. Respondents, however, claimed that Hertz was a California citizen, like themselves, and that, hence, diversity jurisdiction was lacking under § 1332(c)(1), which provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." To show that its "principal place of business" was in New Jersey, not California, Hertz submitted a declaration stating, among other things, that it operated facilities in 44 States, that California accounted for only a portion of its business activity, that its leadership is at its corporate headquarters in New Jersey, and that its core executive and administrative functions are primarily carried out there. The District Court concluded that it lacked diversity jurisdiction because Hertz was a California citizen under Ninth Circuit precedent, which asks, *inter alia*, whether the amount of the corporation's business activity is "significantly larger" or "substantially predominates" in one State. Finding that California was Hertz's "principal place of business" under that test because a plurality of the relevant business activity occurred there, the District Court remanded the case to state court. The Ninth Circuit affirmed.

Held:

1. Respondents' argument that this Court lacks jurisdiction under § 1453(c)—which expressly permits appeals of remand orders such as the District Court's only to "court[s] of appeals," not to the Supreme Court, and provides that if "a final judgment on the appeal" in a court of appeals "is not issued before the end" of 60 days (with a possible 10-day extension), "the appeal shall be denied"—makes far too much of too little. The Court normally does not read statutory silence as implicitly modifying or limiting its jurisdiction that another statute specifically grants. *E. g., Felker* v. *Turpin,* 518 U. S. 651, 660–661. Here, replicating similar, older statutes, § 1254 specifically gives the Court jurisdiction to "revie[w] . . . [b]y writ of certiorari" cases that are "in the courts of

appeals" when it grants the writ. The Court thus interprets § 1453(c)'s "60-day" requirement as simply requiring a court of appeals to reach a decision within a specified time—not to deprive this Court of subsequent jurisdiction to review the case. See, *e. g., Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 466–467. Pp. 83–84.

2. The phrase "principal place of business" in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities, *i. e.*, its "nerve center," which will typically be found at its corporate headquarters. Pp. 84–97.

(a) A brief review of the legislative history of diversity jurisdiction demonstrates that Congress added § 1332(c)(1)'s "principal place of business" language to the traditional state-of-incorporation test in order to prevent corporations from manipulating federal-court jurisdiction as well as to reduce the number of diversity cases. Pp. 84–88.

(b) However, the phrase "principal place of business" has proved more difficult to apply than its originators likely expected. After Congress' amendment, courts were uncertain as to where to look to determine a corporation's "principal place of business" for diversity purposes. If a corporation's headquarters and executive offices were in the same State in which it did most of its business, the test seemed straightforward. The "principal place of business" was in that State. But if those corporate headquarters, including executive offices, were in one State, while the corporation's plants or other centers of business activity were located in other States, the answer was less obvious. Under these circumstances, for corporations with "far-flung" business activities, numerous Circuits have looked to a corporation's "nerve center," from which the corporation radiates out to its constituent parts and from which its officers direct, control, and coordinate the corporation's activities. However, this test did not go far enough, for it did not answer what courts should do when a corporation's operations are not "far-flung" but rather limited to only a few States. When faced with this question, various courts have focused more heavily on where a corporation's actual business activities are located, adopting divergent and increasingly complex tests to interpret the statute. Pp. 89–92.

(c) In an effort to find a single, more uniform interpretation of the statutory phrase, this Court returns to the "nerve center" approach: "[P]rincipal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. In practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i. e.*, the "nerve center," and not simply an office where the corporation holds its board meetings. Pp. 92–97.

Syllabus

(1) Three sets of considerations, taken together, convince the Court that the "nerve center" approach, while imperfect, is superior to other possibilities. First, § 1332(c)(1)'s language supports the approach. The statute's word "place" is singular, not plural. Its word "principal" requires that the main, prominent, or most important place be chosen. Cf., *e. g., Commissioner* v. *Soliman*, 506 U. S. 168, 174. And the fact that the word "place" follows the words "State where" means that the "place" is a place *within* a State, not the State itself. A corporation's "nerve center," usually its main headquarters, is a single place. The public often considers it the corporation's main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are significantly larger than in the next-ranking State. Second, administrative simplicity is a major virtue in a jurisdictional statute. *Sisson* v. *Ruby*, 497 U. S. 358, 375. A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply *comparatively speaking.* By contrast, a corporation's general business activities more often lack a single principal place where they take place. Third, the statute's legislative history suggests that the words "principal place of business" should be interpreted to be no more complex than an earlier, numerical test that was criticized as too complex and impractical to apply. A "nerve center" test offers such a possibility. A general business activities test does not. Pp. 92–95.

(2) While there may be no perfect test that satisfies all administrative and purposive criteria, and there will be hard cases under the "nerve center" test adopted today, this test is relatively easier to apply and does not require courts to weigh corporate functions, assets, or revenues different in kind, one from the other. And though this test may produce results that seem to cut against the basic rationale of diversity jurisdiction, accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system. Pp. 95–96.

(3) If the record reveals attempts at jurisdictional manipulation—for example, that the alleged "nerve center" is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat—the courts should instead take as the "nerve center" the place of actual direction, control, and coordination, in the absence of such manipulation. P. 97.

(d) Although petitioner's unchallenged declaration suggests that Hertz's "nerve center" and its corporate headquarters are one and the same, and that they are located in New Jersey, not in California, respondents should have a fair opportunity on remand to litigate their case in light of today's holding. P. 97.

297 Fed. Appx. 690, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

Sri Srinivasan argued the cause for petitioner. With him on the briefs were *Frank B. Shuster*, *Robert A. Dolinko*, *Chris Baker*, *Irving L. Gornstein*, *Kathryn E. Tarbert*, *Louis R. Franzese*, and *David B. Friedman*.

Todd M. Schneider argued the cause for respondents. With him on the brief were *Robert J. Stein III*, *William M. Hensley*, *Arthur N. Abbey*, *Stephen T. Rodd*, *Stephanie Amin-Giwner*, *W. H. "Hank" Willson IV*, *Norman Pine*, and *Beverly Tillett Pine*.*

JUSTICE BREYER delivered the opinion of the Court.

The federal diversity jurisdiction statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and of the State where it has its principal place of business*." 28 U. S. C. § 1332(c)(1) (emphasis added). We seek here to resolve different interpretations that the Circuits have given this phrase. In doing so, we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible. And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphor-

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**Jonathan S. Franklin*, *Robin Conrad*, *Amar Sarwal*, and *Robert S. Digges, Jr.*, filed a brief for the Chamber of Commerce of the United States of America et al. as *amici curiae* urging reversal.

William C. McNeill III and *Claudia Center* filed a brief for the Legal Aid Society—Employment Law Center as *amicus curiae*.

ically called that place the corporation's "nerve center." See, *e. g.*, *Wisconsin Knife Works* v. *National Metal Crafters*, 781 F. 2d 1280, 1282 (CA7 1986); *Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862, 865 (SDNY 1959) (Weinfeld, J.). We believe that the "nerve center" will typically be found at a corporation's headquarters.

I

In September 2007, respondents Melinda Friend and John Nhieu, two California citizens, sued petitioner, the Hertz Corporation, in a California state court. They sought damages for what they claimed were violations of California's wage and hour laws. App. to Pet. for Cert. 20a. And they requested relief on behalf of a potential class composed of California citizens who had allegedly suffered similar harms.

Hertz filed a notice seeking removal to a federal court. 28 U. S. C. §§ 1332(d)(2), 1453. Hertz claimed that the plaintiffs and the defendant were citizens of different States. §§ 1332(a)(1), (c)(1). Hence, the federal court possessed diversity-of-citizenship jurisdiction. Friend and Nhieu, however, claimed that the Hertz Corporation was a California citizen, like themselves, and that, hence, diversity jurisdiction was lacking.

To support its position, Hertz submitted a declaration by an employee relations manager that sought to show that Hertz's "principal place of business" was in New Jersey, not in California. The declaration stated, among other things, that Hertz operated facilities in 44 States; and that California—which had about 12% of the Nation's population, Pet. for Cert. 8—accounted for 273 of Hertz's 1,606 car rental locations; about 2,300 of its 11,230 full-time employees; about $811 million of its $4.371 billion in annual revenue; and about 3.8 million of its approximately 21 million annual transactions, *i. e.*, rentals. The declaration also stated that the "leadership of Hertz and its domestic subsidiaries" is located at Hertz's "corporate headquarters" in Park Ridge, New Jer-

sey; that its "core executive and administrative functions . . . are carried out" there and "to a lesser extent" in Oklahoma City, Oklahoma; and that its "major administrative operations . . . are found" at those two locations. App. to Pet. for Cert. 26a–30a.

The District Court of the Northern District of California accepted Hertz's statement of the facts as undisputed. But it concluded that, given those facts, Hertz was a citizen of California. In reaching this conclusion, the court applied Ninth Circuit precedent, which instructs courts to identify a corporation's "principal place of business" by first determining the amount of a corporation's business activity State by State. If the amount of activity is "significantly larger" or "substantially predominates" in one State, then that State is the corporation's "principal place of business." If there is no such State, then the "principal place of business" is the corporation's "'nerve center,'" *i. e.*, the place where "'the majority of its executive and administrative functions are performed.'" *Friend* v. *Hertz*, No. C–07–5222 MMC (ND Cal., Jan. 15, 2008), p. 3 (hereinafter Order); *Tosco Corp.* v. *Communities for a Better Environment*, 236 F. 3d 495, 500–502 (CA9 2001) *(per curiam)*.

Applying this test, the District Court found that the "plurality of each of the relevant business activities" was in California, and that "the differential between the amount of those activities" in California and the amount in "the next closest state" was "significant." Order 4. Hence, Hertz's "principal place of business" was California, and diversity jurisdiction was thus lacking. The District Court consequently remanded the case to the state courts.

Hertz appealed the District Court's remand order. 28 U. S. C. § 1453(c). The Ninth Circuit affirmed in a brief memorandum opinion. 297 Fed. Appx. 690 (2008). Hertz filed a petition for certiorari. And, in light of differences among the Circuits in the application of the test for corporate citizenship, we granted the writ. Compare *Tosco Corp.*,

supra, at 500–502, and *Capitol Indemnity Corp.* v. *Russellville Steel Co.*, 367 F. 3d 831, 836 (CA8 2004) (applying "total activity" test and looking at "all corporate activities"), with *Wisconsin Knife Works*, *supra*, at 1282 (applying "nerve center" test).

II

At the outset, we consider a jurisdictional objection. Respondents point out that the statute permitting Hertz to appeal the District Court's remand order to the Court of Appeals, 28 U. S. C. § 1453(c), constitutes an exception to a more general jurisdictional rule that remand orders are "not reviewable on appeal." § 1447(d). They add that the language of § 1453(c) refers only to "court[s] of appeals," not to the Supreme Court. The statute also says that if "a final judgment on the appeal" in a court of appeals "is not issued before the end" of 60 days (with a possible 10-day extension), "the appeal shall be denied." And respondents draw from these statutory circumstances the conclusion that Congress intended to permit review of a remand order only by a court of appeals, not by the Supreme Court (at least not if, as here, this Court's grant of certiorari comes after § 1453(c)'s time period has elapsed).

This argument, however, makes far too much of too little. We normally do not read statutory silence as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants. *Felker* v. *Turpin*, 518 U. S. 651, 660–661 (1996); *Ex parte Yerger*, 8 Wall. 85, 104–105 (1869). Here, another, pre-existing federal statute gives this Court jurisdiction to "revie[w] . . . [b]y writ of certiorari" cases that, like this case, are "in the courts of appeals" when we grant the writ. 28 U. S. C. § 1254. This statutory jurisdictional grant replicates similar grants that yet older statutes provided. See, *e. g.*, § 1254, 62 Stat. 928; § 1, 43 Stat. 938–939 (amending § 240, 36 Stat. 1157); § 240, 36 Stat. 1157; Evarts Act, § 6, 26 Stat. 828. This history provides particularly strong reasons *not* to read § 1453(c)'s silence or am-

biguous language as modifying or limiting our pre-existing jurisdiction.

We thus interpret § 1453(c)'s "60-day" requirement as simply requiring a court of appeals to reach a decision within a specified time—not to deprive this Court of subsequent jurisdiction to review the case. See *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 466–467 (1947); *Gay* v. *Ruff*, 292 U. S. 25, 28–31 (1934).

III

We begin our "principal place of business" discussion with a brief review of relevant history. The Constitution provides that the "judicial Power shall extend" to "Controversies . . . between Citizens of different States." Art. III, § 2. This language, however, does not automatically confer diversity jurisdiction upon the federal courts. Rather, it authorizes Congress to do so and, in doing so, to determine the scope of the federal courts' jurisdiction within constitutional limits. *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 233–234 (1922); *Mayor* v. *Cooper*, 6 Wall. 247, 252 (1868).

Congress first authorized federal courts to exercise diversity jurisdiction in 1789 when, in the First Judiciary Act, Congress granted federal courts authority to hear suits "between a citizen of the State where the suit is brought, and a citizen of another State." § 11, 1 Stat. 78. The statute said nothing about corporations. In 1809, Chief Justice Marshall, writing for a unanimous Court, described a corporation as an "invisible, intangible, and artificial being" which was "certainly not a citizen." *Bank of United States* v. *Deveaux*, 5 Cranch 61, 86. But the Court held that a corporation could invoke the federal courts' diversity jurisdiction based on a pleading that the corporation's shareholders were all citizens of a different State from the defendants, as "the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real

persons who come into court, in this case, under their corporate name." *Id.*, at 91–92.

In *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497 (1844), the Court modified this initial approach. It held that a corporation was to be deemed an artificial person of the State by which it had been created, and its citizenship for jurisdictional purposes determined accordingly. *Id.*, at 558–559. Ten years later, the Court in *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314 (1854), held that the reason a corporation was a citizen of its State of incorporation was that, for the limited purpose of determining corporate citizenship, courts could conclusively (and artificially) presume that a corporation's *shareholders* were citizens of the State of incorporation. *Id.*, at 327–328. And it reaffirmed *Letson*. 16 How., at 325–326. Whatever the rationale, the practical upshot was that, for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation. 13F C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3623, pp. 1–7 (3d ed. 2009) (hereinafter Wright & Miller).

In 1928, this Court made clear that the "state of incorporation" rule was virtually absolute. It held that a corporation closely identified with State A could proceed in a federal court located in that State as long as the corporation had filed its incorporation papers in State B, perhaps a State where the corporation did no business at all. See *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 522–525 (refusing to question corporation's reincorporation motives and finding diversity jurisdiction). Subsequently, many in Congress and those who testified before it pointed out that this interpretation was at odds with diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties. See, *e. g.*, S. Rep. No. 530, 72d Cong., 1st Sess., 2, 4–7 (1932). Through its choice of the State of incorporation,

a corporation could manipulate federal-court jurisdiction, for example, opening the federal courts' doors in a State where it conducted nearly all its business by filing incorporation papers elsewhere. *Id.*, at 4 ("Since the Supreme Court has decided that a corporation is a citizen . . . it has become a common practice for corporations to be incorporated in one State while they do business in another. And there is no doubt but that it often occurs simply for the purpose of being able to have the advantage of choosing between two tribunals in case of litigation"). See also Hearings on S. 937 et al. before a Subcommittee of the Senate Committee on the Judiciary, 72d Cong., 1st Sess., 4–5 (1932) (Letter from Sen. George W. Norris to Atty. Gen. William D. Mitchell (May 24, 1930)) (citing a "common practice for individuals to incorporate in a foreign State simply for the purpose of taking litigation which may arise into the Federal courts"). Although various legislative proposals to curtail the corporate use of diversity jurisdiction were made, see, *e. g.*, S. 937, S. 939, H. R. 11508, 72d Cong., 1st Sess. (1931–1932), none of these proposals were enacted into law.

At the same time as federal dockets increased in size, many judges began to believe those dockets contained too many diversity cases. A committee of the Judicial Conference of the United States studied the matter. See Reports of the Proceedings of the Regular Annual Meeting and Special Meeting (Sept. 24–26 & Mar. 19–20, 1951), in H. R. Doc. No. 365, 82d Cong., 2d Sess., 26–27 (1952). And on March 12, 1951, that committee, the Committee on Jurisdiction and Venue, issued a report (hereinafter Mar. Committee Rep.).

Among its observations, the committee found a general need "to prevent frauds and abuses" with respect to jurisdiction. *Id.*, at 14. The committee recommended against eliminating diversity cases altogether. *Id.*, at 28. Instead it recommended, along with other proposals, a statutory amendment that would make a corporation a citizen both of the State of its incorporation and any State from which it

received more than half of its gross income. *Id.*, at 14–15 (requiring corporation to show that "less than fifty per cent of its gross income was derived from business transacted within the state where the Federal court is held"). If, for example, a citizen of California sued (under state law in state court) a corporation that received half or more of its gross income from California, that corporation would not be able to remove the case to federal court, even if Delaware was its State of incorporation.

During the spring and summer of 1951, committee members circulated their report and attended circuit conferences at which federal judges discussed the report's recommendations. Reflecting those criticisms, the committee filed a new report in September, in which it revised its corporate citizenship recommendation. It now proposed that "'a corporation shall be deemed a citizen of the state of its original creation . . . [and] shall also be deemed a citizen of a state where it has its principal place of business.'" Judicial Conference of the United States, Report of the Committee on Jurisdiction and Venue 4 (Sept. 24, 1951) (hereinafter Sept. Committee Rep.)—the source of the present-day statutory language. See Hearings on H. R. 2516 et al. before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 1st Sess., 9 (1957) (hereinafter House Hearings). The committee wrote that this new language would provide a "simpler and more practical formula" than the "gross income" test. Sept. Committee Rep. 2. It added that the language "ha[d] a precedent in the jurisdictional provisions of the Bankruptcy Act." *Id.*, at 2–3.

In mid-1957, the committee presented its reports to the House of Representatives Committee on the Judiciary. House Hearings 9–27; see also H. R. Rep. No. 1706, 85th Cong., 2d Sess., 27–28 (1958) (hereinafter H. R. Rep. 1706) (reprinting Mar. and Sept. Committee Reps.); S. Rep. No. 1830, 85th Cong., 2d Sess., 15–31 (1958) (hereinafter S. Rep. 1830) (same). Judge Albert Maris, representing

Judge John Parker (who had chaired the Judicial Conference Committee), discussed various proposals that the Judicial Conference had made to restrict the scope of diversity jurisdiction. In respect to the "principal place of business" proposal, he said that the relevant language "ha[d] been defined in the Bankruptcy Act." House Hearings 37. He added:

> "All of those problems have arisen in bankruptcy cases, and as I recall the cases—and I wouldn't want to be bound by this statement because I haven't them before me—I think the courts have generally taken the view that where a corporation's interests are rather widespread, the principal place of business is an actual rather than a theoretical or legal one. It is the actual place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made, and not necessarily a State in which it may have a plant, if it is a big corporation, or something of that sort.
>
> "But that has been pretty well worked out in the bankruptcy cases, and that law would all be available, you see, to be applied here without having to go over it again from the beginning." *Ibid.*

The House Committee reprinted the Judicial Conference Committee Reports along with other reports and relevant testimony and circulated it to the general public "for the purpose of inviting further suggestions and comments." *Id.*, at III. Subsequently, in 1958, Congress both codified the courts' traditional place of incorporation test and also enacted into law a slightly modified version of the Conference Committee's proposed "principal place of business" language. A corporation was to "be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." §2, 72 Stat. 415.

IV

The phrase "principal place of business" has proved more difficult to apply than its originators likely expected. Decisions under the Bankruptcy Act did not provide the firm guidance for which Judge Maris had hoped because courts interpreting bankruptcy law did not agree about how to determine a corporation's "principal place of business." Compare *Burdick* v. *Dillon*, 144 F. 737, 738 (CA1 1906) (holding that a corporation's "principal office, rather than a factory, mill, or mine . . . constitutes the 'principal place of business'"), with *Continental Coal Corp.* v. *Roszelle Bros.*, 242 F. 243, 247 (CA6 1917) (identifying the "principal place of business" as the location of mining activities, rather than the "principal office"); see also Friedenthal, New Limitations on Federal Jurisdiction, 11 Stan. L. Rev. 213, 223 (1959) ("The cases under the Bankruptcy Act provide no rigid legal formula for the determination of the principal place of business").

After Congress' amendment, courts were similarly uncertain as to where to look to determine a corporation's "principal place of business" for diversity purposes. If a corporation's headquarters and executive offices were in the same State in which it did most of its business, the test seemed straightforward. The "principal place of business" was located in that State. See, *e. g.*, *Long* v. *Silver*, 248 F. 3d 309, 314–315 (CA4 2001); *Pinnacle Consultants, Ltd.* v. *Leucadia Nat. Corp.*, 101 F. 3d 900, 906–907 (CA2 1996).

But suppose those corporate headquarters, including executive offices, are in one State, while the corporation's plants or other centers of business activity are located in other States? In 1959, a distinguished federal district judge, Edward Weinfeld, relied on the Second Circuit's interpretation of the Bankruptcy Act to answer this question in part:

> "Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its

> principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective. The test applied by our Court of Appeals, is that place where the corporation has an 'office from which its business was directed and controlled'—the place where 'all of its business was under the supreme direction and control of its officers.'" *Scot Typewriter Co.*, 170 F. Supp., at 865.

Numerous Circuits have since followed this rule, applying the "nerve center" test for corporations with "far-flung" business activities. See, *e. g.*, *Topp* v. *CompAir Inc.*, 814 F. 2d 830, 834 (CA1 1987); see also 15 J. Moore et al., Moore's Federal Practice § 102.54[2], p. 102–112.1 (3d ed. 2009) (hereinafter Moore's).

Scot's analysis, however, did not go far enough. For it did not answer what courts should do when the operations of the corporation are not "far-flung" but rather limited to only a few States. When faced with this question, various courts have focused more heavily on where a corporation's actual business activities are located. See, *e. g.*, *Diaz-Rodriguez* v. *Pep Boys Corp.*, 410 F. 3d 56, 60–61 (CA1 2005); *R. G. Barry Corp.* v. *Mushroom Makers, Inc.*, 612 F. 2d 651, 656–657 (CA2 1979); see also 15 Moore's § 102.54, at 102–112.1.

Perhaps because corporations come in many different forms, involve many different kinds of business activities, and locate offices and plants for different reasons in different ways in different regions, a general "business activities" approach has proved unusually difficult to apply. Courts must decide which factors are more important than others: for example, plant location, sales or servicing centers; transactions, payrolls, or revenue generation. See, *e. g.*, *R. G. Barry Corp.*, *supra*, at 656–657 (place of sales and advertisement, office, and full-time employees); *Diaz-Rodriguez*,

supra, at 61–62 (place of stores and inventory, employees, income, and sales).

The number of factors grew as courts explicitly combined aspects of the "nerve center" and "business activity" tests to look to a corporation's "total activities," sometimes to try to determine what treatises have described as the corporation's "center of gravity." See, *e. g.*, *Gafford* v. *General Elec. Co.*, 997 F. 2d 150, 162–163 (CA6 1993); *Amoco Rocmount Co.* v. *Anschutz Corp.*, 7 F. 3d 909, 915 (CA10 1993); 13F Wright & Miller § 3625, at 100. A major treatise confirms this growing complexity, listing, Circuit by Circuit, cases that highlight different factors or emphasize similar factors differently, and reporting that the "federal courts of appeals have employed various tests"—tests which "tend to overlap" and which are sometimes described in "language" that "is imprecise." 15 Moore's § 102.54[2], at 102–112. See also *id.*, §§ 102.54[2], [13], at 102–112 to 102–122 (describing, in 14 pages, major tests as looking to the "nerve center," "locus of operations," or "center of corporate activities"). Not surprisingly, different Circuits (and sometimes different courts within a single Circuit) have applied these highly general multifactor tests in different ways. *Id.*, §§ 102.54[3]–[7], [11]–[13] (noting that the First Circuit "has never explained a basis for choosing between 'the center of corporate activity' test and the 'locus of operations' test"; the Second Circuit uses a "two-part test" similar to that of the Fifth, Ninth, and Eleventh Circuits involving an initial determination as to whether "a corporation's activities are centralized or decentralized" followed by an application of either the "place of operations" or "nerve center" test; the Third Circuit applies the "center of corporate activities" test searching for the "headquarters of a corporation's day-to-day activity"; the Fourth Circuit has "endorsed neither [the 'nerve center' nor the 'place of operations'] test to the exclusion of the other"; the Tenth Circuit directs consideration of the "total activity of the company considered as a whole"). See also 13F

Wright & Miller § 3625 (describing, in 73 pages, the "nerve center," "corporate activities," and "total activity" tests as part of an effort to locate the corporation's "center of gravity," while specifying different ways in which different circuits apply these or other factors).

This complexity may reflect an unmediated judicial effort to apply the statutory phrase "principal place of business" in light of the general purpose of diversity jurisdiction, *i. e.*, an effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court, *Pease* v. *Peck*, 18 How. 595, 599 (1856). But, if so, that task seems doomed to failure. After all, the relevant purposive concern—prejudice against an out-of-state party—will often depend upon factors that courts cannot easily measure, for example, a corporation's image, its history, and its advertising, while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law, an unfortunate consequence in a federal legal system.

V

A

In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals' divergent and increasingly complex interpretations. Having done so, we now return to, and expand, Judge Weinfeld's approach, as applied in the Seventh Circuit. See, *e. g.*, *Scot Typewriter Co.*, *supra*, at 865; *Wisconsin Knife Works*, 781 F. 2d, at 1282. We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's

activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i. e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities. First, the statute's language supports the approach. The statute's text deems a corporation a citizen of the "State where it has its principal place of business. " 28 U. S. C. § 1332(c)(1). The word "place" is in the singular, not the plural. The word "principal" requires us to pick out the "main, prominent" or "leading" place. 12 Oxford English Dictionary 495 (2d ed. 1989) (def. (A)(I)(2)). Cf. *Commissioner* v. *Soliman*, 506 U. S. 168, 174 (1993) (interpreting "principal place of business" for tax purposes to require an assessment of "whether any one business location is the 'most important, consequential, or influential' one"). And the fact that the word "place" follows the words "State where" means that the "place" is a place *within* a State. It is not the State itself.

A corporation's "nerve center," usually its main headquarters, is a single place. The public often (though not always) considers it the corporation's main place of business. And it is a place within a State. By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are "significantly larger" than in the next-ranking State. 297 Fed. Appx., at 691.

This approach invites greater litigation and can lead to strange results, as the Ninth Circuit has since recognized. Namely, if a "corporation may be deemed a citizen of California on th[e] basis" of "activities [that] roughly reflect California's larger population . . . nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes." *Davis* v. *HSBC Bank Nev., N. A.*, 557 F. 3d 1026, 1029–1030 (2009). But why award or decline diversity jurisdiction on the basis of a State's population, whether measured directly, indirectly (say proportionately), or with modifications?

Second, administrative simplicity is a major virtue in a jurisdictional statute. *Sisson* v. *Ruby*, 497 U. S. 358, 375 (1990) (SCALIA, J., concurring in judgment) (eschewing "the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible"). Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Cf. *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458, 464, n. 13 (1980). Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006) (citing *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 583 (1999)). So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. *Arbaugh*, *supra*, at 514.

Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Cf. *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 621 (1983) (recognizing the "need for certainty and pre-

dictability of result while generally protecting the justified expectations of parties with interests in the corporation"). Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply *comparatively speaking.* The metaphor of a corporate "brain," while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. That is to say, the corporation may have several plants, many sales locations, and employees located in many different places. If so, it will not be as easy to determine which of these different business locales is the "principal" or most important "place."

Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretive benchmark. The Judicial Conference provided an initial version of its proposal that suggested a numerical test. A corporation would be deemed a citizen of the State that accounted for more than half of its gross income. Mar. Committee Rep. 14–15; see *supra*, at 86–87. The Conference changed its mind in light of criticism that such a test would prove too complex and impractical to apply. Sept. Committee Rep. 2; see also H. R. Rep. 1706, at 28; S. Rep. 1830, at 31. That history suggests that the words "principal place of business" should be interpreted to be no more complex than the initial "half of gross income" test. A "nerve center" test offers such a possibility. A general business activities test does not.

B

We recognize that there may be no perfect test that satisfies all administrative and purposive criteria. We recognize as well that, under the "nerve center" test we adopt today, there will be hard cases. For example, in this era of telecommuting, some corporations may divide their command

and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet. That said, our test nonetheless points courts in a single direction, toward the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other. Our approach provides a sensible test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result.

We also recognize that the use of a "nerve center" test may in some cases produce results that seem to cut against the basic rationale for 28 U. S. C. § 1332, see *supra*, at 85. For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York—yet the corporation will still be entitled to remove a New Jersey state case to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.

We understand that such seeming anomalies will arise. However, in view of the necessity of having a clearer rule, we must accept them. Accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system.

The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994); *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936); see also 13E Wright & Miller § 3602.1, at 119. When challenged on allegations of jurisdictional facts, the parties must support their allegations by compe-

tent proof. *McNutt, supra*, at 189; 15 Moore's § 102.14, at 102–32 to 102–32.1. And when faced with such a challenge, we reject suggestions such as, for example, the one made by petitioner that the mere filing of a form like the Securities and Exchange Commission's Form 10–K listing a corporation's "principal executive offices" would, without more, be sufficient proof to establish a corporation's "nerve center." See, *e. g.*, SEC Form 10–K, online at http://www.sec.gov/about/forms/form10-k.pdf (as visited Feb. 19, 2010, and available in Clerk of Court's case file). Cf. *Dimmitt & Owens Financial, Inc.* v. *United States*, 787 F. 2d 1186, 1190–1192 (CA7 1986) (distinguishing "principal executive office" in the tax lien context, see 26 U. S. C. § 6323(f)(2), from "principal place of business" under 28 U. S. C. § 1332(c)). Such possibilities would readily permit jurisdictional manipulation, thereby subverting a major reason for the insertion of the "principal place of business" language in the diversity statute. Indeed, if the record reveals attempts at manipulation—for example, that the alleged "nerve center" is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat—the courts should instead take as the "nerve center" the place of actual direction, control, and coordination, in the absence of such manipulation.

VI

Petitioner's unchallenged declaration suggests that Hertz's center of direction, control, and coordination, its "nerve center," and its corporate headquarters are one and the same, and they are located in New Jersey, not in California. Because respondents should have a fair opportunity to litigate their case in light of our holding, however, we vacate the Ninth Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

MARYLAND *v.* SHATZER

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 08–680. Argued October 5, 2009—Decided February 24, 2010

In 2003, a police detective tried to question respondent Shatzer, who was incarcerated at a Maryland prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer invoked his *Miranda* right to have counsel present during interrogation, so the detective terminated the interview. Shatzer was released back into the general prison population, and the investigation was closed. Another detective reopened the investigation in 2006 and attempted to interrogate Shatzer, who was still incarcerated. Shatzer waived his *Miranda* rights and made inculpatory statements. The trial court refused to suppress those statements, reasoning that *Edwards* v. *Arizona*, 451 U. S. 477, did not apply because Shatzer had experienced a break in *Miranda* custody prior to the 2006 interrogation. Shatzer was convicted of sexual child abuse. The Court of Appeals of Maryland reversed, holding that the mere passage of time does not end the *Edwards* protections, and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population did not constitute such a break.

Held: Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his 2006 statements. Pp. 103–117.

(a) *Edwards* created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary. *Edwards*' fundamental purpose is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel," *Patterson* v. *Illinois*, 487 U. S. 285, 291, by "prevent[ing] police from badgering [him] into waiving his previously asserted *Miranda* rights," *Michigan* v. *Harvey*, 494 U. S. 344, 350. It is easy to believe that a suspect's later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and isolated in a "police-dominated atmosphere," *Miranda* v. *Arizona*, 384 U. S. 436, 456, where his captors "appear to control [his] fate," *Illinois* v. *Perkins*, 496 U. S. 292, 297. But where a suspect has been released from custody and re-

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turned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart has been coerced. Because the *Edwards* presumption has been established by opinion of this Court, it is appropriate for this Court to specify the period of release from custody that will terminate its application. See *County of Riverside* v. *McLaughlin*, 500 U. S. 44. The Court concludes that the appropriate period is 14 days, which provides ample time for the suspect to get reacclimated to his normal life, consult with friends and counsel, and shake off any residual coercive effects of prior custody. Pp. 103–112.

(b) Shatzer's release back into the general prison population constitutes a break in *Miranda* custody. Lawful imprisonment imposed upon conviction does not create the coercive pressures produced by investigative custody that justify *Edwards*. When previously incarcerated suspects are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives before the attempted interrogation. Their continued detention is relatively disconnected from their prior unwillingness to cooperate in an investigation. The "inherently compelling pressures" of custodial interrogation ended when Shatzer returned to his normal life. Pp. 112–114.

405 Md. 585, 954 A. 2d 1118, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which THOMAS, J., joined as to Part III. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 117. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 120.

Douglas F. Gansler, Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Brian S. Kleinbord*, *Mary Ann Rapp Ince*, and *Diane E. Keller*, *Assistant Attorneys General*.

Toby J. Heytens argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Solicitor General Kagan*, *Acting Assistant Attorney General Glavin*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

Celia Anderson Davis argued the cause for respondent. With her on the brief were *Nancy S. Forster* and *Brian L. Zavin.**

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a break in custody ends the presumption of involuntariness established in *Edwards* v. *Arizona*, 451 U. S. 477 (1981).

I

In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son. At that time, Shatzer was

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Bill McCollum*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Craig D. Feiser*, Deputy Solicitor General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Steven N. Six* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Steven Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *John R. Kroger* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Daniel Meron, *Colleen C. Smith*, and *Jeffrey L. Fisher* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

incarcerated at the Maryland Correctional Institution-Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion—he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.

Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, then eight years old, who described the incident in more detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Hoover explained that he wanted to ask Shatzer about the alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in

front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, "'I didn't force him. I didn't force him.'" 405 Md. 585, 590, 954 A. 2d 1118, 1121 (2008). After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State's Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards.* The trial court held a suppression hearing and later denied Shatzer's motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. No. 21–K–06–37799 (Cir. Ct. Washington Cty., Md., Sept. 14, 2006), App. 55. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer's 2006 statements to the detectives. Based on the proffered testimony of the victim and the "admission of the defendant as to the act of masturbation," the trial court found Shatzer guilty of sexual child abuse of his

son.[1] No. 21–K–06–37799 (Cir. Ct. Washington Cty., Md., Sept. 21, 2006), *id.*, at 70, 79.

Over the dissent of two judges, the Court of Appeals of Maryland reversed and remanded. The court held that "the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*," and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population between interrogations did not constitute a break in custody. 405 Md., at 606–607, 954 A. 2d, at 1131. We granted certiorari, 555 U. S. 1152 (2009).

II

The Fifth Amendment, which applies to the States by virtue of the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. *Id.*, at 467. The Court observed that "incommunicado interrogation" in an "unfamiliar," "police-dominated atmosphere," *id.*, at 456–457, involves psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," *id.*, at 467. Consequently, it reasoned, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.*, at 458.

To counteract the coercive pressure, *Miranda* announced that police officers must warn a suspect prior to questioning

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[1] The State filed a *nolle prosequi* to the second-degree sexual offense charge, and consented to dismissal of the misdemeanor charges as barred by the statute of limitations.

that he has a right to remain silent, and a right to the presence of an attorney. *Id.*, at 444. After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. *Id.*, at 473–474. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. *Id.*, at 474. Critically, however, a suspect can waive these rights. *Id.*, at 475. To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)." *Id.*, at 475.

In *Edwards*, the Court determined that *Zerbst*'s traditional standard for waiver was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel; "additional safeguards" were necessary. 451 U. S., at 484. The Court therefore superimposed a "second layer of prophylaxis," *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991). *Edwards* held:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U. S., at 484–485.

The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling

pressures' and not the purely voluntary choice of the suspect." *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to "increase as custody is prolonged," *Minnick* v. *Mississippi*, 498 U. S. 146, 153 (1990). The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of "prolonged police custody," *Roberson*, 486 U. S., at 686, by repeatedly attempting to question a suspect who previously requested counsel until the suspect is "badgered into submission," *id.*, at 690 (KENNEDY, J., dissenting).

We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. See, *e. g.*, *Montejo* v. *Louisiana*, 556 U. S. 778, 787 (2009); *Michigan* v. *Harvey*, 494 U. S. 344, 349 (1990); *Solem* v. *Stumes*, 465 U. S. 638, 644, n. 4 (1984). Because *Edwards* is "our rule, not a constitutional command," "it is our obligation to justify its expansion." *Roberson*, *supra*, at 688 (KENNEDY, J., dissenting). Lower courts have uniformly held that a break in custody ends the *Edwards* presumption, see, *e. g.*, *People* v. *Storm*, 28 Cal. 4th 1007, 1023–1024, and n. 6, 52 P. 3d 52, 61–62, and n. 6 (2002) (collecting state and federal cases), but we have previously addressed the issue only in dicta, see *McNeil*, *supra*, at 177 (*Edwards* applies "assuming there has been no break in custody").

A judicially crafted rule is "justified only by reference to its prophylactic purpose," *Davis* v. *United States*, 512 U. S. 452, 458 (1994) (internal quotation marks omitted), and applies only where its benefits outweigh its costs, *Montejo*, *supra*, at 793. We begin with the benefits. *Edwards*' presumption of involuntariness has the incidental effect of "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Minnick*, *supra*, at 151. Its fundamental purpose, however, is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel," *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988), by "prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Harvey*, *supra*, at 350. Thus, the benefits of the rule are measured by the number of coerced confessions it suppresses that otherwise would have been admitted. See *Montejo*, *supra*, at 793.

It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an "unfamiliar," "police-dominated atmosphere," *Miranda*, 384 U. S., at 456–457, where his captors "appear to control [his] fate," *Illinois* v. *Perkins*, 496 U. S. 292, 297 (1990). That was the situation confronted by the suspects in *Edwards*, *Roberson*, and *Minnick*, the three cases in which we have held the *Edwards* rule applicable. Edwards was arrested pursuant to a warrant and taken to a police station, where he was interrogated until he requested counsel. *Edwards*, 451 U. S., at 478–479. The officer ended

the interrogation and took him to the county jail,[2] but at 9:15 the next morning, two of the officer's colleagues reinterrogated Edwards at the jail. *Id.*, at 479. Roberson was arrested "at the scene of a just-completed burglary" and interrogated there until he requested a lawyer. *Roberson*, 486 U. S., at 678. A different officer interrogated him three days later while he "was still in custody pursuant to the arrest." *Ibid.* Minnick was arrested by local police and taken to the San Diego jail, where two Federal Bureau of Investigation agents interrogated him the next morning until he requested counsel. *Minnick*, 498 U. S., at 148–149. Two days later a Mississippi deputy sheriff reinterrogated him at the jail. *Id.*, at 149. None of these suspects regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.

When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends.[3] And he knows from his earlier experience that he need only demand counsel to bring the interro-

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[2] Jail is a "local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined." Black's Law Dictionary 910 (9th ed. 2009). Prison, by contrast, is a "state or federal facility of confinement for convicted criminals, esp. felons." *Id.*, at 1314.

[3] JUSTICE STEVENS points out, *post*, at 126 (opinion concurring in judgment), that in *Minnick*, actual pre-reinterrogation consultation with an attorney during *continued* custody did not suffice to avoid application of *Edwards*. That does not mean that the ability to consult freely with attorneys and others does not reduce the level of coercion at all, or that it is "only questionably relevant," *post*, at 125, to whether termination of custody reduces the coercive pressure that is the basis for *Edwards*' super-prophylactic rule.

gation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is farfetched to think that a police officer's asking the suspect whether he would like to waive his *Miranda* rights will any more "wear down the accused," *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984) *(per curiam)*, than did the first such request at the original attempted interrogation—which is of course not deemed coercive. His change of heart is less likely attributable to "badgering" than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded. The "justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991).

At the same time that extending the *Edwards* rule yields diminished benefits, extending the rule also increases its costs: the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are not merely "a proper element in law enforcement," *Miranda*, *supra*, at 478, they are an "unmitigated good," *McNeil*, 501 U. S., at 181, "'essential to society's compelling interest in finding, convicting, and punishing those who violate the law,'" *ibid.* (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)).

The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation—and barring some purely arbitrary time limit[4]—every *Edwards* prohibition of custodial interro-

[4] The State's alternative argument in the present case is that the substantial lapse in time between the 2003 and 2006 attempts at interrogation independently ended the *Edwards* presumption. Our disposition makes it unnecessary to address that argument.

gation of a particular suspect would be eternal. The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, *Roberson*, *supra*, when it is conducted by a different law enforcement authority, *Minnick*, 498 U. S. 146, and even when the suspect has met with an attorney after the first interrogation, *ibid.* And it not only prevents questioning *ex ante;* it would render invalid, *ex post*, confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction.[5] In a country that harbors a large number of repeat offenders,[6] this consequence is disastrous.

We conclude that such an extension of *Edwards* is not justified; we have opened its "'protective umbrella,'" *Solem*, 465 U. S., at 644, n. 4, far enough. The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.

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[5] This assumes that *Roberson*'s extension of *Edwards* to subsequent interrogation for a different crime and *Minnick*'s extension of *Edwards* to subsequent interrogation by a different law enforcement agency would apply even when the place of custody and the identity of the custodial agency are not the same (as they were in *Roberson* and *Minnick*) as those of the original interrogation. That assumption would seem reasonable if the *Edwards*-suspending effect of a termination of custody is rejected. Reinterrogation in different custody or by a different interrogating agency would seem, if anything, *less* likely than termination of custody to reduce coercive pressures. At the original site, and with respect to the original interrogating agency, the suspect has already experienced cessation of interrogation when he demands counsel—which he may have no reason to expect elsewhere.

[6] According to a recent study, 67.5% of prisoners released from 15 States in 1994 were rearrested within three years. See Dept. of Justice, Bureau of Justice Statistics, Special Report, Recidivism of Prisoners Released in 1994 (NCJ 193427, 2002).

If Shatzer's return to the general prison population qualified as a break in custody (a question we address in Part III, *infra*), there is no doubt that it lasted long enough (two years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard of. In *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991), we specified 48 hours as the time within which the police must comply with the requirement of *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.

Like *McLaughlin*, this is a case in which the requisite police action (there, presentation to a magistrate; here, abstention from further interrogation) has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption "will not reach the correct result most of the time." *Coleman*, *supra*, at 737. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.

The 14-day limitation meets Shatzer's concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its

coercive effect, there will be nothing to gain by such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.[7]

Shatzer argues that ending the *Edwards* protections at a break in custody will undermine *Edwards*' purpose to conserve judicial resources. To be sure, we have said that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick*, 498 U. S., at 151. But clarity and certainty are not goals in themselves. They are valuable only when they reasonably further the achievement of some substantive end—here, the exclusion of compelled confessions. Confessions obtained after a 2-week break in custody and a waiver of *Miranda* rights are most unlikely to be compelled, and hence are unreasonably excluded. In any case, a break-in-custody exception will dim only marginally, if at all, the bright-line nature of *Edwards*. In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy. And when it is determined that the defendant pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive

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[7] A defendant who experiences a 14-day break in custody after invoking the *Miranda* right to counsel is not left without protection. *Edwards* establishes a *presumption* that a suspect's waiver of *Miranda* rights is involuntary. See *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). Even without this "second layer of prophylaxis," *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991), a defendant is still free to claim the prophylactic protection of *Miranda*—arguing that his waiver of *Miranda* rights was in fact involuntary under *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). See *Miranda*, 384 U. S., at 475.

inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel.

III

The facts of this case present an additional issue. No one questions that Shatzer was in custody for *Miranda* purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006. Likewise, no one questions that Shatzer triggered the *Edwards* protections when, according to Detective Blankenship's notes of the 2003 interview, he stated that " 'he would not talk about this case without having an attorney present,' " 405 Md., at 589, 954 A. 2d, at 1120. After the 2003 interview, Shatzer was released back into the general prison population where he was serving an unrelated sentence. The issue is whether that constitutes a break in *Miranda* custody.

We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. See *Perkins*, 496 U. S., at 299. See also *Bradley* v. *Ohio*, 497 U. S. 1011, 1013 (1990) (Marshall, J., dissenting from denial of certiorari). Whether it does depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against—the "danger of coercion [that] results from the *interaction* of custody and official interrogation." *Perkins*, *supra*, at 297 (emphasis added). To determine whether a suspect was in *Miranda* custody we have asked whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *New York* v. *Quarles*, 467 U. S. 649, 655 (1984); see also *Stansbury* v. *California*, 511 U. S. 318, 322 (1994) *(per curiam)*. This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it "talismanic power," because *Miranda* is to be enforced "only in those types of situations in which the concerns that powered the decision are impli-

cated." *Berkemer* v. *McCarty*, 468 U. S. 420, 437 (1984). Thus, the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop, see *Terry* v. *Ohio*, 392 U. S. 1 (1968), does not constitute *Miranda* custody. *McCarty*, *supra*, at 439–440. See also *Perkins*, *supra*, at 296.

Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing.[8] And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time

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[8] We distinguish the duration of incarceration from the duration of what might be termed interrogative custody. When a prisoner is removed from the general prison population and taken to a separate location for questioning, the duration of *that separation* is assuredly dependent upon his interrogators. For which reason once he has asserted a refusal to speak without assistance of counsel *Edwards* prevents any efforts to get him to change his mind during that interrogative custody.

served. This is in stark contrast to the circumstances faced by the defendants in *Edwards*, *Roberson*, and *Minnick*, whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.

Shatzer's experience illustrates the vast differences between *Miranda* custody and incarceration pursuant to conviction. At the time of the 2003 attempted interrogation, Shatzer was already serving a sentence for a prior conviction. After that, he returned to the general prison population in the Maryland Correctional Institution-Hagerstown and was later transferred, for unrelated reasons, down the street to the Roxbury Correctional Institute. Both are medium-security state correctional facilities. See Maryland Div. of Correction Inmate Handbook 7 (2007), online at http://dpscs.md.gov/rehabservs/doc/pdfs/2007_Inmate_Handbook.pdf (all Internet materials as visited Feb. 22, 2010, and available in Clerk of Court's case file). Inmates in these facilities generally can visit the library each week, *id.*, at 28; have regular exercise and recreation periods, *id.*, at 17; can participate in basic adult education and occupational training, *id.*, at 26, 7; are able to send and receive mail, *id.*, at 21–22, 16; and are allowed to receive visitors twice a week, see http://dpscs.md.gov/locations/mcih.shtml; http://www.dpscs.state.md.us/locations/rci.shtml. His continued detention after the 2003 interrogation did not depend on what he said (or did not say) to Detective Blankenship, and he has not alleged that he was placed in a higher level of security or faced any continuing restraints as a result of the 2003 interrogation. The "inherently compelling pressures" of custodial interrogation ended when he returned to his normal life.

IV

A few words in response to JUSTICE STEVENS' concurrence: It claims we ignore that "[w]hen police tell an indigent

suspect that he has the right to an attorney" and then "reinterrogate" him without providing a lawyer, "the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer." *Post*, at 121 (opinion concurring in judgment) (hereinafter concurrence). See also *post*, at 123, 126, n. 11, 130, n. 16. The fallacy here is that we are not talking about "reinterrogating" the suspect; we are talking about *asking his permission* to be interrogated. An officer has in no sense lied to a suspect when, after advising, as *Miranda* requires, "You have the right to remain silent, and if you choose to speak you have the right to the presence of an attorney," he promptly ends the attempted interrogation because the suspect declines to speak without counsel present, and then, two weeks later, reapproaches the suspect and asks, "Are you now willing to speak without a lawyer present?"

The "concer[n] that motivated the *Edwards* line of cases," *post*, at 121, n. 2, is that the suspect will be coerced into saying yes. That concern guides our decision today. Contrary to the concurrence's conclusion, *post*, at 122, 124–125, there is no reason to believe a suspect will view confession as "'the only way to end his interrogation'" when, before the interrogation begins, he is told that he can avoid it by simply requesting that he not be interrogated without counsel present—an option that worked before. If, as the concurrence argues will often be the case, *post*, at 124, a break in custody does not change the suspect's mind, he need only say so.

The concurrence also accuses the Court of "ignor[ing] that when a suspect asks for counsel, until his request is answered, there are still the same 'inherently compelling' pressures of custodial interrogation on which the *Miranda* line of cases is based." *Post*, at 123. We do not ignore these pressures; nor do we suggest that they disappear when custody is recommenced after a break, see *post*, at 124. But if those pressures are merely "the same" as before, then *Miranda* provides sufficient protection—as it did before. The

Edwards presumption of involuntariness is justified only in circumstances where the coercive pressures have increased so much that suspects' waivers of *Miranda* rights are likely to be involuntary most of the time. Contrary to the concurrence's suggestion, *post*, at 122, it is only in those narrow circumstances—when custody is unbroken—that the Court has concluded a "'fresh se[t] of *Miranda* warnings'" is not sufficient. See *Roberson*, 486 U. S., at 686.

In the last analysis, it turns out that the concurrence accepts our principal points. It agrees that *Edwards* prophylaxis is not perpetual; it agrees that a break in custody reduces the inherently compelling pressure upon which *Edwards* was based; it agrees that Shatzer's release back into the general prison population constituted a break in custody; and it agrees that in this case the break was long enough to render *Edwards* inapplicable. *Post*, at 129–130. We differ in two respects: Instead of terminating *Edwards* protection when the custodial pressures that were the basis for that protection dissipate, the concurrence would terminate it when the suspect would no longer "feel that he has 'been denied the counsel he has clearly requested,'" *post*, at 129. This is entirely unrelated to the rationale of *Edwards*. If confidence in the police's promise to provide counsel were the touchstone, *Edwards* would not have applied in *Minnick*, where the suspect in continuing custody actually met with appointed counsel. The concurrence's rule is also entirely unrelated to the existence of a break in custody. While that may relieve the accumulated coercive pressures of custody that are the foundation for *Edwards*, it is hard to see how it bolsters the suspect's confidence that if he asks for counsel he will get one.

And secondly, the concurrence differs from us in declining to say *how long* after a break in custody the termination of *Edwards* protection occurs. Two and one-half years, it says, is clearly enough—but it gives law enforcement authorities no further guidance. The concurrence criticizes our use of

14 days as arbitrary and unexplained, *post,* at 123–124, and n. 7. But in fact that rests upon the same basis as the concurrence's own approval of a 2½-year break in custody: how much time will justify "treating the second interrogation as no more coercive than the first," *post,* at 129. Failure to say where the line falls short of 2½ years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary.

* * *

Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

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

I join Part III of the Court's opinion, which holds that release into the general prison population constitutes a break in custody. I do not join the Court's decision to extend the presumption of involuntariness established in *Edwards* v. *Arizona,* 451 U. S. 477 (1981), for 14 days after custody ends.

It is not apparent to me that the presumption of involuntariness the Court recognized in *Edwards* is justifiable even in the custodial setting to which *Edwards* applies it. See, *e. g.*, *Minnick* v. *Mississippi,* 498 U. S. 146, 160 (1990) (SCALIA, J., dissenting). Accordingly, I would not extend the *Edwards* rule "beyond the circumstances present in *Edwards* itself." 498 U. S., at 162. But even if one believes that the Court is obliged to apply *Edwards* to any case involving continuing custody, the Court's opinion today goes well beyond that. It extends the presumption of involuntar-

iness *Edwards* applies in custodial settings to interrogations that occur after custody ends.

The Court concedes that this extension, like the *Edwards* presumption itself, is not constitutionally required. The Court nevertheless defends the extension as a judicially created prophylaxis against compelled confessions. Even if one accepts that such prophylaxis is both permissible generally and advisable for some period following a break in custody,[1] the Court's 14-day rule fails to satisfy the criteria our precedents establish for the judicial creation of such a safeguard.

Our precedents insist that judicially created prophylactic rules like those in *Edwards* and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), maintain "the closest possible fit" between the rule and the Fifth Amendment interests they seek to protect. *United States* v. *Patane*, 542 U. S. 630, 640–641 (2004) (plurality opinion); see generally *Montejo* v. *Louisiana*, 556 U. S. 778, 797 (2009); *Chavez* v. *Martinez*, 538 U. S. 760, 772 (2003) (plurality opinion). The Court's 14-day rule does not satisfy this test. The Court relates its 14-day rule

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[1] At a minimum the latter proposition is questionable. I concede that some police officers might badger a suspect during a subsequent interrogation after a break in custody, or might use catch-and-release tactics to suggest they will not take no for an answer. But if a suspect reenters custody after being questioned and released, he need only invoke his right to counsel to ensure *Edwards*' protection for the duration of the subsequent detention. And, if law enforcement officers repeatedly release and recapture a suspect to wear down his will—such that his participation in a subsequent interrogation is no longer truly voluntary—the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)," will protect against the admission of the suspect's statements in court. *Miranda* v. *Arizona*, 384 U. S. 436, 475 (1966). The *Zerbst* inquiry takes into account the totality of the circumstances surrounding the waiver—including any improper pressures by police. See *id.*, at 464; cf. *ante*, at 111, n. 7 (stating that "[e]ven without *[Edwards']* second layer of prophylaxis, a defendant is still free to claim the prophylactic protection of *Miranda*—arguing that his waiver of *Miranda* rights was in fact involuntary under *Johnson* v. *Zerbst*" (internal quotation marks and citation omitted)).

to the Fifth Amendment simply by asserting that 14 days between release and recapture should provide "plenty of time for the suspect . . . to shake off any residual coercive effects of his prior custody," *ante*, at 110.

This *ipse dixit* does not explain why extending the *Edwards* presumption for 14 days following a break in custody—as opposed to 0, 10, or 100 days—provides the "closest possible fit" with the Self-Incrimination Clause, *Patane*, *supra*, at 640–641; see *ante*, at 110 (merely stating that "[i]t seems to us that" the appropriate "period is 14 days"). Nor does it explain how the benefits of a prophylactic 14-day rule (either on its own terms or compared with other possible rules) "outweigh its costs" (which would include the loss of law enforcement information as well as the exclusion of confessions that are in fact voluntary). *Ante*, at 106 (citing *Montejo*, *supra*, at 793).

To be sure, the Court's rule has the benefit of providing a bright line. *Ante*, at 111. But bright-line rules are not necessary to prevent Fifth Amendment violations, as the Court has made clear when refusing to adopt such rules in cases involving other *Miranda* rights. See, *e. g.*, *Michigan* v. *Mosley*, 423 U. S. 96, 103–104 (1975). And an otherwise arbitrary rule is not justifiable merely because it gives clear instruction to law enforcement officers.[2]

As the Court concedes, "clarity and certainty are not goals in themselves. They are valuable only when they reasonably further the achievement of some substantive end—here, the exclusion of compelled confessions" that the Fifth Amendment prohibits. *Ante*, at 111. The Court's arbitrary 14-day rule fails this test, even under the relatively permis-

[2] Though the Court asserts that its 14-day rule will tell "law enforcement officers . . . with certainty and beforehand, when renewed interrogation is lawful," *ante*, at 110, that is not so clear. Determining whether a suspect was previously in custody, and when the suspect was released, may be difficult without questioning the suspect, especially if state and federal authorities are conducting simultaneous investigations.

sive criteria set forth in our precedents. Accordingly, I do not join that portion of the Court's opinion.

JUSTICE STEVENS, concurring in the judgment.

While I agree that the presumption from *Edwards* v. *Arizona*, 451 U. S. 477 (1981), is not "eternal," *ante*, at 109, and does not mandate suppression of Shatzer's statement made after a 2-year break in custody, I do not agree with the Court's newly announced rule: that *Edwards always* ceases to apply when there is a 14-day break in custody, *ante*, at 110.

In conducting its "cost-benefit" analysis, the Court demeans *Edwards* as a "'second layer'" of "judicially prescribed prophylaxis," *ante*, at 104, 105, 111, n. 7; see also *ante*, at 105 (describing *Edwards* as "'our rule, not a constitutional command'" (quoting *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (KENNEDY, J., dissenting))). The source of the holdings in the long line of cases that includes both *Edwards* and *Miranda*, however, is the Fifth Amendment's protection against compelled self-incrimination applied to the "compulsion inherent in custodial" interrogation, *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966), and the "significan[ce]" of "the assertion of the right to counsel," *Edwards*, 451 U. S., at 485.[1] The Court's analysis today is insufficiently sensitive to the concerns that motivated the *Edwards* line of cases.

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[1] See *Dickerson* v. *United States*, 530 U. S. 428, 438 (2000) (holding that "the protections announced in *Miranda*" are "constitutionally required"); *Shea* v. *Louisiana*, 470 U. S. 51, 52 (1985) ("In *Edwards* . . . , this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney"); *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1043 (1983) (plurality opinion) ("[The] subsequent incriminating statements made without [an] attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution"); *Miranda*, 384 U. S., at 458 (examining the "history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation").

I

The most troubling aspect of the Court's time-based rule is that it disregards the compulsion caused by a second (or third, or fourth) interrogation of an indigent suspect who was told that if he requests a lawyer, one will be provided for him. When police tell an indigent suspect that he has the right to an attorney, that he is not required to speak without an attorney present, and that an attorney will be provided to him at no cost before questioning, the police have made a significant promise. If they cease questioning and then reinterrogate the suspect 14 days later without providing him with a lawyer, the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer.[2]

When officers informed Shatzer of his rights during the first interrogation, they presumably informed him that if he requested an attorney, one would be appointed for him before he was asked any further questions. But if an indigent suspect requests a lawyer, "any further interrogation" (even 14 days later) "without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U. S., at 686. When police have not honored an earlier commitment to provide a de-

[2] The Court states that this argument rests on a "fallacy" because "we are not talking about 'reinterrogating' the suspect; we are talking about asking his permission to be interrogated." *Ante*, at 115 (emphasis deleted). Because, however, a suspect always has the right to remain silent, this is a distinction without a difference: Any time that the police interrogate or reinterrogate, and read a suspect his *Miranda* rights, the suspect may decline to speak. And if this is a "fallacy," it is the same "fallacy" upon which this Court has relied in the *Edwards* line of cases that held that police may not continue to interrogate a suspect who has requested a lawyer: Police may not continue to ask such a suspect whether they may interrogate him until that suspect has a lawyer present. The Court's apparent belief that this is a "fallacy" only underscores my concern that its analysis is insufficiently sensitive to the concerns that motivated the *Edwards* line of cases.

tainee with a lawyer, the detainee likely will "understan[d] his (expressed) wishes to have been ignored" and "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis* v. *United States*, 512 U. S. 452, 472–473 (1994) (Souter, J., concurring in judgment). Cf. *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1225 (CA9 1992) (en banc) (describing an elaborate police task force plan to ignore a suspect's requests for counsel, on the theory that such would induce hopelessness and thereby elicit an admission). Simply giving a "fresh se[t] of *Miranda* warnings" will not " 'reassure' a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled." *Roberson*, 486 U. S., at 686.

II

The Court never explains why its rule cannot depend on, in addition to a break in custody and passage of time, a concrete event or state of affairs, such as the police's having honored their commitment to provide counsel. Instead, the Court simply decides to create a time-based rule, and in so doing, disregards much of the analysis upon which *Edwards* and subsequent decisions were based. "[T]he assertion of the right to counsel" "[i]s a significant event."[3] *Edwards*, 451 U. S., at 485. As the Court today acknowledges, the

[3] Indeed, a lawyer has a "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979). Counsel can curb an officer's overbearing conduct, advise a suspect of his rights, and ensure that there is an accurate record of any interrogation. "Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege." *Arizona* v. *Roberson*, 486 U. S. 675, 682, n. 4 (1988) (internal quotation marks omitted). Thus, "once the accused has requested counsel," courts must be especially wary of "coercive form[s] of custodial interrogation." *Bradshaw*, 462 U. S., at 1051 (Powell, J., concurring in judgment).

right to counsel, like the right to remain silent, is one that police may "coerc[e] or badge[r]," *ante*, at 106, a suspect into abandoning.[4] However, as discussed above, the Court ignores the effects not of badgering but of reinterrogating a suspect who took the police at their word that he need not answer questions without an attorney present. See *Roberson*, 486 U. S., at 686. The Court, moreover, ignores that when a suspect asks for counsel, until his request is answered, there are still the same "inherently compelling" pressures of custodial interrogation on which the *Miranda* line of cases is based, see 486 U. S., at 681,[5] and that the concern about compulsion is especially serious for a detainee who has requested a lawyer, an act that signals his "inability to cope with the pressures of custodial interrogation," *id.*, at 686.[6]

Instead of deferring to these well-settled understandings of the *Edwards* rule, the Court engages in its own specula-

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[4] See *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990) (subsequent confession suggests the police "badger[ed] a defendant into waiving his previously asserted *Miranda* rights").

[5] See *Minnick* v. *Mississippi*, 498 U. S. 146, 155 (1990) ("[N]either admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause"); cf. *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984) *(per curiam)* ("[T]he authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance").

[6] See *Roberson*, 486 U. S., at 681 ("[I]f a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' "); *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (White, J., concurring in result) ("[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism").

tion that a 14-day break in custody eliminates the compulsion that animated *Edwards*. But its opinion gives no strong basis for believing that this is the case.[7] A 14-day break in custody does not eliminate the rationale for the initial *Edwards* rule: The detainee has been told that he may remain silent and speak only through a lawyer and that if he cannot afford an attorney, one will be provided for him. He has asked for a lawyer. He does not have one. He is in custody. And police are still questioning him. A 14-day break in custody does not change the fact that custodial interrogation is inherently compelling. It is unlikely to change the fact that a detainee "considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Roberson*, 486 U. S., at 683.[8] And in some instances, a 14-day break in custody may make matters worse[9] "[w]hen a

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[7] Today's decision, moreover, offers no reason for its 14-day time period. To be sure, it may be difficult to marshal conclusive evidence when setting an arbitrary time period. But in light of the basis for *Edwards*, we should tread carefully. Instead, the only reason for choosing a 14-day time period, the Court tells us, is that "[i]t seems to us that period is 14 days." *Ante*, at 110. That time period is "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." *Ibid.* But the Court gives no reason for that speculation, which may well prove inaccurate in many circumstances.

[8] In *Roberson*, for example, we observed that once a suspect has asserted his right to an attorney, courts must presume he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist . . . ." 486 U. S., at 684. We held in *Roberson* that just because different police come to speak about a different investigation, that presumption does not change: "[T]here is no reason to assume that a suspect's state of mind is in any way investigation-specific." *Ibid.* Nor is there any reason to believe that it is arrest specific.

[9] The compulsion is heightened by the fact that "[t]he uncertainty of fate that being released from custody and then reapprehended entails is, in some circumstances, more coercive than continual custody." Strauss, Reinterrogation, 22 Hastings Const. L. Q. 359, 390 (1995).

suspect understands his (expressed) wishes to have been ignored" and thus "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis*, 512 U. S., at 472–473 (Souter, J., concurring in judgment).[10]

The Court ignores these understandings from the *Edwards* line of cases and instead speculates that if a suspect is reinterrogated and eventually talks, it must be that "further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest." *Ante*, at 108. But it is not apparent why that is the case. The answer, we are told, is that once a suspect has been out of *Miranda* custody for 14 days, "[h]e has likely been able to seek advice from an attorney, family members, and friends." *Ante*, at 107. This speculation, however, is overconfident and only questionably relevant. As a factual matter, we do not know whether the defendant has been able to seek advice: First of all, suspects are told that if they cannot afford a lawyer, one will be provided for them. Yet under the majority's rule, an indigent suspect who took the police at their word when he asked for a lawyer will nonetheless be assumed to have "been able to seek advice from an attorney." Second, even suspects who

[10] Not only is this a likely effect of reinterrogation, but police may use this effect to their advantage. Indeed, the Court's rule creates a strange incentive to delay formal proceedings, in order to gain additional information by way of interrogation after the time limit lapses. The justification for Fifth Amendment rules "must be consistent with . . . practical realities," *Roberson*, 486 U. S., at 688 (KENNEDY, J., dissenting), and the reality is that police may operate within the confines of the Fifth Amendment in order to extract as many confessions as possible, see Leo & White, Adapting to *Miranda:* Modern Interrogators' Strategies for Dealing With the Obstacles Posed by *Miranda*, 84 Minn. L. Rev. 397 (1999). With a time limit as short as 14 days, police who hope that they can eventually extract a confession may feel comfortable releasing a suspect for a short period of time. The resulting delay will only increase the compelling pressures on the suspect.

are not indigent cannot necessarily access legal advice (or social advice as the Court presumes) within 14 days. Third, suspects may not realize that they *need* to seek advice from an attorney. Unless police warn suspects that the interrogation will resume in 14 days, why contact a lawyer? When a suspect is let go, he may assume that the police were satisfied. In any event, it is not apparent why interim advice matters.[11] In *Minnick* v. *Mississippi*, 498 U. S. 146, 153 (1990), we held that it is not sufficient that a detainee happened to speak at some point with a lawyer. See *ibid.* (noting that "consultation with an attorney" does not prevent "persistent attempts by officials to persuade [a suspect] to waive his rights" or shield against the "coercive pressures that accompany custody"). If the actual interim advice of an attorney is not sufficient, the hypothetical, interim advice of "an attorney, family members, and friends," *ante,* at 107, is not enough.

The many problems with the Court's new rule are exacerbated in the very situation in this case: a suspect who is in prison. Even if, as the Court assumes, a trip to one's home significantly changes the *Edwards* calculus, a trip to one's prison cell is not the same. A prisoner's freedom is severely limited, and his entire life remains subject to government control. Such an environment is not conducive to "shak[ing] off any residual coercive effects of his prior custody." *Ante,* at 110.[12] Nor can a prisoner easily "seek advice from an at-

[11] It is important to distinguish this from the point that I make above about indigent suspects. If the police promise to provide a lawyer and never do so, it sends a message to the suspect that the police have lied and that the rights read to him are hollow. But the mere fact that a suspect consulted a lawyer does not itself reduce the compulsion when police reinterrogate him.

[12] Cf. *Orozco* v. *Texas,* 394 U. S. 324, 326 (1969) (holding that a suspect was in custody while being held in own home, despite his comfort and familiarity with the surroundings); *Mathis* v. *United States,* 391 U. S. 1, 5 (1968) (holding that a person serving a prison sentence for one crime was in custody when he was interrogated in prison about another, unrelated

torney, family members, and friends," *ante,* at 107, especially not within 14 days; prisoners are frequently subject to restrictions on communications. Nor, in most cases, can he live comfortably knowing that he cannot be badgered by police; prison is not like a normal situation in which a suspect "is in control, and need only shut his door or walk away to avoid police badgering." *Montejo* v. *Louisiana,* 556 U. S. 778, 795 (2009). Indeed, for a person whose every move is controlled by the State, it is likely that "his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified." *United States* v. *Green,* 592 A. 2d 985, 989 (D. C. 1991); cf. *Minnick,* 498 U. S., at 153 (explaining that coercive pressures "may increase as custody is prolonged").[13] The Court ignores these realities of prison, and instead rests its argument on the supposition that a prisoner's "detention . . . is relatively disconnected from their prior unwillingness to cooperate in an investigation." *Ante,* at 113. But that is not necessarily the case. Prisoners are uniquely vulnerable to the officials who control every aspect of their lives; prison guards may not look kindly upon a prisoner who refuses to cooperate with police. And cooperation frequently is relevant to

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crime); *Miranda* v. *Arizona,* 384 U. S. 436, 478 (1966) ("[W]hen an individual is . . . deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized").

[13] Prison also presents a troubling set of incentives for police. First, because investigators know that their suspect is also a prisoner, there is no need formally to place him under arrest. Thus, police generally can interview prisoners even without probable cause to hold them. This means that police can interrogate suspects with little or no evidence of guilt, and police can do so time after time, without fear of being sued for wrongful arrest. Second, because police know that their suspect is otherwise detained, there is no need necessarily to resolve the case quickly. Police can comfortably bide their time, interrogating and reinterrogating their suspect until he slips up. Third, because police need not hold their suspect, they do not need to arraign him or otherwise initiate formal legal proceedings that would trigger various protections.

whether the prisoner can obtain parole. See, *e. g.*, Code of Md. Regs., tit. 12, § 08.01.18(A)(3) (2008). Moreover, even if it is true as a factual matter that a prisoner's fate is not controlled by the police who come to interrogate him, how is the prisoner supposed to know that? As the Court itself admits, compulsion is likely when a suspect's "captors appear to control [his] fate," *ante,* at 106 (internal quotation marks omitted). But when a guard informs a suspect that he must go speak with police, it will "appear" to the prisoner that the guard and police are not independent. "Questioning by captors, who *appear* to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." *Illinois* v. *Perkins,* 496 U. S. 292, 297 (1990) (emphasis added).[14]

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[14] The Court attempts to distinguish detention in prison from the "paradigm *Edwards* case," *ante,* at 106, but it is not clear why that is so. The difference cannot be simply that convicted prisoners' "detention . . . is relatively disconnected from their prior unwillingness to cooperate in an investigation," *ante,* at 113, because in many instances of pretrial custody, the custody will continue regardless of whether a detainee answers questions. Take *Roberson* for example. Roberson was arrested and being held for one crime when, days later, a different officer interrogated him about a different crime. 486 U. S., at 678. Regardless of whether he cooperated with the second investigation, he was still being held for the first crime. Yet under the Court's analysis, had Roberson been held long enough that he had become "accustomed" to the detention facility, *ante,* at 113, there would have been a break in custody between each interrogation. Thus, despite the fact that coercive pressures "may increase as custody is prolonged," *Minnick,* 498 U. S., at 153, the real problem in *Roberson* may have been that the police did not leave him sitting in jail for long enough.

This problem of pretrial custody also highlights a tension with the Court's decision last Term in *Montejo* v. *Louisiana,* 556 U. S. 778 (2009). In *Montejo,* the Court overturned *Michigan* v. *Jackson,* 475 U. S. 625, 636 (1986), which had protected an accused's Sixth Amendment right to counsel by "forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding." 556 U. S., at 780–781. In so doing, the Court emphasized that because the *Edwards* "regime suffices to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence,' before his arraignment,

III

Because, at the very least, we do not know whether Shatzer could obtain a lawyer, and thus would have felt that police had lied about providing one, I cannot join the Court's opinion. I concur in today's judgment, however, on another ground: Even if Shatzer could not consult a lawyer and the police never provided him one, the 2-year break in custody is a basis for treating the second interrogation as no more coercive than the first. Neither a break in custody nor the passage of time has an inherent, curative power. But certain things change over time. An indigent suspect who took police at their word that they would provide an attorney probably will feel that he has "been denied the counsel he has clearly requested," *Roberson*, 486 U. S., at 686, when police begin to question him, without a lawyer, only 14 days later.[15] But, when a suspect has been left alone for a sig-

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it is hard to see why it would not also suffice to protect that same choice after arraignment." 556 U. S., at 795 (quoting *Texas* v. *Cobb*, 532 U. S. 162, 175 (2001) (KENNEDY, J., concurring); citation omitted). But typically, after arraignment, defendants are released on bail or placed in detention facilities, both of which, according to the majority's logic, sometimes constitute breaks in custody. How then, under the Court's decision today, will *Edwards* serve the role that the Court placed on it in *Montejo?*

[15] The Court responds that "[i]f confidence in the police's promise to provide counsel were the touchstone, *Edwards* would not have applied in *Minnick*, where the suspect in continuing custody actually met with appointed counsel." *Ante*, at 116. But my view is not that "confidence in the police's promise to provide counsel" is "the touchstone." *Ibid.* Rather, my view is that although an appropriate break in custody will mitigate many of the reasons that custodial reinterrogation of a suspect who requested counsel is inherently compelling, it will not mitigate the effect of an indigent detainee believing that he has "been denied the counsel he has clearly requested," *Roberson*, 486 U. S., at 686. If police tell an indigent suspect that he is not required to speak without an attorney, and that they will provide him with an attorney, and that suspect asserts his right to an attorney, but police nonetheless do not provide an attorney and reinterrogate him (even if there was a break in custody between the interrogations), the indigent suspect is likely to feel that the police lied to

nificant period of time, he is not as likely to draw such conclusions when the police interrogate him again.[16] It is concededly "impossible to determine with precision" where to draw such a line. *Barker* v. *Wingo*, 407 U. S. 514, 521 (1972). In the case before us, however, the suspect was returned to the general prison population for two years. I am convinced that this period of time is sufficient. I therefore concur in the judgment.

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him or are ignoring his rights. This view is not in tension with *Minnick*. *Minnick* holds only that consultation with an attorney between interrogations is not *sufficient* to end the *Edwards* presumption and therefore that when there has been no break in custody, "counsel's *presence* at interrogation," 498 U. S., at 152, is necessary to address the compulsion with which the *Edwards* line of cases is concerned.

[16] I do not doubt that some of the compulsion caused by reinterrogating an indigent suspect without providing a lawyer may survive even a break in custody and a very long passage of time. The relevant point here is more limited: A long break in time, far longer than 14 days, diminishes, rather than eliminates, that compulsion.

KIYEMBA ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.

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

No. 08–1234. Decided March 1, 2010

After this Court granted certiorari to determine whether a federal habeas court has the power to order release of Guantanamo Bay prisoners into the continental United States, each detainee at issue received an offer of resettlement in another country. Only five refused the offer and remain at Guantanamo Bay.

Held: This case is remanded for the Court of Appeals to determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the change in the underlying facts, which may affect the legal issues presented.

555 F. 3d 1022, vacated and remanded.

PER CURIAM.

We granted certiorari, 558 U. S. 969 (2009), on the question whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantanamo Bay "where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy," Pet. for Cert. i. By now, however, each of the detainees at issue in this case has received at least one offer of resettlement in another country. Most of the detainees have accepted an offer of resettlement; five detainees, however, have rejected two such offers and are still being held at Guantanamo Bay.

This change in the underlying facts may affect the legal issues presented. No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so. See, *e. g.*, *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view").

Per Curiam

Under these circumstances, we vacate the judgment and remand the case to the United States Court of Appeals for the District of Columbia Circuit. It should determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.

It is so ordered.

Syllabus

JOHNSON *v.* UNITED STATES

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

No. 08–6925. Argued October 6, 2009—Decided March 2, 2010

Petitioner Johnson pleaded guilty to possession of ammunition by a convicted felon. 18 U. S. C. § 922(g)(1). The Government sought sentencing under the Armed Career Criminal Act, which authorizes an enhanced penalty for a person who violates § 922(g) and who "has three previous convictions" for "a violent felony," § 924(e)(1), defined as, *inter alia*, an offense that "has as an element the use . . . of physical force against the person of another," § 924(e)(2)(B)(i). Among the three prior felony convictions the Government proffered was Johnson's 2003 Florida conviction for simple battery, which ordinarily is a first-degree misdemeanor, Fla. Stat. § 784.03(1)(b), but was a felony conviction for Johnson because he had previously been convicted of another battery, § 784.03(2). Under Florida law, a battery occurs when a person either "[a]ctually and intentionally touches or strikes another person against [his] will," or "[i]ntentionally causes bodily harm to another person." § 784.03(1)(a). Nothing in the record permitted the District Court to conclude that Johnson's 2003 conviction rested upon the "strik[ing]" or "[i]ntentionally caus[ing] bodily harm" elements of the offense. Accordingly, his conviction was a predicate conviction for a "violent felony" under the Armed Career Criminal Act only if "[a]ctually and intentionally touch[ing]" another constitutes the use of "physical force" under § 924(e)(2)(B)(i). Concluding it does, the District Court enhanced Johnson's sentence under § 924(e)(1), sentencing him to a term of 15 years and 5 months. The Eleventh Circuit affirmed.

Held: The Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use . . . of physical force against the person of another," § 924(e)(2)(B)(i), and thus does not constitute a "violent felony" under § 924(e)(1). Pp. 137–145.

(a) In interpreting the phrase "physical force" in § 924(e)(2)(B)(i), the Court is not bound by the Florida Supreme Court's conclusion in *State* v. *Hearns*, 961 So. 2d 211, 218, that, under Florida's statutory equivalent to the Armed Career Criminal Act, Fla. Stat. § 775.084, the offense of battery does not "involve the use . . . of physical force or violence against any individual," § 776.08. The meaning of "physical force" in § 924(e)(2)(B)(i) is a question of federal law, not state law. The Court is bound, however, by the Florida Supreme Court's interpretation of the

elements of the state-law offense, including the Florida Supreme Court's holding that § 784.03(1)(a)'s element of "[a]ctually and intentionally touching" another person is satisfied by *any* intentional physical contact, no matter how slight. Pp. 137–138.

(b) Because § 924(e)(2)(B)(i) does not define "physical force," the Court gives the phrase its ordinary meaning. *Bailey* v. *United States*, 516 U. S. 137, 144–145. The adjective "physical" is clear. The noun "force," however, has a number of meanings. Its ordinary meaning refers to the application of strength, power, and violence—in this context, against another person. Pp. 138–139.

(c) The Government suggests that "force" in § 924(e)(2)(B)(i)'s definition of "violent felony" is a legal term of art describing one of the elements of the common-law crime of battery. At common law, that element was satisfied by even the slightest offensive touching. Although a common-law term of art should be given its established common-law meaning, the Court does not ascribe to a statutory term a common-law meaning where that meaning does not fit. Here "physical force" is used in defining not the crime of battery, but rather the statutory category of "*violent* felony." § 924(e)(2)(B)(i). In that context, "physical force" means *violent* force—*i. e.*, force capable of causing physical pain or injury to another person. Cf. *Leocal* v. *Ashcroft*, 543 U. S. 1, 11. Moreover, it is significant that the meaning the Government seeks to impute to the term "force" derives from the elements of a common-law misdemeanor. Nothing in the text of § 924(e)(2)(B)(i) suggests that "force" in the definition of a "violent felony" should be regarded as a common-law term of art used to define the contours of a misdemeanor. Nor can any negative inference about the amount of "force" required by § 924(e)(2)(B)(i) be drawn from § 924(e)(2)(B)(ii) and § 922(g)(8)(C)(ii). Pp. 139–143.

(d) There is no force to the Government's prediction that this decision will undermine its ability to enforce § 922(g)(9)'s firearm disability against a person previously convicted of a misdemeanor crime of domestic violence that has as an element the "use . . . of physical force," § 921(a)(33)(A)(ii). The Court interprets the phrase "physical force" only in the context of a statutory definition of "violent felony," and does not decide whether the same meaning applies in the context of defining the scope of misdemeanor offenses. Similarly misplaced is the Government's assertion that it will now be more difficult to obtain sentencing enhancements for individuals convicted under generic felony-battery statutes that cover both violent force and unwanted physical contact, and to remove an alien convicted of a nonviolent battery conviction under the statutory provision for an alien convicted of a "crime of domestic violence," 8 U. S. C. § 1227(a)(2)(E). See, *e. g.*, *Chambers* v.

United States, 555 U. S. 122, 126; *Shepard* v. *United States*, 544 U. S. 13, 26. Pp. 143–145.

(e) Before the District Court the Government disclaimed any reliance upon the so-called "residual clause" of the definition of "violent felony" in § 924(e)(2)(B)(ii), which covers an offense that "involves conduct that presents a serious potential risk of physical injury to another." Accordingly, the Court declines to remand for consideration whether Johnson's 2003 battery conviction qualifies as a "violent felony" under that provision. P. 145.

528 F. 3d 1318, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 145.

Lisa Call argued the cause for petitioner. With her on the briefs were *Donna Lee Elm*, *James T. Skuthan*, and *Rosemary T. Cakmis*.

Leondra R. Kruger argued the cause for the United States. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.*

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether the Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person, Fla. Stat. § 784.03(1)(a), (2) (2003), "has as an element the use . . . of physical force against the person of another," 18 U. S. C. § 924(e)(2)(B)(i), and thus constitutes a "violent felony" under the Armed Career Criminal Act, § 924(e)(1).

I

Curtis Johnson pleaded guilty to knowingly possessing ammunition after having been convicted of a felony, in viola-

**Michael C. Small*, *Patricia A. Millett*, and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

tion of 18 U. S. C. § 922(g)(1). The Government sought an enhanced penalty under § 924(e), which provides that a person who violates § 922(g) and who "has three previous convictions" for "a violent felony" "committed on occasions different from one another" shall be imprisoned for a minimum of 15 years and a maximum of life. A "violent felony" is defined as "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).

Johnson's indictment specified five prior felony convictions. The Government contended that three of those convictions—for aggravated battery and for burglary of a dwelling in October 1986, and for battery in May 2003—rendered Johnson eligible for sentencing under § 924(e)(1). At the sentencing hearing, Johnson did not dispute that the two 1986 convictions were for "violent felon[ies]," but he objected to counting his 2003 battery conviction. That conviction was for simple battery under Florida law, which ordinarily is a first-degree misdemeanor, Fla. Stat. § 784.03(1)(b), but is a third-degree felony for a defendant who (like Johnson) has been convicted of battery (even simple battery) before, § 784.03(2).

Under § 784.03(1)(a), a battery occurs when a person either "1. [a]ctually and intentionally touches or strikes another person against the will of the other," or "2. [i]ntentionally causes bodily harm to another person." Because the elements of the offense are disjunctive, the prosecution can prove a battery in one of three ways. *State* v. *Hearns*, 961 So. 2d 211, 218 (Fla. 2007). It can prove that the defendant

"[i]ntentionally caus[ed] bodily harm," that he "intentionally str[uck]" the victim, or that he merely "[a]ctually and intentionally touche[d]" the victim.

Since nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, see *Shepard* v. *United States*, 544 U. S. 13, 26 (2005) (plurality opinion), his conviction was a predicate conviction for a "violent felony" under the Armed Career Criminal Act only if "[a]ctually and intentionally touch[ing]" another person constitutes the use of "physical force" within the meaning of § 924(e)(2)(B)(i). The District Court concluded that it does, and accordingly sentenced Johnson under § 924(e)(1) to a prison term of 15 years and 5 months.

The Eleventh Circuit affirmed. 528 F. 3d 1318 (2008). We granted certiorari, 555 U. S. 1169 (2009).

II

Florida has a statute similar to the Armed Career Criminal Act that imposes mandatory-minimum sentences upon "violent career criminal[s]," Fla. Stat. § 775.084(4)(d) (2007), defined to mean persons who have three convictions for certain felonies, including any "forcible felony," § 775.084(1)(d)(1)(a). "[F]orcible felony" is defined to include a list of enumerated felonies—including murder, manslaughter, sexual battery, carjacking, aggravated assault, and aggravated battery—and also "any other felony which involves the use or threat of physical force or violence against any individual." § 776.08. In *Hearns*, the Florida Supreme Court held that the felony offense of battery on a law enforcement officer, § 784.07(2)(b)—which requires the same conduct (directed against a law enforcement officer) as misdemeanor battery under § 784.03(1)(a)—was not a forcible felony. See 961 So. 2d, at 219. It said that since § 784.03(1)(a) requires proof of only the slightest unwanted physical touch,

"the use . . . of physical force" was not an element of the offense. *Id.*, at 219.

Johnson argues that in deciding whether any unwanted physical touching constitutes "physical force" under 18 U. S. C. § 924(e)(2)(B)(i), we are bound by the Florida Supreme Court's conclusion in *Hearns* that it does not constitute "physical force." That is not so. The meaning of "physical force" in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court's interpretation of a similar—or even identical—state statute.

We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2). See *Johnson* v. *Fankell*, 520 U. S. 911, 916 (1997). The Florida Supreme Court has held that the element of "actually and intentionally touching" under Florida's battery law is satisfied by *any* intentional physical contact, "no matter how slight." *Hearns*, 961 So. 2d, at 218. The most "nominal contact," such as a "ta[p] . . . on the shoulder without consent," *id.*, at 219, establishes a violation. We apply "th[is] substantive elemen[t] of the criminal offense," *Jackson* v. *Virginia*, 443 U. S. 307, 324, n. 16 (1979), in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of "violent felony" in 18 U. S. C. § 924(e)(2)(B)(i).

III

Section 924(e)(2)(B)(i) does not define "physical force," and we therefore give the phrase its ordinary meaning. *Bailey* v. *United States*, 516 U. S. 137, 144–145 (1995). The adjective "physical" is clear in meaning but not of much help to our inquiry. It plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force. It is the noun that poses the difficulty; "force" has a number of meanings. For present purposes we can exclude its specialized

meaning in the field of physics: a cause of the acceleration of mass. Webster's New International Dictionary 986 (2d ed. 1954) (hereinafter Webster's Second). In more general usage it means "[s]trength or energy; active power; vigor; often an unusual degree of strength or energy," "[p]ower to affect strongly in physical relations," or "[p]ower, violence, compulsion, or constraint exerted upon a person." *Id.*, at 985. Black's Law Dictionary 717 (9th ed. 2009) (hereinafter Black's) defines "force" as "[p]ower, violence, or pressure directed against a person or thing." And it defines "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim." *Ibid.* All of these definitions suggest a degree of power that would not be satisfied by the merest touching.

There is, however, a more specialized legal usage of the word "force": its use in describing one of the elements of the common-law crime of battery, which consisted of the intentional application of unlawful force against the person of another. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.15(a), p. 301 (1986 and Supp. 2003); accord, Black's 173. The common law held this element of "force" to be satisfied by even the slightest offensive touching. See 3 W. Blackstone, Commentaries on the Laws of England 120 (1768) (hereinafter Blackstone); *Lynch* v. *Commonwealth*, 131 Va. 762, 765, 109 S. E. 427, 428 (1921); see also 2 LaFave & Scott, *supra*, § 7.15(a). The question is whether the term "force" in 18 U. S. C. § 924(e)(2)(B)(i) has the specialized meaning that it bore in the common-law definition of battery. The Government asserts that it does. We disagree.

Although a common-law term of art should be given its established common-law meaning, *United States* v. *Turley*, 352 U. S. 407, 411 (1957), we do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961), and we "do not force term-of-art definitions into contexts where they plainly

do not fit and produce nonsense," *Gonzales* v. *Oregon*, 546 U. S. 243, 282 (2006) (SCALIA, J., dissenting). Here we are interpreting the phrase "physical force" as used in defining not the crime of battery, but rather the statutory category of "violent felon[ies]," § 924(e)(2)(B). In *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), we interpreted the statutory definition of "crime of violence" in 18 U. S. C. § 16. That provision is very similar to § 924(e)(2)(B)(i), in that it includes any felony offense which "has as an element the use . . . of physical force against the person or property of another," § 16(a). We stated:

> "In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes . . . ." 543 U. S., at 11.

Just so here. We think it clear that in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force—that is, force capable of causing physical pain or injury to another person. See *Flores* v. *Ashcroft*, 350 F. 3d 666, 672 (CA7 2003) (Easterbrook, J.). Even by itself, the word "violent" in § 924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement . . . "); 19 Oxford English Dictionary 656 (2d ed. 1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. See *id.*, at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and

assault and battery with a dangerous weapon"); see also *United States* v. *Doe*, 960 F. 2d 221, 225 (CA1 1992) (Breyer, C. J.) ("[T]he term to be defined, 'violent felony,' . . . calls to mind a tradition of crimes that involve the possibility of more closely related, active violence").

It is significant, moreover, that the meaning of "physical force" the Government would seek to import into this definition of "violent felony" is a meaning derived from a common-law *misdemeanor*. At common law, battery—*all* battery, and not merely battery by the merest touching—was a misdemeanor, not a felony. See 4 Blackstone 216–218 (1769); see also 1 LaFave & Scott, *supra*, § 2.1(b), at 90; ALI, Model Penal Code § 211.1, Comment, p. 175 (1980). As the dissent points out, *post*, at 149–150 (opinion of ALITO, J.), the dividing line between misdemeanors and felonies has shifted over time. But even today a simple battery—whether of the mere-touching or bodily-injury variety—generally is punishable as a misdemeanor.[1] See, *e. g.*, 2 W. LaFave, Substantive Criminal Law § 16.1(b) (2d ed. 2003 and Supp. 2009–2010); Cal. Penal Code Ann. §§ 242 and 243 (West 2008); Fla. Stat. § 784.03(1)(b); Ill. Comp. Stat., ch. 720, § 5/12–3(b) (West 2009); Tex. Penal Code Ann. § 22.01(b) (West Supp. 2009). It is unlikely that Congress would select as a term of art defining "violent felony" a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor. Of course "physical force" *can* be given its common-law misdemeanor meaning by artful language, but here the only text that can be claimed to accomplish that is the phrase "physical

[1] The dissent notes, *post*, at 150, that, around the time the Armed Career Criminal Act became law, in "quite a few States" it was a felony offense to commit an unwanted physical touching of certain victims, such as police officers. That would be relevant for determining whether a conviction under one of those statutes meets the 18 U. S. C. § 924(e)(2)(B) requirement of being a "felony" conviction. But it has no bearing upon whether the substantive element of those offenses—making unwanted physical contact with certain special categories of individuals—involves the use of "force" within the meaning of § 924(e)(2)(B)(i), a statute applicable to all victims.

force" itself. Since, as we have seen, that is as readily (indeed, much more readily) taken to describe *violent* force, there is no reason to define "violent felony" by reference to a nonviolent misdemeanor.

The Government argues that we cannot construe 18 U. S. C. § 924(e)(2)(B)(i) to reach only offenses that have as an element the use of *violent* force, because there is no modifier in § 924(e)(2)(B)(i) that specifies the degree of "physical force" required. As we have discussed, however, the term "physical force" itself normally connotes force strong enough to constitute "power"—and all the more so when it is contained in a definition of "violent felony." Nor is there any merit to the dissent's contention, *post*, at 148–149, that the term "force" in § 924(e)(2)(B)(i) cannot be read to require violent force, because Congress specifically named "burglary" and "extortion" as "violent felon[ies]" in § 924(e)(2)(B)(ii) notwithstanding that those offenses can be committed without violence. The point would have force (so to speak) if burglary and extortion were listed in § 924(e)(2)(B)(i), as felonies that have "as an element the use, attempted use, or threatened use of physical force." In fact, however, they are listed in § 924(e)(2)(B)(ii) as examples of felonies that "presen[t] a serious potential risk of physical injury to another." The Government has not argued that intentional, unwanted touching qualifies under this latter provision. What the dissent's argument comes down to, then, is the contention that, since felonies that create a serious risk of physical injury qualify as violent felonies under subparagraph (B)(ii), felonies that involve a mere unwanted touching must involve the use of physical force and qualify as violent felonies under subparagraph (B)(i). That obviously does not follow.[2]

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[2] Even further afield is the dissent's argument, *post*, at 147, that since § 924(e)(2)(B)(ii) requires conduct that "presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(i) must not. That is rather like saying a provision which includes (i) apples and (ii) overripe oranges must exclude overripe apples. It does not follow.

The Government also asks us to draw a negative inference from the presence of the "bodily injury" specification added to the phrase "physical force" in § 922(g)(8)(C)(ii). That provision forbids the possession of firearms by a person subject to a court order explicitly prohibiting the "use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonably be expected to cause bodily injury." *Ibid.* The absence of such language in § 924(e)(2)(B)(i), the Government contends, proves that the merest touch suffices. Even as a matter of logic that does not follow. Specifying that "physical force" must rise to the level of bodily injury does not suggest that without the qualification "physical force" would consist of the merest touch. It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example. Moreover, this is not a case where Congress has "include[d] particular language in one section of a statute but omit[ted] it in another section of *the same Act*," *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted; emphasis added). Section 922(g)(8)(C)(ii) was enacted into law in 1994—eight years after enactment of the language in § 924(e)(2)(B)(i). Compare Pub. L. 103–322, § 110401, 108 Stat. 2015 (1994), with Pub. L. 99–570, § 1402, 100 Stat. 3207–39 (1986).

IV

The Government contends that interpreting 18 U. S. C. § 924(e)(2)(B)(i) to require violent force will undermine its ability to enforce the firearm disability in § 922(g)(9) for persons who previously have been convicted of a "misdemeanor crime of domestic violence," which is defined to include certain misdemeanor offenses that have, "as an element, the use or attempted use of physical force . . . ," § 921(a)(33)(A)(ii). The prediction is unfounded. We have interpreted the phrase "physical force" only in the context of a statutory definition of "violent felony." We do not decide that the phrase has the same meaning in the context of defining a

misdemeanor crime of domestic violence. The issue is not before us, so we do not decide it.

In a similar vein, the Government asserts that our interpretation will make it more difficult to remove, pursuant to 8 U. S. C. § 1227(a)(2)(E), an alien convicted of a "crime of domestic violence." That phrase is defined to mean "any crime of violence (as defined in [18 U. S. C. § 16])" committed by certain persons, including spouses, former spouses, and parents. § 1227(a)(2)(E)(i). The Government contends it will be harder to obtain removal based upon battery convictions that, like those in Florida, do not require the use of violent physical force. The dissent likewise anticipates that in the States it has identified, *post*, at 151–152, and n. 3, as having generic felony-battery statutes that cover both violent force and unwanted physical contact, our decision will render convictions under those statutes "outside the scope of [the Armed Career Criminal Act]," *post*, at 152.

This exaggerates the practical effect of our decision. When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the "'modified categorical approach'" that we have approved, *Nijhawan* v. *Holder*, 557 U. S. 29, 41 (2009), permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms. See *Chambers* v. *United States*, 555 U. S. 122, 126 (2009); *Shepard*, 544 U. S., at 26 (plurality opinion); *Taylor* v. *United States*, 495 U. S. 575, 602 (1990). Indeed, the Government has in the past obtained convictions under the Armed Career Criminal Act in precisely this manner. See, *e. g.*, *United States* v. *Simms*, 441 F. 3d 313, 316–317 (CA4 2006) (Maryland battery); cf. *United States* v. *Robledo-Leyva*, 307 Fed. Appx. 859, 862 (CA5) (Florida battery), cert. denied,

558 U. S. 831 (2009); *United States* v. *Luque-Barahona*, 272 Fed. Appx. 521, 524–525 (CA7 2008) (same).

It may well be true, as the Government contends, that in many cases state and local records from battery convictions will be incomplete. But absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well. See, *e. g.*, *Shepard*, *supra*, at 22–23 (burglary). It is implausible that avoiding that common-enough consequence with respect to the single crime of battery, under the single statute that is the Armed Career Criminal Act, caused Congress to import a term of art that is a comical misfit with the defined term "violent felony."

* * *

The Government asks us to remand to the Eleventh Circuit for its consideration of whether Johnson's 2003 battery conviction is a "violent felony" within the meaning of the so-called "residual clause" in 18 U. S. C. § 924(e)(2)(B)(ii). We decline to do so. The Government did not keep this option alive because it disclaimed at sentencing any reliance upon the residual clause. App. 44–45. Moreover, the parties briefed the § 924(e)(2)(B)(ii) issue to the Eleventh Circuit, which nonetheless reasoned that if Johnson's conviction under Fla. Stat. § 784.03(2) satisfied § 924(e)(2)(B)(i), then it was a predicate "violent felony" under § 924(e)(1); but "if not, then not." 528 F. 3d, at 1320.

We reverse the judgment of the Eleventh Circuit, set aside Johnson's sentence, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Armed Career Criminal Act (ACCA) defines a "violent felony" to mean, among other things, "any crime punishable by imprisonment for a term exceeding one year . . .

that . . . has as an element the use, attempted use, or threatened use of *physical force against the person of another*." 18 U. S. C. § 924(e)(2)(B)(i) (emphasis added). The classic definition of the crime of battery is the "intentional application of unlawful force against the person of another." *Ante*, at 139 (citing 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.15, p. 301 (1986 and Supp. 2003); Black's Law Dictionary 173 (9th ed. 2009)). Thus, the crime of battery, as traditionally defined, falls squarely within the plain language of ACCA. Because I believe that ACCA was meant to incorporate this traditional definition, I would affirm the decision of the Court of Appeals.

I

The Court starts out in the right direction by noting that the critical statutory language—"the use, attempted use, or threatened use of physical force against the person of another," 18 U. S. C. § 924(e)(2)(B)(i)—may mean either (1) the use of violent force or (2) the use of force that is sufficient to satisfy the traditional definition of a battery. See *ante*, at 138–139. The Court veers off course, however, by concluding that the statutory language reaches only violent force.

The term "force," as the Court correctly notes, had a well-established meaning at common law that included even the "slightest offensive touching." *Ante*, at 139. See also *Respublica* v. *De Longchamps*, 1 Dall. 111, 114 (O. T. Phila. 1784) ("[T]hough no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal d[e]finition of Assault and Battery . . . "); 3 W. Blackstone, Commentaries on the Laws of England 120, 218 (1768) (hereinafter Blackstone). This approach recognized that an offensive but nonviolent touching (for example, unwanted sexual contact) may be even more injurious than the use of force that is sufficient to inflict physical pain or injury (for example, a sharp slap in the face).

When Congress selects statutory language with a well-known common-law meaning, we generally presume that Congress intended to adopt that meaning. See, *e. g.*, *United States* v. *Turley*, 352 U. S. 407, 411 (1957) ("We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning"); *Morissette* v. *United States*, 342 U. S. 246, 263 (1952); *United States* v. *Carll*, 105 U. S. 611, 612–613 (1882). And here, I see nothing to suggest that Congress meant the phrase "use of physical force" in ACCA to depart from that phrase's meaning at common law.

On the contrary, other standard canons of statutory interpretation point to the same conclusion. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). In 18 U. S. C. § 924(e)(2)(B)(ii)—the clause immediately following the clause at issue in this case—the term "violent felony" is defined as including any crime that "involves conduct that presents *a serious potential risk of physical injury to another*." (Emphasis added.) Because Congress did not include a similar limitation in § 924(e)(2)(B)(i), we should presume that it did not intend for such a limitation to apply.

The language used by Congress in § 922(g)(8)(C)(ii) further illustrates this point. This provision criminalizes, among other things, the possession of a firearm by a person who is subject to a court order that "explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury*." (Emphasis added.) Although § 922(g)(8)(C)(ii) was not enacted until eight years after § 924(e)(2)(B)(i), see *ante*, at 143, the former provision

is nevertheless instructive. If Congress had wanted to include in § 924(e)(2)(B)(i) a limitation similar to those in §§ 924(e)(2)(B)(ii) and 922(g)(8)(C)(ii), Congress could have easily done so expressly.

II

The Court provides two reasons for refusing to interpret 18 U. S. C. § 924(e)(2)(B)(i) in accordance with the common-law understanding, but neither is persuasive.

A

The Court first argues that § 924(e)(2)(B)(i) must be read to refer to "violent" force because that provision defines the term "violent felony." *Ante*, at 140. But it is apparent that ACCA uses "violent felony" as a term of art with a wider meaning than the phrase may convey in ordinary usage. ACCA specifically provides that burglary and extortion are "violent felon[ies]," § 924(e)(2)(B)(ii), and we have held that ACCA also reaches the crime of attempted burglary, *James* v. *United States*, 550 U. S. 192 (2007). All of these offenses may be committed without violent force,[1] and it is therefore

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[1] For the purposes of ACCA, burglary is defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). See also *James*, 550 U. S., at 197, 198, 202–203 (attempted burglary under Florida law requires "overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein" and that the "defendant fail in the perpetration or be intercepted or prevented in the execution of the underlying offense" (internal quotation marks and brackets omitted)). Although we have not defined extortion under ACCA, the Hobbs Act defines it as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or *fear*, or under color of official right." 18 U. S. C. § 1951(b)(2) (emphasis added); see also *James*, *supra*, at 223–224 (SCALIA, J., dissenting) (defining extortion in ACCA as "the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the person *or property of another*" (emphasis added)).

clear that the use of such force is not a requirement under ACCA. Instead, ACCA classifies crimes like burglary and extortion as violent felonies because they often lead to violence. As we have put it, these crimes create "significant risks of . . . confrontation that might result in bodily injury," *id.*, at 199, and offensive touching creates just such a risk. For example, when one bar patron spits on another, violence is a likely consequence. See *United States* v. *Velazquez-Overa*, 100 F. 3d 418, 422 (CA5 1996) ("If burglary, with its tendency to cause alarm and to provoke physical confrontation, is considered a violent crime under 18 U. S. C. § 16(b), then surely the same is true of the far greater intrusion that occurs when a child is sexually molested"); *United States* v. *Wood*, 52 F. 3d 272, 276 (CA9 1995) (same).

B

The Court's only other reason for rejecting the common-law definition is the fact that battery at common law was a misdemeanor. The Court reasons that "[i]t is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Ante*, at 141 (citing 4 Blackstone 216–218 (1769), and ALI, Model Penal Code § 211.1, Comment, p. 175 (1980)). The Court does not spell out why Congress' selection of this term would be unlikely, but I assume that the Court's point is that Congress is unlikely to have decided to treat as a violent felony an offense that was regarded at common law as a mere misdemeanor. This argument overlooks the significance of the misdemeanor label at common law, the subsequent evolution of battery statutes, and the limitation imposed by 18 U. S. C. § 924(e)(2)(B).

At common law, the terms "felony" and "misdemeanor" did not have the same meaning as they do today. At that time, imprisonment as a form of punishment was rare, see *Apprendi* v. *New Jersey*, 530 U. S. 466, 480, n. 7 (2000); most

felonies were punishable by death, see *Tennessee* v. *Garner*, 471 U. S. 1, 13 (1985); and many very serious crimes, such as kidnaping and assault with the intent to murder or rape, were categorized as misdemeanors, see *United States* v. *Watson*, 423 U. S. 411, 439–440 (1976) (Marshall, J., dissenting). Since that time, however, the term "felony" has come to mean any offense punishable by a lengthy term of imprisonment (commonly more than one year, see *Burgess* v. *United States*, 553 U. S. 124, 130 (2008)); the term "misdemeanor" has been reserved for minor offenses; and many crimes that were misdemeanors at common law have been reclassified as felonies. And when the relevant language in ACCA was enacted, quite a few States had felony battery statutes that retained the common-law definition of "force." See Fla. Stat. § 784.07(2)(b) (1987) (making simple battery of a police officer a felony); Idaho Code § 18–915(c) (Lexis 1987) (same); Ill. Rev. Stat., ch. 38, § 12–4(b)(6) (West 1987) (same); La. Rev. Stat. Ann. §§ 14:33, 14:43.1 (West 1986) (sexual battery punishable by more than one year's imprisonment); N. M. Stat. Ann. § 40A–22–23 (1972) (battery of a police officer a felony); see also Kan. Stat. Ann. § 21–3413(b) (Supp. 1994) (simple battery of corrections officers a felony).[2]

ACCA's mechanism for identifying the battery convictions that merit treatment as "violent felon[ies]" is contained in 18 U. S. C. § 924(e)(2)(B), which provides that an offense committed by an adult is not a "violent felony" unless it is "punishable by imprisonment for a term exceeding one year." Consequently, while all convictions under battery statutes that track the common-law definition of the offense satisfy the requirements of § 924(e)(2)(B)(i)—because they have "as an element the use, attempted use, or threatened use of

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[2] These state statutes show that Congress, by using a term of art, "force," did not adopt a meaning "peculiar . . . [to the] definition of a misdemeanor," *ante*, at 141, 142, and, therefore, they are relevant in determining whether touching involves the use of force under ACCA, see *ante*, at 141, n. 1.

physical force against the person of another"—not all battery convictions qualify as convictions for a violent felony because § 924(e)(2)(B) excludes any battery conviction that was not regarded by the jurisdiction of conviction as being sufficiently serious to be punishable by imprisonment for more than one year. There is nothing extraordinary or unlikely about this approach.

III

The Court's interpretation will have untoward consequences. Almost half of the States have statutes that reach both the use of violent force and force that is not violent but is unlawful and offensive.[3] Many of the States classify these

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[3] Ariz. Rev. Stat. Ann. § 13–1203(A) (West 2001); Cal. Penal Code Ann. § 242 (West 2008); *People* v. *Pinholster*, 1 Cal. 4th 865, 961, 824 P. 2d 571, 622 (1992); D. C. Code § 22–404(a) (2001); *Ray* v. *United States*, 575 A. 2d 1196, 1199 (D. C. 1990); Fla. Stat. § 784.03(1)(a) (2007); Ga. Code Ann. § 16–5–23(a) (2007); Idaho Code § 18–903 (Lexis 2004); Ill. Comp. Stat., ch. 720, § 5/12–3(a) (West 2008); Ind. Code § 35–42–2–1(a) (West 2004); Iowa Code § 708.1 (2009); Kan. Stat. Ann. § 21–3412(a) (2007); La. Rev. Stat. Ann. § 14:33 (West 2007); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987); Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A) (2006); Md. Crim. Law Code Ann. §§ 3–201(b), 3–203(a) (Lexis Supp. 2009); *Kellum* v. *State*, 223 Md. 80, 84–85, 162 A. 2d 473, 476 (1960); Mass. Gen. Laws, ch. 265, § 13A(a) (West 2008); *Commonwealth* v. *Campbell*, 352 Mass. 387, 397, 226 N. E. 2d 211, 218 (1967); Mich. Comp. Laws Ann. §§ 750.81(1), (2) (West 2004); *People* v. *Nickens*, 470 Mich. 622, 627–628, 685 N. W. 2d 657, 661 (2004); Mo. Rev. Stat. § 565.070.1(5) (2000); Mont. Code Ann. § 45–5–201(1)(c) (2009); N. H. Rev. Stat. Ann. § 631:2–aI(a) (West 2007); N. M. Stat. Ann. § 30–3–4 (2004); N. C. Gen. Stat. Ann. § 14–33(a) (Lexis 2007); *State* v. *West*, 146 N. C. App. 741, 744, 554 S. E. 2d 837, 840 (2001); Okla. Stat. Ann., Tit. 21, § 642 (West 2002); *Steele* v. *State*, 778 P. 2d 929, 931 (Okla. Crim. App. 1989); R. I. Gen. Laws § 11–5–3(a) (Lexis 2002); *State* v. *Coningford*, 901 A. 2d 623, 630 (R. I. 2006); S. C. Code Ann. § 22–3–560(A) (Supp. 2009); *State* v. *Mims*, 286 S. C. 553, 554, 335 S. E. 2d 237 (1985) *(per curiam);* Tenn. Code Ann. § 39–13–101(a)(3) (2003); Tex. Penal Code Ann. § 22.01(a) (West Supp. 2009); Va. Code Ann. § 18.2–57(A) (Lexis 2009); *Wood* v. *Commonwealth*, 149 Va. 401, 404, 140 S. E. 114, 115 (1927); Wash. Rev. Code § 9A.36.011 *et seq.* (2008); *State* v. *Stevens*, 158 Wash. 2d 304, 311, 143 P. 3d 817, 821 (2006); W. Va. Code Ann. § 61–2–9(c) (Lexis 2005).

batteries as felonies or make them punishable by imprisonment for more than one year.[4] Although the great majority of convictions under these statutes are, no doubt, based on the use of violent force, the effect of the Court's decision will be to take all these convictions outside the scope of ACCA—unless the Government is able to produce documents that may properly be consulted under the modified categorical approach and that conclusively show that the offender's conduct involved the use of violent force, see *ante*, at 144–145. As the Government notes, however, this will often be impossible because, in those States in which the same battery provision governs both the use of violent force and offensive touching, charging documents frequently simply track the language of the statute, and jury instructions often do not require juries to draw distinctions based on the type of force that the defendant employed. See Brief for United States 42–43.

In addition, the Court's interpretation of the term "physical force" may hobble at least two federal statutes that contain this identical term. Under 18 U. S. C. § 922(g)(9), a person convicted of a "misdemeanor crime of domestic violence" may not lawfully possess a firearm, and the term "misdemeanor crime of domestic violence" is defined as applying only to crimes that "ha[ve], as an element, the use or attempted use of *physical force*, or the threatened use of a deadly weapon," § 921(a)(33)(A)(ii) (emphasis added). As we recently explained, Congress recognized that "'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies,'" and Congress therefore enacted this provision to keep firearms out of the

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[4] See Iowa Code §§ 708.1, 708.2(5) (2009); Kan. Stat. Ann. §§ 21–3412(a), 21–3412a, 3413(b), 3448(b) (2007); La. Rev. Stat. Ann. §§ 14:34.2(B)(2), 14:34.3(C)(2) (West Supp. 2010), 14:34.5(B)(2) (West 2007), 14:35.3(E) (West Supp. 2010); Md. Crim. Law Code Ann. §§ 3–201(b), 3–203(a), (b) (Lexis Supp. 2009); Mass. Gen. Laws, ch. 265, § 13A(a); Mich. Comp. Laws Ann. § 750.81(4) (West 2004); Mo. Rev. Stat. §§ 565.070.1(5), 565.070.4 (2000); Okla. Stat. Ann., Tit. 21, §§ 642 (West 2002), 644 (West Supp. 2010).

hands of such abusers. *United States* v. *Hayes*, 555 U. S. 415, 426 (2009). Cases of spousal and child abuse are frequently prosecuted under generally applicable assault and battery statutes, *id.*, at 427 and as noted, the assault and battery statutes of almost half the States apply both to cases involving the use of violent force and cases involving offensive touching. As a result, if the Court's interpretation of the term "physical force" in ACCA is applied to § 922(g)(9), a great many persons convicted for serious spousal or child abuse will be allowed to possess firearms.

Under 8 U. S. C. § 1227(a)(2)(E), an alien convicted of a "crime of domestic violence" is subject to removal, and the term "crime of domestic violence" is defined as an offense that, among other things, has "as an element the use [or] attempted use . . . of physical force." 18 U. S. C. § 16(a). Accordingly, if the Court's interpretation of the term "physical force" is applied to this provision, many convicted spousal and child abusers will escape removal, a result that Congress is unlikely to have intended.

* * *

For all these reasons, I believe that the Court's decision is incorrect, and I therefore respectfully dissent.

Syllabus

REED ELSEVIER, INC., ET AL. *v.* MUCHNICK ET AL.

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

No. 08–103. Argued October 7, 2009—Decided March 2, 2010

The Copyright Act generally requires copyright holders to register their works before suing for copyright infringement. 17 U. S. C. § 411(a). The complaint in this consolidated, class-action copyright infringement suit alleged that the named plaintiffs each own at least one copyright, typically in a freelance article written for a newspaper or magazine, that they had registered in accordance with § 411(a). The class, however, included both authors who had registered their works and authors who had not. The parties moved the District Court to certify a settlement class and approve a settlement agreement. The District Court did so over the objections of some freelance authors. On appeal, the Second Circuit *sua sponte* raised the question whether § 411(a) deprives federal courts of subject-matter jurisdiction over infringement claims involving unregistered copyrights, concluding that the District Court lacked jurisdiction to certify the class or approve the settlement.

Held: Section 411(a)'s registration requirement is a precondition to filing a copyright infringement claim. A copyright holder's failure to comply with that requirement does not restrict a federal court's subject-matter jurisdiction over infringement claims involving unregistered works. Pp. 160–171.

(a) "Jurisdiction" refers to "a court's adjudicatory authority," *Kontrick* v. *Ryan*, 540 U. S. 443, 455. Thus, "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority. *Ibid.* Because the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice, federal courts and litigants should use the term "jurisdictional" only when it is apposite. *Ibid.* A statutory requirement is considered jurisdictional if Congress "clearly states that [it] count[s] as jurisdictional"; a condition "not rank[ed]" as such should be treated "as nonjurisdictional in character." *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515–516. In *Arbaugh*, the Court held that the employee numerosity coverage requirement of Title VII of the Civil Rights Act of 1964 was not a jurisdictional requirement because the provision did not "clearly stat[e]" that the numerosity rule counted as jurisdictional, this Court's prior Title VII cases did not

compel the conclusion that the rule nonetheless was jurisdictional, and the requirement's location in a provision separate from Title VII's jurisdiction-granting section indicated that Congress had not ranked the rule as jurisdictional. Pp. 160–163.

(b) Like the Title VII numerosity requirement in *Arbaugh*, § 411(a) does not "clearly stat[e]" that its registration requirement is "jurisdictional." 546 U. S., at 515. Although § 411(a)'s last sentence contains the word "jurisdiction," that sentence speaks to a court's adjudicatory authority to determine a copyright claim's registrability and says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works. Moreover, § 411(a)'s registration requirement, like Title VII's employee numerosity requirement, is located in a provision "separate" from those granting federal courts subject-matter jurisdiction over those respective claims, *ibid.*, and no other factor suggests that § 411(a)'s registration requirement can be read to "'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,'" *ibid.* This conclusion is not affected by the fact that the employee numerosity requirement in *Arbaugh* was considered an element of a Title VII claim rather than a prerequisite to initiating a lawsuit. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393. Pp. 163–166.

(c) A contrary result is not required by *Bowles* v. *Russell*, 551 U. S. 205. There, in finding that Congress had ranked as jurisdictional 28 U. S. C. § 2107's requirement that parties in a civil action file a notice of appeal within 30 days of the judgment, this Court analyzed § 2107's specific language and the historical treatment accorded to that type of limitation. That analysis is consistent with the *Arbaugh* framework because context is relevant to whether a statute "rank[s]" a requirement as jurisdictional. Pp. 167–169.

(d) The Court declines to apply judicial estoppel to affirm the Second Circuit's judgment vacating the settlement. While some of petitioners' arguments below are in tension with those made in this Court, accepting their arguments here does not create the type of "inconsistent court determinations" in their favor that estoppel is meant to address. See *New Hampshire* v. *Maine*, 532 U. S. 742. Pp. 169–170.

(e) Because § 411(a) does not restrict a federal court's subject-matter jurisdiction, this Court need not address the question whether the District Court had authority to approve the settlement under the Second Circuit's erroneous reading of § 411. The Court also declines to decide whether § 411(a)'s registration requirement is a mandatory precondition to suit that district courts may or should enforce *sua sponte* by dis-

missing copyright infringement claims involving unregistered works. Pp. 170–171.

509 F. 3d 116, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and BREYER, JJ., joined, *post*, p. 171. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Charles S. Sims argued the cause for petitioners. With him on the briefs were *Jon A. Baumgarten*, *Mark D. Harris*, *Henry B. Gutman*, *James L. Hallowell*, *Richard A. Bierschbach*, *David Nimmer*, *Ian Ballon*, and *Michael S. Denniston*.

Ginger D. Anders argued the cause for the United States as *amicus curiae*. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Scott R. McIntosh*, and *Jonathan H. Levy*.

Deborah Jones Merritt, by invitation of the Court, 556 U. S. 1161, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With her on the brief were *John Deaver Drinko* and *Andrew Lloyd Merritt*. *Charles D. Chalmers* filed a brief for respondents Muchnick et al. With him on the brief were *Amy Howe*, *Kevin K. Russell*, *Pamela S. Karlan*, and *Jeffrey L. Fisher*. *Michael J. Boni*, *Joanne Zack*, *Joshua D. Snyder*, *Gary Fergus*, and *George W. Croner* filed briefs for respondents Pogrebin et al.*

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*Briefs of *amici curiae* urging reversal were filed for the American Intellectual Property Law Association by *Amy Sullivan Cahill;* and for Media Publishers by *Clifford M. Sloan*, *Judith S. Kaye*, *Sarah E. McCallum*, *René P. Milam*, *Eve Burton*, *Jonathan Donnellan*, *Guy R. Friddell III*, *Eric Lieberman*, and *James McLaughlin*.

Jonathan Band filed a brief for the Computer & Communications Industry Association et al. as *amici curiae*.

JUSTICE THOMAS delivered the opinion of the Court.

Subject to certain exceptions, the Copyright Act (Act) requires copyright holders to register their works before suing for copyright infringement. 17 U. S. C. § 411(a) (2006 ed., Supp. II). In this case, the Court of Appeals for the Second Circuit held that a copyright holder's failure to comply with § 411(a)'s registration requirement deprives a federal court of jurisdiction to adjudicate his copyright infringement claim. We disagree. Section 411(a)'s registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction.

I

A

The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to . . . their . . . Writings." Art. I, § 8, cl. 8. Exercising this power, Congress has crafted a comprehensive statutory scheme governing the existence and scope of "[c]opyright protection" for "original works of authorship fixed in any tangible medium of expression." 17 U. S. C. § 102(a) (2006 ed.). This scheme gives copyright owners "the exclusive rights" (with specified statutory exceptions) to distribute, reproduce, or publicly perform their works. § 106. "Anyone who violates any of the exclusive rights of the copyright owner as provided" in the Act "is an infringer of the copyright." § 501(a). When such infringement occurs, a copyright owner "is entitled, *subject to the requirements of section 411*, to institute an action" for copyright infringement. § 501(b) (emphasis added).

This case concerns "the requirements of section 411" to which § 501(b) refers. Section 411(a) provides, *inter alia* and with certain exceptions, that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copy-

right claim has been made in accordance with this title."[1] This provision is part of the Act's remedial scheme. It establishes a condition—copyright registration—that plaintiffs ordinarily must satisfy before filing an infringement claim and invoking the Act's remedial provisions. We address whether § 411(a) also deprives federal courts of subject-matter jurisdiction to adjudicate infringement claims involving unregistered works.

B

The relevant proceedings in this case began after we issued our opinion in *New York Times Co.* v. *Tasini*, 533 U. S. 483 (2001). In *Tasini*, we agreed with the Court of Appeals for the Second Circuit that several owners of online databases and print publishers had infringed the copyrights of six freelance authors by reproducing the authors' works electronically without first securing their permission. See *id.*, at 493. In so holding, we affirmed the principal theory of liability underlying copyright infringement suits that other freelance authors had filed after the Court of Appeals had issued its opinion in *Tasini*. These other suits, which were stayed pending our decision in *Tasini*, resumed after we issued our opinion and were consolidated in the United States District Court for the Southern District of New York by the Judicial Panel on Multidistrict Litigation.

The consolidated complaint alleged that the named plaintiffs each own at least one copyright, typically in a freelance article written for a newspaper or a magazine, that they had registered in accordance with § 411(a). The class, however, included both authors who had registered their copyrighted works and authors who had not. See App. 94.

Because of the growing size and complexity of the lawsuit, the District Court referred the parties to mediation. For

[1] Other sections of the Act—principally §§ 408–410—detail the registration process, and establish remedial incentives to encourage copyright holders to register their works, see, *e. g.*, § 410(c); 17 U. S. C. § 412 (2006 ed. and Supp. II).

more than three years, the freelance authors, the publishers (and their insurers), and the electronic databases (and their insurers) negotiated. Finally, in March 2005, they reached a settlement agreement that the parties intended "to achieve a global peace in the publishing industry." *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F. 3d 116, 119 (CA2 2007).

The parties moved the District Court to certify a class for settlement and to approve the settlement agreement. Ten freelance authors, including Irvin Muchnick (hereinafter Muchnick respondents), objected. The District Court overruled the objections; certified a settlement class of freelance authors under Federal Rules of Civil Procedure 23(a) and (b)(3); approved the settlement as fair, reasonable, and adequate under Rule 23(e); and entered final judgment. At no time did the Muchnick respondents or any other party urge the District Court to dismiss the case, or to refuse to certify the class or approve the settlement, for lack of subject-matter jurisdiction.

The Muchnick respondents appealed, renewing their objections to the settlement on procedural and substantive grounds. Shortly before oral argument, the Court of Appeals *sua sponte* ordered briefing on the question whether § 411(a) deprives federal courts of subject-matter jurisdiction over infringement claims involving unregistered copyrights. All parties filed briefs asserting that the District Court had subject-matter jurisdiction to approve the settlement agreement even though it included unregistered works.

Relying on two Circuit precedents holding that § 411(a)'s registration requirement was jurisdictional, see 509 F. 3d, at 121 (citing *Well-Made Toy Mfg. Corp.* v. *Goffa Int'l Corp.*, 354 F. 3d 112, 114–115 (CA2 2003); *Morris* v. *Business Concepts, Inc.*, 259 F. 3d 65, 72–73 (CA2 2001)), the Court of Appeals concluded that the District Court lacked jurisdiction to certify a class of claims arising from the infringement of unregistered works, and also lacked jurisdiction to approve a set-

tlement with respect to those claims, 509 F. 3d, at 121 (citing "widespread agreement among the circuits that section 411(a) is jurisdictional").[2]

Judge Walker dissented. He concluded "that § 411(a) is more like the [nonjurisdictional] employee-numerosity requirement in *Arbaugh* [v. *Y & H Corp.*, 546 U. S. 500 (2006),]" than the jurisdictional statutory time limit in *Bowles* v. *Russell*, 551 U. S. 205 (2007). 509 F. 3d, at 129. Accordingly, he reasoned that § 411(a)'s registration requirement does not limit federal subject-matter jurisdiction over infringement suits involving unregistered works. *Ibid.*

We granted the owners' and publishers' petition for a writ of certiorari, and formulated the question presented to ask whether § 411(a) restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions. 555 U. S. 1211 (2009). Because no party supports the Court of Appeals' jurisdictional holding, we appointed an *amicus curiae* to defend the Court of Appeals' judgment.[3] 556 U. S. 1161 (2009). We now reverse.

II

A

"Jurisdiction" refers to "a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004). Accordingly, the term "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject-matter juris-

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[2] See *La Resolana Architects, PA* v. *Clay Realtors Angel Fire*, 416 F. 3d 1195, 1200–1201 (CA10 2005); *Positive Black Talk Inc.* v. *Cash Money Records Inc.*, 394 F. 3d 357, 365 (CA5 2004); *Xoom, Inc.* v. *Imageline, Inc.*, 323 F. 3d 279, 283 (CA4 2003); *Murray Hill Publications, Inc.* v. *ABC Communications, Inc.*, 264 F. 3d 622, 630, and n. 1 (CA6 2001); *Brewer-Giorgio* v. *Producers Video, Inc.*, 216 F. 3d 1281, 1285 (CA11 2000); *Data Gen. Corp.* v. *Grumman Systems Support Corp.*, 36 F. 3d 1147, 1163 (CA1 1994).

[3] We appointed Deborah Jones Merritt to brief and argue the case, as *amicus curiae*, in support of the Court of Appeals' judgment. Ms. Merritt has ably discharged her assigned responsibilities.

diction) and the persons (personal jurisdiction)" implicating that authority. *Ibid.;* see also *Steel Co.* v. *Citizens for Better Environment,* 523 U. S. 83, 89 (1998) ("subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case" (emphasis in original)); *Landgraf* v. *USI Film Products,* 511 U. S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties' " (quoting *Republic Nat. Bank of Miami* v. *United States,* 506 U. S. 80, 100 (1992) (THOMAS, J., concurring))).

While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 511–512 (2006) (citing examples); *Steel Co.*, 523 U. S., at 91 (same). Our recent cases evince a marked desire to curtail such "drive-by jurisdictional rulings," *ibid.*, which too easily can miss the "critical difference[s]" between true jurisdictional conditions and nonjurisdictional limitations on causes of action, *Kontrick, supra,* at 456; see also *Arbaugh,* 546 U. S., at 511.

In light of the important distinctions between jurisdictional prescriptions and claim-processing rules, see, *e. g., id.*, at 514, we have encouraged federal courts and litigants to "facilitat[e]" clarity by using the term "jurisdictional" only when it is apposite, *Kontrick, supra,* at 455. In *Arbaugh,* we described the general approach to distinguish "jurisdictional" conditions from claim-processing requirements or elements of a claim:

> "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Con-

> gress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." 546 U. S., at 515–516 (citation and footnote omitted).

The plaintiff in *Arbaugh* brought a claim under Title VII of the Civil Rights Act of 1964, which makes it unlawful "for an employer . . . to discriminate," *inter alia,* on the basis of sex. 42 U. S. C. § 2000e–2(a)(1). But employees can bring Title VII claims only against employers that have "fifteen or more employees." § 2000e(b). *Arbaugh* addressed whether that employee numerosity requirement "affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." 546 U. S., at 503. We held that it does the latter.

Our holding turned principally on our examination of the text of § 2000e(b), the section in which Title VII's numerosity requirement appears. Section 2000e(b) does not "clearly stat[e]" that the employee numerosity threshold on Title VII's scope "count[s] as jurisdictional." *Id.*, at 515–516, and n. 11. And nothing in our prior Title VII cases compelled the conclusion that even though the numerosity requirement lacks a clear jurisdictional label, it nonetheless imposed a jurisdictional limit. See *id.*, at 511–513. Similarly, § 2000e(b)'s text and structure did not demonstrate that Congress "rank[ed]" that requirement as jurisdictional. See *id.*, at 513–516. As we observed, the employee numerosity requirement is located in a provision "separate" from § 2000e–5(f)(3), Title VII's jurisdiction-granting section, distinguishing it from the "amount-in-controversy threshold ingredient of subject-matter jurisdiction in . . . diversity-of-jurisdiction under 28 U. S. C. § 1332." *Arbaugh,* 546 U. S., at 514–515. Accordingly, the numerosity requirement could not fairly be read to "'speak in jurisdictional terms or in any way refer to the jurisdiction of the district courts.'" *Id.*, at 515 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982)). We thus "refrain[ed] from" construing the numer-

osity requirement to "constric[t] § 1331 or Title VII's jurisdictional provision." *Arbaugh*, *supra*, at 515 (internal quotation marks omitted).

We now apply this same approach to § 411(a).

B

Section 411(a) provides:

> "Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue." (Footnote omitted.)

We must consider whether § 411(a) "clearly states" that its registration requirement is "jurisdictional." *Arbaugh*, *supra*, at 515. It does not. *Amicus* disagrees, pointing to the presence of the word "jurisdiction" in the last sentence of § 411(a) and contending that the use of the term there indicates the jurisdictional cast of § 411(a)'s first sentence as well. Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below 18 (hereinafter *Amicus* Brief). But this reference to "jurisdiction" cannot bear the weight that *ami-*

cus places upon it. The sentence upon which *amicus* relies states:

> "The Register [of Copyrights] may, at his or her option, become a party to the [copyright infringement] action with respect to *the issue of registrability of the copyright claim* by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine *that issue*." § 411(a) (emphasis added).

Congress added this sentence to the Act in 1976, 90 Stat. 2583, to clarify that a federal court can determine "the issue of registrability of the copyright claim" even if the Register does not appear in the infringement suit. That clarification was necessary because courts had interpreted § 411(a)'s precursor provision,[4] which imposed a similar registration requirement, as prohibiting copyright owners who had been *refused* registration by the Register of Copyrights from suing for infringement until the owners *first* sought mandamus against the Register. See *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F. 2d 637, 640–641 (CA2 1958) (construing § 411(a)'s precursor). The 1976 amendment made it clear that a federal court plainly has adjudicatory authority to determine "*that* issue," § 411(a) (emphasis added)—*i. e.*, the issue of *registrability*—regardless of whether the Register is a party to the *infringement* suit. The word "jurisdiction," as used here, thus says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works.

Moreover, § 411(a)'s registration requirement, like Title VII's numerosity requirement, is located in a provision "separate" from those granting federal courts subject-matter jurisdiction over those respective claims. See *Arbaugh*, *supra*, at 514–515. Federal district courts have subject-

[4] See Act of Mar. 4, 1909, § 12, 35 Stat. 1078.

matter jurisdiction over copyright infringement actions based on 28 U. S. C. §§ 1331 and 1338. But neither § 1331, which confers subject-matter jurisdiction over questions of federal law, nor § 1338(a), which is specific to copyright claims, conditions its jurisdictional grant on whether copyright holders have registered their works before suing for infringement. Cf. *Arbaugh*, 546 U. S., at 515 ("Title VII's jurisdictional provision" does not "specif[y] any threshold ingredient akin to 28 U. S. C. § 1332's monetary floor").

Nor does any other factor suggest that 17 U. S. C. § 411(a)'s registration requirement can be read to "'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Arbaugh*, *supra*, at 515 (quoting *Zipes*, 455 U. S., at 394). First, and most significantly, § 411(a) expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances: where the work is not a U. S. work, where the infringement claim concerns rights of attribution and integrity under § 106A, or where the holder attempted to register the work and registration was refused. Separately, § 411(c) permits courts to adjudicate infringement actions over certain kinds of unregistered works where the author "declare[s] an intention to secure copyright in the work" and "makes registration for the work, if required by subsection (a), within three months after [the work's] first transmission." §§ 411(c)(1)–(2). It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions.[5]

That the numerosity requirement in *Arbaugh* could be considered an element of a Title VII claim, rather than a prereq-

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[5] Cf. *Zipes*, 455 U. S., at 393–394, 397 (relying on the fact that Congress had "approved" at least some cases awarding Title VII relief to claimants who had not complied with the statute's Equal Employment Opportunity Commission (EEOC) filing requirement in holding that the filing requirement was not a jurisdictional prerequisite to suit); *United States* v. *Cotton*, 535 U. S. 625, 630 (2002) ("[J]urisdiction" properly refers to a court's power to hear a case, a matter that "can never be forfeited or waived").

uisite to initiating a lawsuit, does not change this conclusion, as our decision in *Zipes* demonstrates. *Zipes* (upon which *Arbaugh* relied) held that Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court was nonjurisdictional. See 455 U. S., at 393; 42 U. S. C. § 2000e–5(f)(1) (establishing specific time periods within which a discrimination claimant must file a lawsuit after filing a charge with the EEOC). A statutory condition that requires a party to take some action before filing a lawsuit is not automatically "a *jurisdictional* prerequisite to suit." *Zipes*, 455 U. S., at 393 (emphasis added). Rather, the jurisdictional analysis must focus on the "legal character" of the requirement, *id.*, at 395, which we discerned by looking to the condition's text, context, and relevant historical treatment, *id.*, at 393–395; see also *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 119–121 (2002). We similarly have treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.[6]

The registration requirement in 17 U. S. C. § 411(a) fits in this mold. Section 411(a) imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions. See §§ 411(a)–(c). Section 411(a) thus imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents.

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[6] See *Jones* v. *Bock*, 549 U. S. 199, 211 (2007) (treating the administrative exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA)—which states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted," 42 U. S. C. § 1997e(a)—as an affirmative defense even though "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"); *Woodford* v. *Ngo*, 548 U. S. 81, 93 (2006) (same).

C

Amicus insists that our decision in *Bowles*, 551 U. S. 205, compels a conclusion contrary to the one we reach today. *Amicus* cites *Bowles* for the proposition that where Congress did not explicitly label a statutory condition as jurisdictional, a court nevertheless should treat it as such if that is how the condition consistently has been interpreted and if Congress has not disturbed that interpretation. *Amicus* Brief 26. Specifically, *amicus* relies on a footnote in *Bowles* to argue that here, as in *Bowles*, it would be improper to characterize the statutory condition as nonjurisdictional because doing so would override "'a century's worth of precedent'" treating §411(a)'s registration requirement as jurisdictional. *Amicus* Brief 26 (quoting *Bowles*, *supra*, at 209, n. 2). This argument focuses on the result in *Bowles*, rather than on the analysis we employed.

Bowles did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional.[7] Rather,

[7] *Bowles*, for example, distinguished *Scarborough* v. *Principi*, 541 U. S. 401 (2004), which characterized as nonjurisdictional an express statutory time limit for initiating postjudgment proceedings for attorney's fees under the Equal Access to Justice Act. See 551 U. S., at 211. As we explained, the time limit in *Scarborough* "concerned 'a *mode of relief* . . . ancillary to the judgment of a court' that already had plenary jurisdiction." 551 U. S., at 211 (quoting *Scarborough*, *supra*, at 413; emphasis added). *Bowles* also distinguished *Kontrick* v. *Ryan*, 540 U. S. 443 (2004), and *Eberhart* v. *United States*, 546 U. S. 12 (2005) *(per curiam)*, as cases in which the Court properly held that certain time limits were nonjurisdictional because they were imposed by rules that did not purport to have any jurisdictional significance. See 551 U. S., at 210–211. *Kontrick* involved "time constraints applicable to objections to discharge" in bankruptcy proceedings. 540 U. S., at 453. In that case, we first examined 28 U. S. C. §157(b)(2)(J), the statute "conferring jurisdiction over objections to discharge," and observed that it did not contain a timeliness requirement. *Kontrick*, 540 U. S., at 453. Rather, the "time constraints applicable to

Bowles stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional.

In *Bowles*, we considered 28 U. S. C. § 2107, which requires parties in a civil action to file a notice of appeal within 30 days of the judgment being appealed, and Rule 4 of the Federal Rules of Appellate Procedure, which "carries § 2107 into practice." 551 U. S., at 208. After analyzing § 2107's specific language and this Court's historical treatment of the type of limitation § 2107 imposes (*i. e.*, statutory deadlines for filing appeals), we concluded that Congress had ranked the statutory condition as jurisdictional. Our focus in *Bowles* on the historical treatment of statutory conditions for taking an appeal is thus consistent with the *Arbaugh* framework. Indeed, *Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than § 2107, and specifically in statutes that predated the creation of the courts of appeals. See 551 U. S., at 209–210, and n. 2.

Bowles therefore demonstrates that the relevant question here is not (as *amicus* puts it) whether § 411(a) itself has long been labeled jurisdictional, but whether the type of limitation that § 411(a) imposes is one that is properly ranked as jurisdictional absent an express designation. The statutory limitation in *Bowles* was of a type that we had long held *did* "speak in jurisdictional terms" even absent a "jurisdictional" label, and nothing about § 2107's text or context, or the historical treatment of that type of limitation, justified a departure from this view. That was not the case, however, for the types of conditions in *Zipes* and *Arbaugh*.

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objections to discharge" were contained in the Bankruptcy Rules, which expressly state that they "'shall not be construed to extend or limit the jurisdiction of the courts.'" See *ibid.* (quoting Fed. Rule Bkrtcy. Proc. 9030). *Eberhart*, in turn, treated as nonjurisdictional certain rules that the Court held "closely parallel[ed]" those in *Kontrick*. 546 U. S., at 15.

Here, that same analysis leads us to conclude that § 411(a) does not implicate the subject-matter jurisdiction of federal courts. Although § 411(a)'s historical treatment as "jurisdictional" is a factor in the analysis, it is not dispositive. The other factors discussed above demonstrate that § 411(a)'s registration requirement is more analogous to the nonjurisdictional conditions we considered in *Zipes* and *Arbaugh* than to the statutory time limit at issue in *Bowles*.[8] We thus conclude that § 411(a)'s registration requirement is nonjurisdictional, notwithstanding its prior jurisdictional treatment.[9]

III

Amicus argues that even if § 411(a) is nonjurisdictional, we should nonetheless affirm on estoppel grounds the Court of Appeals' judgment vacating the District Court's order approving the settlement and dismissing the case. According to *amicus*, petitioners asserted previously in these proceedings that copyright registration was jurisdictional, and this assertion should estop them from now asserting a right to waive objections to the authors' failure to register. *Amicus* urges us to prevent the parties "from 'playing fast and loose with the courts' by 'deliberately changing positions accord-

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[8] This conclusion mirrors our holding in *Zipes* that Title VII's EEOC filing requirement was nonjurisdictional, even though some of our own decisions had characterized it as jurisdictional. See 455 U. S., at 395 (noting that "the legal character of the requirement was not at issue in those" earlier cases); see also *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 109, 121 (2002) (relying on the analysis in *Zipes*).

[9] *Amicus*' remaining jurisdictional argument—that the policy goals underlying copyright registration support construing § 411(a)'s registration provisions as jurisdictional, see *Amicus* Brief 45—is similarly unavailing. We do not agree that a condition should be ranked as jurisdictional merely because it promotes important congressional objectives. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 504, 515–516 (2006) (holding that Title VII's numerosity requirement is nonjurisdictional even though it serves the important policy goal of "spar[ing] very small businesses from Title VII liability").

ing to the exigencies of the moment.'" *Amicus* Brief 58 (quoting *New Hampshire* v. *Maine*, 532 U. S. 742, 750 (2001)).

We agree that some statements in the parties' submissions to the District Court and the Court of Appeals are in tension with their arguments here. But we decline to apply judicial estoppel. As we explained in *New Hampshire*, that doctrine typically applies when, among other things, a "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Ibid.* (internal quotation marks omitted).

Such circumstances do not exist here for two reasons. First, the parties made their prior statements when negotiating or defending the settlement agreement. We do not fault the parties' lawyers for invoking in the negotiations binding Circuit precedent that supported their clients' positions. Perhaps more importantly, in approving the settlement, the District Court did not adopt petitioners' interpretation of § 411(a) as jurisdictional. Second, when the Court of Appeals asked petitioners to brief whether § 411(a) restricted the District Court's subject-matter jurisdiction, they argued that it did not, and the Court of Appeals rejected their arguments. See App. to Reply Brief for Petitioners 3a–5a, and n. 2. Accepting petitioners' arguments here thus cannot create "inconsistent court determinations" in their favor. *New Hampshire*, *supra*, at 751 (internal quotation marks omitted). We therefore hold that the District Court had authority to adjudicate the parties' request to approve their settlement.

IV

Our holding that § 411(a) does not restrict a federal court's subject-matter jurisdiction precludes the need for us to address the parties' alternative arguments as to whether the District Court had authority to approve the settlement even under the Court of Appeals' erroneous reading of § 411. In

concluding that the District Court had jurisdiction to approve the settlement, we express no opinion on the settlement's merits.

We also decline to address whether § 411(a)'s registration requirement is a mandatory precondition to suit that—like the threshold conditions in *Arizona* v. *California*, 530 U. S. 392, 412–413 (2000) (res judicata defense); *Day* v. *McDonough*, 547 U. S. 198, 205–206 (2006) (habeas statute of limitations); and *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 26, 31 (1989) (Resource Conservation and Recovery Act of 1976 notice provision)—district courts may or should enforce *sua sponte* by dismissing copyright infringement claims involving unregistered works.

* * *

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

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

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

I agree with the Court's characterization of 17 U. S. C. § 411(a) (2006 ed. and Supp. II). That provision, which instructs authors to register their copyrights before commencing suit for infringement, "is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." *Ante*, at 157. I further agree that *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500 (2006), is the controlling precedent, see *ante*, at 161–162, and that *Bowles* v. *Russell*, 551 U. S. 205 (2007), does not counsel otherwise. There is, however, undeniable tension between the two decisions. Aiming to stave off continuing controversy over what qualifies

as "jurisdictional," and what does not, I set out my understanding of the Court's opinions in *Arbaugh* and *Bowles*, and the ground on which I would reconcile those rulings.

In *Arbaugh*, we held nonjurisdictional a prescription confining Title VII's coverage to employers with 15 or more employees, 42 U. S. C. § 2000e–2(a)(1). After observing that "the 15-employee threshold . . . 'd[id] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,'" 546 U. S., at 515 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982)), the *Arbaugh* opinion announced and applied a "readily administrable bright line":

> "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." 546 U. S., at 515–516 (citation and footnote omitted).

As the above-quoted passage indicates, the unanimous *Arbaugh* Court anticipated that all federal courts would thereafter adhere to the "bright line" held dispositive that day.

Bowles moved in a different direction. A sharply divided Court there held "mandatory and jurisdictional" the time limits for filing a notice of appeal stated in 28 U. S. C. § 2107(a), (c). 551 U. S., at 209 (internal quotation marks omitted). *Bowles* mentioned *Arbaugh* only to distinguish it as involving a statute setting "an employee-numerosity requirement, not a time limit." 551 U. S., at 211. Section 2107's time limits were "jurisdictional," *Bowles* explained,

because they were contained in a statute, not merely a rule, *id.*, at 210–213, and because "[t]his Court ha[d] long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" *id.*, at 209. Fidelity to *Arbaugh* and similarly reasoned decisions,* the dissent in *Bowles* observed, would have yielded the conclusion that statutory time limits "are only jurisdictional if Congress says so." 551 U. S., at 217 (opinion of Souter, J.).

Bowles and *Arbaugh* can be reconciled without distorting either decision, however, on the ground that *Bowles* "rel[ied] on a long line of this Court's decisions left undisturbed by Congress." *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 82 (2009) (citing *Bowles*, 551 U. S., at 209–211). The same is true of our decision, subsequent to *Bowles*, in *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130 (2008). There the Court concluded, largely on *stare decisis* grounds, that the Court of Federal Claims statute of limitations requires *sua sponte* consideration of a lawsuit's timeliness. *Id.*, at 136 ("[P]etitioner can succeed only by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent.").

Plainly read, *Arbaugh* and *Bowles* both point to the conclusion that § 411(a) is nonjurisdictional. Section 411(a) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes*, 455 U. S., at 394. *Arbaugh*'s "readily administrable bright line" is therefore controlling. 546 U. S., at 516.

Bowles does not detract from that determination. *Amicus*, reading *Bowles* as I do, urges on its authority that we hold § 411(a) jurisdictional lest we disregard "'a century's worth of precedent.'" Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below 26 (quoting *Bowles*, 551 U. S., at 209, n. 2); see *ante*, at 167. But in *Bowles* and

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*E. g., *Eberhart* v. *United States*, 546 U. S. 12 (2005) *(per curiam)*; *Scarborough* v. *Principi*, 541 U. S. 401 (2004); *Kontrick* v. *Ryan*, 540 U. S. 443 (2004).

John R. Sand & Gravel Co., as just explained, we relied on longstanding decisions of *this Court* typing the relevant prescriptions "jurisdictional." *Bowles*, 551 U. S., at 209–210 (citing, *inter alia*, *Scarborough* v. *Pargoud*, 108 U. S. 567 (1883), and *United States* v. *Curry*, 6 How. 106 (1848)); *John R. Sand & Gravel Co.*, 552 U. S., at 136. *Amicus* cites well over 200 opinions that characterize § 411(a) as jurisdictional, but not one is from this Court, and most are "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect,'" *Arbaugh*, 546 U. S., at 511 (quoting *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 91 (1998)); see *Arbaugh*, 546 U. S., at 511–513; *ante*, at 161.

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For the reasons stated, I join the Court's judgment and concur in part in the Court's opinion.

Syllabus

MAC'S SHELL SERVICE, INC., ET AL. *v.* SHELL OIL PRODUCTS CO. LLC ET AL.

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

No. 08–240. Argued January 19, 2010—Decided March 2, 2010*

The Petroleum Marketing Practices Act (Act) limits the circumstances in which franchisors may "terminate" a service-station franchise or "fail to renew" a franchise relationship. 15 U. S. C. §§ 2802, 2804. Typically, the franchisor leases the service station to the franchisee and permits the franchisee to use the franchisor's trademark and purchase the franchisor's fuel for resale. § 2801(1). As relevant here, service-station franchisees (dealers) filed suit under the Act, alleging that a petroleum franchisor and its assignee had constructively "terminate[d]" their franchises and constructively "fail[ed] to renew" their franchise relationships by substantially changing the rental terms that the dealers had enjoyed for years, increasing costs for many of them. The dealers asserted these claims even though they had not been compelled to abandon their franchises, and even though they had been offered and had accepted renewal agreements. The jury found against the franchisor and assignee, and the District Court denied their requests for judgment as a matter of law. The First Circuit affirmed as to the constructive termination claims, holding that the Act does not require a franchisee to abandon its franchise to recover for such termination, and concluding that a simple breach of contract by an assignee of a franchise agreement can amount to constructive termination if the breach resulted in a material change effectively ending the lease. However, the court reversed as to the constructive nonrenewal claims, holding that such a claim cannot be maintained once a franchisee signs and operates under a renewal agreement.

Held:

1. A franchisee cannot recover for constructive termination under the Act if the franchisor's allegedly wrongful conduct did not compel the franchisee to abandon its franchise. Pp. 182–190.

(a) The Act provides that "no franchisor . . . may . . . terminate any franchise," except for an enumerated reason and after giving written notice, §§ 2802(a)–(b), and specifies that " 'termination' includes cancellation," § 2801(17). Because it does not further define those terms, they

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*Together with No. 08–372, *Shell Oil Products Co. LLC et al.* v. *Mac's Shell Service, Inc., et al.*, also on certiorari to the same court.

are given their ordinary meanings: "put [to] an end" or "annul[ed] or destroy[ed]." Thus, the Act prohibits only franchisor conduct that has the effect of ending a franchise. The same conclusion follows even if Congress used "terminate" and "cancel" in their technical, rather than ordinary, senses. This conclusion is also consistent with the general understanding of the constructive termination doctrine as applied in analogous legal contexts—*e. g.*, employment law, see *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 141–143—where a termination is deemed "constructive" only because the plaintiff, not the defendant, formally ends a particular legal relationship—not because there is no end to the relationship at all. Allowing franchisees to obtain relief for conduct that does not force a franchise to end would ignore the Act's scope, which is limited to the circumstances in which franchisors may terminate a franchise or decline to renew a franchise relationship and leaves undisturbed state-law regulation of other types of disputes between petroleum franchisors and franchisees, see § 2806(a). This conclusion is also informed by important practical considerations, namely, that any standard for identifying those breaches of contract that should be treated as effectively ending a franchise, even though the franchisee continues to operate, would be indeterminate and unworkable. Pp. 182–187.

(b) The dealers' claim that this interpretation of the Act fails to provide franchisees with protection from unfair and coercive franchisor conduct that does not force an end to the franchise ignores the availability of state-law remedies to address such wrongful conduct. The Court's reading of the Act is also faithful to the statutory interpretation principle that statutes should be construed "in a manner that gives effect to all of their provisions," *United States ex rel. Eisenstein* v. *City of New York*, 556 U. S. 928, 933, because this interpretation gives meaningful effect to the Act's preliminary injunction provisions and its alternative statute-of-limitations accrual dates. Pp. 187–190.

2. A franchisee who signs and operates under a renewal agreement with a franchisor may not maintain a constructive nonrenewal claim under the Act. The Act's text leaves no room for such an interpretation. It is violated only when a franchisor "fail[s] to renew" a franchise relationship for an enumerated reason or fails to provide the required notice, see § 2802, and it defines "fail to renew" as a "failure to reinstate, continue, or extend the franchise relationship," § 2801(14). A franchisee that signs a renewal agreement cannot carry the threshold burden of showing a "nonrenewal of the franchise relationship," § 2805(c), and thus necessarily cannot establish that the franchisor has violated the Act. Signing their renewal agreements "under protest" did not preserve the dealers' ability to assert nonrenewal claims. When a franchisee signs a renewal agreement—even "under protest"—

there has been no "fail[ure] to renew," and thus no violation of the Act. The Act's structure and purpose confirm this interpretation. Accepting the dealers' contrary reading would greatly expand the Act's reach. Pp. 191–195.

524 F. 3d 33, reversed in part, affirmed in part, and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

Jeffrey A. Lamken argued the cause for petitioners in No. 08–372 and respondents in No. 08–240. With him on the briefs were *Robert K. Kry*, *Macey Reasoner Stokes*, *David M. Rodi*, *Paul D. Sanson*, *Vaughan Finn*, *Karen T. Staib*, and *James Cowan*.

David A. O'Neil argued the cause for the United States as *amicus curiae* supporting petitioners in No. 08–372 and respondents in No. 08–240. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Varney*, *Deputy Solicitor General Stewart*, *Deputy Assistant Attorney General Weiser*, *Catherine G. O'Sullivan*, and *Nickolai G. Levin*.

John F. Farraher, Jr., argued the cause for respondents in No. 08–372 and petitioners in No. 08–240. With him on the briefs were *Gary R. Greenberg*, *Peter Alley*, *Louis J. Scerra*, *Justin F. Keith*, *Mark E. Solomons*, and *Laura Metcoff Klaus*.†

JUSTICE ALITO delivered the opinion of the Court.

The Petroleum Marketing Practices Act (PMPA or Act), 92 Stat. 322, 15 U. S. C. § 2801 *et seq.*, limits the circumstances in which petroleum franchisors may "terminate" a franchise or "fail to renew" a franchise relationship. § 2802. In these consolidated cases, service-station franchisees brought suit under the Act, alleging that a franchisor had constructively "terminate[d]" their franchises and had constructively "fail[ed] to renew" their franchise relationships. They asserted these claims even though the conduct of which they

†*Robert A. Long, Jr.*, *Jonathan L. Marcus*, *Harry M. Ng*, and *Janice K. Raburn* filed a brief for the American Petroleum Institute as *amicus curiae*.

complained had not compelled any of them to abandon their franchises and even though they had been offered and had accepted renewal agreements. We hold that a franchisee cannot recover for constructive termination under the PMPA if the franchisor's allegedly wrongful conduct did not compel the franchisee to abandon its franchise. Additionally, we conclude that a franchisee who signs and operates under a renewal agreement with a franchisor may not maintain a claim for constructive nonrenewal. We therefore reverse in part and affirm in part.

I

A

Petroleum refiners and distributors supply motor fuel to the public through service stations that often are operated by independent franchisees. In the typical franchise arrangement, the franchisor leases the service-station premises to the franchisee, grants the franchisee the right to use the franchisor's trademark, and agrees to sell motor fuel to the franchisee for resale. Franchise agreements remain in effect for a stated term, after which the parties can opt to renew the franchise relationship by executing a new agreement.

Enacted in 1978, the PMPA was a response to widespread concern over increasing numbers of allegedly unfair franchise terminations and nonrenewals in the petroleum industry. See, *e. g.*, Comment, 1980 Duke L. J. 522, 524–531. The Act establishes minimum federal standards governing the termination and nonrenewal of petroleum franchises. Under the Act's operative provisions, a franchisor may "terminate" a "franchise" during the term stated in the franchise agreement and may "fail to renew" a "franchise relationship" at the conclusion of that term only if the franchisor provides written notice and takes the action in question for a reason specifically recognized in the statute. 15 U. S. C. §§ 2802, 2804. Consistent with the typical franchise arrangement, a "franchise" is defined as "any contract" that authorizes a

franchisee to use the franchisor's trademark, as well as any associated agreement providing for the supply of motor fuel or authorizing the franchisee to occupy a service station owned by the franchisor.[1] § 2801(1). The Act defines a "franchise relationship" in more general terms: the parties' "respective motor fuel marketing or distribution obligations and responsibilities" that result from the franchise arrangement. § 2801(2).

To enforce these provisions, a franchisee may bring suit in federal court against any franchisor that fails to comply with the Act's restrictions on terminations and nonrenewals. See § 2805. Successful franchisees can benefit from a wide range of remedies, including compensatory and punitive damages, reasonable attorney's fees and expert costs, and equitable relief. See §§ 2805(b), (d). The Act also requires district courts to grant preliminary injunctive relief to aggrieved franchisees, if there are "sufficiently serious questions going to the merits" that present "a fair ground for litigation" and the balance of hardships favors such relief. § 2805(b)(2).

B

This litigation involves a dispute between Shell Oil Company (Shell), a petroleum franchisor, and several Shell franchisees in Massachusetts.[2] Pursuant to their franchise agreements with Shell, each franchisee was required to pay Shell monthly rent for use of the service-station premises. For many years, Shell offered the franchisees a rent subsidy that reduced the monthly rent by a set amount for every gallon of motor fuel a franchisee sold above a specified threshold. Shell renewed the subsidy annually through no-

[1] Courts sometimes describe these three types of agreements as the "statutory elements" of a petroleum franchise. See, *e. g.*, *Marcoux* v. *Shell Oil Prods. Co.*, 524 F. 3d 33, 37, n. 1 (CA1 2008).

[2] Shell Oil Products Company LLC, another party in this litigation, is a wholly owned subsidiary of Shell Oil Company. See Brief for Petitioners in No. 08–372, p. iii.

tices that "explicitly provided for cancellation [of the rent subsidy] with thirty days' notice." *Marcoux* v. *Shell Oil Prods. Co.*, 524 F. 3d 33, 38 (CA1 2008). Nonetheless, Shell representatives made various oral representations to the franchisees "that the [s]ubsidy or something like it would always exist." *Ibid.*

In 1998, Shell joined with two other oil companies to create Motiva Enterprises LLC (Motiva), a joint venture that combined the companies' petroleum-marketing operations in the eastern United States. *Id.*, at 37. Shell assigned to Motiva its rights and obligations under the relevant franchise agreements. Motiva, in turn, took two actions that led to this lawsuit. First, effective January 1, 2000, Motiva ended the volume-based rent subsidy, thus increasing the franchisees' rent. *Id.*, at 38. Second, as each franchise agreement expired, Motiva offered the franchisees new agreements that contained a different formula for calculating rent. For some (but not all) of the franchisees, annual rent was greater under the new formula.

C

In July 2001, 63 Shell franchisees (hereinafter dealers) filed suit against Shell and Motiva in Federal District Court. Their complaint alleged that Motiva's discontinuation of the rent subsidy constituted a breach of contract under state law. Additionally, the dealers asserted two claims under the PMPA. First, they maintained that Shell and Motiva, by eliminating the rent subsidy, had "constructively terminated" their franchises in violation of the Act. Second, they claimed that Motiva's offer of new franchise agreements that calculated rent using a different formula amounted to a "constructive nonrenewal" of their franchise relationships.[3] 524 F. 3d, at 47.

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[3] The dealers also claimed that Shell and Motiva had violated the Uniform Commercial Code, as adopted in Massachusetts, by setting unreasonable prices under the open-price terms of their fuel-supply agreements with the dealers. The jury found in favor of the dealers on this claim,

After a 2-week trial involving eight of the dealers, the jury found against Shell and Motiva on all claims. Both before and after the jury's verdict, Shell and Motiva moved for judgment as a matter of law on the dealers' two PMPA claims. They argued that they could not be found liable for constructive termination under the Act because none of the dealers had abandoned their franchises in response to Motiva's elimination of the rent subsidy—something Shell and Motiva said was a necessary element of any constructive termination claim. Similarly, they argued that the dealers' constructive nonrenewal claims necessarily failed because seven of the eight dealers had signed and operated under renewal agreements with Motiva, and the eighth had sold his franchise prior to the expiration of his franchise agreement. The District Court denied these motions, and Shell and Motiva appealed.

The First Circuit affirmed in part and reversed in part. In affirming the judgment on the dealers' constructive termination claims, the Court of Appeals held that a franchisee is not required to abandon its franchise to recover for constructive termination under the PMPA. See *id.*, at 45–47. Instead, the court ruled, a simple breach of contract by an assignee of a franchise agreement can amount to constructive termination under the Act, so long as the breach resulted in "such a material change that it effectively ended the lease, even though the [franchisee] continued to operate [its franchise]." *Id.*, at 46 (internal quotation marks omitted). Turning to the dealers' constructive nonrenewal claims, the First Circuit agreed with Shell and Motiva that a franchisee cannot maintain a claim for unlawful nonrenewal under the PMPA "where the franchisee has signed and operates under the renewal agreement complained of." *Id.*, at 49. The court thus reversed the judgment on those claims.

We granted certiorari. 557 U. S. 903 (2009).

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and the Court of Appeals affirmed. 524 F. 3d, at 51. That issue is not before us.

II

The first question we are asked to decide is whether a service-station franchisee may recover for constructive termination under the PMPA when the franchisor's allegedly wrongful conduct did not force the franchisee to abandon its franchise. For the reasons that follow, we conclude that a necessary element of any constructive termination claim under the Act is that the franchisor's conduct forced an end to the franchisee's use of the franchisor's trademark, purchase of the franchisor's fuel, or occupation of the franchisor's service station.[4]

A

When given its ordinary meaning, the text of the PMPA prohibits only that franchisor conduct that has the effect of ending a franchise. As relevant here, the Act provides that "no franchisor . . . may . . . terminate any franchise," except for an enumerated reason and after providing written notice. 15 U. S. C. §§ 2802(a)–(b). The Act specifies that "[t]he term 'termination' includes cancellation," § 2801(17), but it does not further define the term "terminate" or the incorporated term "cancel." We therefore give those terms their ordinary meanings. See *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995).

The word "terminate" ordinarily means "put an end to." Webster's New International Dictionary 2605 (2d ed. 1957);

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[4] Because resolving this question is sufficient to decide these cases, we need not address Shell and Motiva's alternative argument that the PMPA does not embrace claims for constructive termination at all. Several Courts of Appeals have held that the Act does create a cause of action for constructive termination. See, *e. g.*, 524 F. 3d, at 44–45 (case below); *Clark* v. *BP Oil Co.*, 137 F. 3d 386, 390–391 (CA6 1998); *Shukla* v. *BP Exploration & Oil, Inc.*, 115 F. 3d 849, 852–853 (CA11 1997). Others have reserved judgment on the issue. See, *e. g.*, *Abrams Shell* v. *Shell Oil Co.*, 343 F. 3d 482, 486–488 (CA5 2003); *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of Cal.*, 153 F. 3d 938, 948 (CA9 1998). We leave the question for another day.

see also The Random House Dictionary of the English Language 1465 (1967). The term "cancel" carries a similar meaning: to "annul or destroy." Webster's, *supra*, at 389; see also Random House, *supra*, at 215 ("to make void; revoke; annul"). The object of the verb "terminate" is the noun "franchise," a term the Act defines as "any contract" for the provision of one (or more) of the three elements of a typical petroleum franchise. §2801(1). Thus, when given its ordinary meaning, the Act is violated only if an agreement for the use of a trademark, purchase of motor fuel, or lease of a premises is "put [to] an end" or "annul[ed] or destroy[ed]." Conduct that does not force an end to the franchise, in contrast, is not prohibited by the Act's plain terms.

The same conclusion follows even if Congress was using the words "terminate" and "cancel" in their technical, rather than ordinary, senses. When Congress enacted the PMPA, those terms had established meanings under the Uniform Commercial Code.[5] Under both definitions, however, a "termination" or "cancellation" occurs only when a contracting party "puts an end to the contract." U. C. C. §§2–106(3)–(4) (1972); see also U. C. C. §§2–106(3)–(4), 1 U. L. A. 695, 695–696 (2004). Thus, a franchisee who contin-

[5] The difference between a "termination" and a "cancellation" under the Uniform Commercial Code relates to how the contracting party justifies its ending of the contractual relationship. A "termination" occurs when "either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach." U. C. C. §2–106(3) (1972). By contrast, a "cancellation" occurs when "either party puts an end to the contract for breach by the other." §2–106(4).

That difference might well explain why Congress felt compelled to specify that "cancellation[s]," no less than "termination[s]," are covered by the Act. Prior to the PMPA, franchisors often leveraged their greater bargaining power to end franchise agreements for minor or technical breaches by the franchisee. See, *e. g.*, *Chestnut Hill Gulf, Inc.* v. *Cumberland Farms, Inc.*, 940 F. 2d 744, 746–747 (CA1 1991). By specifying that the Act covers "cancellation[s]" as well as "termination[s]," Congress foreclosed any argument that a termination for breach is not covered by the Act because it is technically a "cancellation" rather than a "termination."

ues operating a franchise—occupying the same premises, receiving the same fuel, and using the same trademark—has not had the franchise "terminate[d]" in either the ordinary or technical sense of the word.

Requiring franchisees to abandon their franchises before claiming constructive termination is also consistent with the general understanding of the doctrine of constructive termination. As applied in analogous legal contexts—both now and at the time Congress enacted the PMPA—a plaintiff must actually sever a particular legal relationship in order to maintain a claim for constructive termination. For example, courts have long recognized a theory of constructive discharge in the field of employment law. See *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 141–143 (2004) (tracing the doctrine to the 1930's). To recover for constructive discharge, however, an employee generally is required to quit his or her job. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 1449 (4th ed. 2007); 3 L. Larson, Labor and Employment Law § 59.05[8] (2009); 2 EEOC Compliance Manual § 612.9(a) (2008); cf. *Suders*, *supra*, at 141–143, 148; *Young* v. *Southwestern Savings & Loan Assn.*, 509 F. 2d 140, 144 (CA5 1975); *Muller* v. *United States Steel Corp.*, 509 F. 2d 923, 929 (CA10 1975). Similarly, landlord-tenant law has long recognized the concept of constructive eviction. See Rapacz, Origin and Evolution of Constructive Eviction in the United States, 1 DePaul L. Rev. 69 (1951). The general rule under that doctrine is that a tenant must actually move out in order to claim constructive eviction. See *id.*, at 75; Glendon, The Transformation of American Landlord-Tenant Law, 23 Boston College L. Rev. 503, 513–514 (1982); 1 H. Tiffany, Real Property §§ 141, 143 (3d ed. 1939).[6]

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[6] Before Congress enacted the PMPA, at least one court, it is true, had held that a tenant asserting constructive eviction could obtain *declaratory* relief without abandoning the premises—although the court observed that the tenant still would have to abandon the premises in order to obtain rescission. See *Charles E. Burt, Inc.* v. *Seven Grand Corp.*, 340 Mass. 124, 129–130, 163 N. E. 2d 4, 7–8 (1959). But as even the dealers concede,

As generally understood in these and other contexts, a termination is deemed "constructive" because it is the plaintiff, rather than the defendant, who formally puts an end to the particular legal relationship—not because there is no end to the relationship at all. There is no reason why a different understanding should apply to constructive termination claims under the PMPA. At the time when it enacted the statute, Congress presumably was aware of how courts applied the doctrine of constructive termination in these analogous legal contexts. Cf. *Fitzgerald* v. *Barnstable School Comm.*, 555 U. S. 246, 258–259 (2009). And in the absence of any contrary evidence, we think it reasonable to interpret the Act in a way that is consistent with this well-established body of law.

The Court of Appeals was of the view that analogizing to doctrines of constructive termination in other contexts was inappropriate because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible." 524 F. 3d, at 46. But surely these same factors compel employees and tenants—no less than service-station franchisees—to try to make their changed arrangements work. Nonetheless, courts have long required plaintiffs asserting such claims to show an actual severance of the relevant legal relationship. We see no reason for a different rule here.

Additionally, allowing franchisees to obtain PMPA relief for conduct that does not force an end to a franchise would extend the reach of the Act much further than its text and structure suggest. Prior to 1978, the regulation of petro-

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see Tr. of Oral Arg. 37–38, the clear majority of authority required a tenant to leave the premises before claiming constructive eviction.

For similar reasons, the Second Restatement of Property is of no help to the dealers. Although it would allow a tenant to bring a constructive eviction claim without moving out, it noted that this proposition was "contrary to the present weight of judicial authority." 1 Restatement (Second) of Property § 6.1, Reporter's Note 1, p. 230 (1976).

leum franchise agreements was largely a matter of state law. See *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F. 3d 846, 861 (CA7 2002); Comment, 32 Emory L. J. 273, 277–283 (1983). In enacting the PMPA, Congress did not regulate every aspect of the petroleum franchise relationship but instead federalized only the two parts of that relationship with which it was most concerned: the circumstances in which franchisors may terminate a franchise or decline to renew a franchise relationship. See 15 U. S. C. § 2802; *Dersch Energies*, *supra*, at 861–862. Congress left undisturbed state-law regulation of other types of disputes between petroleum franchisors and franchisees. See § 2806(a) (pre-empting only those state laws governing franchise terminations or nonrenewals).

The dealers would have us interpret the PMPA in a manner that ignores the Act's limited scope. On their view, and in the view of the Court of Appeals, the PMPA prohibits, not just unlawful terminations and nonrenewals, but also certain serious breaches of contract that do not cause an end to the franchise. See Brief for Respondents in No. 08–372, pp. 28–35 (hereinafter Respondents' Brief); 524 F. 3d, at 44–47. Reading the Act to prohibit simple breaches of contract, however, would be inconsistent with the Act's limited purpose and would further expand federal law into a domain traditionally reserved for the States. Without a clearer indication that Congress intended to federalize such a broad swath of the law governing petroleum franchise agreements, we decline to adopt an interpretation of the Act that would have such sweeping consequences. See, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 349 (1971).[7]

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[7] Adopting such a broad reading of the PMPA also would have serious implications for run-of-the-mill franchise disputes. The Act *requires* courts to award attorney's fees and expert-witness fees in any case in which a plaintiff recovers more than nominal damages. See 15 U. S. C. § 2805(d)(1)(C). The Act also permits punitive damages, § 2805(d)(1)(B), a remedy ordinarily not available in breach-of-contract actions, see *Barnes* v. *Gorman*, 536 U. S. 181, 187–188 (2002). Accepting the dealers' reading

Finally, important practical considerations inform our decision. Adopting the dealers' reading of the PMPA would require us to articulate a standard for identifying those breaches of contract that should be treated as effectively ending a franchise, even though the franchisee in fact continues to use the franchisor's trademark, purchase the franchisor's fuel, and occupy the service-station premises.[8] We think any such standard would be indeterminate and unworkable. How is a court to determine whether a breach is serious enough effectively to end a franchise when the franchisee is still willing and able to continue its operations? And how is a franchisor to know in advance which breaches a court will later determine to have been so serious? The dealers have not provided answers to these questions. Nor could they. Any standard for identifying when a simple breach of contract amounts to a PMPA termination, when all three statutory elements remain operational, simply evades coherent formulation.

B

The dealers suggest that this interpretation of the PMPA fails to provide franchisees with much-needed protection from unfair and coercive franchisor conduct that does not force an end to the franchise. That argument, however, ignores the fact that franchisees still have state-law remedies available to them. The pre-emptive scope of the PMPA is

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of the statute, therefore, would turn everyday contract disputes into high-stakes affairs.

[8] The First Circuit, for example, approved of a test that asks whether the breach resulted in "such a material change that it effectively ended the lease, even though the plaintiffs continued to operate [their franchises]." 524 F. 3d, at 46 (internal quotation marks omitted). That standard, it seems to us, does little more than restate the relevant question. While we do not decide whether the PMPA contemplates claims for constructive termination, we observe that the Court of Appeals' unwillingness or inability to establish a more concrete standard underscores the difficulties and inherent contradictions involved in crafting a standard for finding a "termination" when no termination has in fact occurred.

limited: The Act pre-empts only those state or local laws that govern the termination of petroleum franchises or the nonrenewal of petroleum franchise relationships. See 15 U. S. C. § 2806(a). Outside of those areas, therefore, franchisees can still rely on state-law remedies to address wrongful franchisor conduct that does not have the effect of ending the franchise. Indeed, that happened in this very lawsuit. The dealers argued in the District Court that Motiva's elimination of the rent subsidy not only constructively terminated their franchises in violation of the PMPA but also amounted to a breach of contract under state law. The jury found in their favor on their state-law claims and awarded them almost $1.3 million in damages. See App. 376–379. Thus, the dealers' own experience demonstrates that franchisees do not need a PMPA remedy to have meaningful protection from abusive franchisor conduct.

The dealers also charge that this interpretation of the PMPA cannot be correct because it renders other provisions of the Act meaningless. Respondents' Brief 21–22, 24–25. While we agree that we normally should construe statutes "in a manner that gives effect to all of their provisions," we believe our interpretation is faithful to this "well-established principl[e] of statutory interpretation." *United States ex rel. Eisenstein* v. *City of New York*, 556 U. S. 928, 933 (2009).

To begin, the dealers insist that our reading of the term "terminate" will require franchisees to go out of business before they can obtain preliminary relief and thus will render useless the Act's preliminary injunction mechanism. We disagree. To obtain a preliminary injunction, it is true, a franchisee must show, among other things, that "the franchise of which he is a party *has been terminated*." 15 U. S. C. § 2805(b)(2)(A)(i) (emphasis added). But that does not necessarily mean that a franchisee must go *out of business* before obtaining an injunction. For example, in cases of actual termination, the Act requires franchisors to pro-

vide franchisees with written notice of termination well in advance of the date on which the termination "takes effect." § 2804(a). A franchisee that receives notice of termination "has been terminated" within the meaning of § 2805(b)(2)(A)(i), even though the termination "takes effect" on a later date, just as an employee who receives notice of discharge can be accurately described as *having been* discharged, even though the employee's last day at work may perhaps be weeks later. Thus, franchisees that receive notice of impending termination can invoke the protections of the Act's preliminary injunction mechanism well before having to go out of business.[9] Contrary to the dealers' assertions, therefore, our interpretation of the Act gives meaningful effect to the PMPA's preliminary injunction provisions.

Our interpretation also gives effect to the Act's alternative statute-of-limitations accrual dates. The 1-year limitations period governing PMPA claims runs from the later of either (1) "the date of termination of the franchise" *or* (2) "the date the franchisor fails to comply with the requirements of" the Act. § 2805(a). Some violations of the PMPA, however, cannot occur until *after* a franchise has been terminated. See, *e. g.,* § 2802(d)(1) (franchisor must share with a franchisee certain parts of a condemnation award when the termination was the result of a condemnation or taking); § 2802(d)(2) (franchisor must grant a franchisee a right of first refusal if the franchise was terminated due to the destruction of the service station and the station subsequently is rebuilt). The second accrual date listed in § 2805(a), therefore, shows only that the limitations period runs from the

[9] The Government reads the Act to permit a dealer to seek preliminary injunctive relief if a franchisor announces its "intent to engage in conduct that would leave the franchisee no reasonable alternative but to abandon" one (or more) of the franchise elements. Brief for United States as *Amicus Curiae* 21. Because we do not decide whether the PMPA permits constructive termination claims at all, see n. 4, *supra,* we need not address this argument.

date of these types of post-termination violations. It does not suggest that Congress intended franchisees to maintain claims under the PMPA to redress franchisor conduct that does not force an end to the franchise.

* * *

We therefore hold that a necessary element of any constructive termination claim under the PMPA is that the complained-of conduct forced an end to the franchisee's use of the franchisor's trademark, purchase of the franchisor's fuel, or occupation of the franchisor's service station. Because none of the dealers in this litigation abandoned any element of their franchise operations in response to Motiva's elimination of the rent subsidy,[10] they cannot maintain a constructive termination claim on the basis of that conduct.

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[10] After Motiva withdrew the rent subsidy, seven of the dealers continued operating their franchises for the full terms of their franchise agreements and then signed new agreements that did not include the subsidy. See App. 161, 164, 316–321 (Mac's Shell Service, Inc.); *id.*, at 138–139, 314–315 (Cynthia Karol); *id.*, at 154–155, 310–311 (Akmal, Inc.); *id.*, at 185–186, 268–269 (Sid Prashad); *id.*, at 190, 312–313 (J & M Avramidis, Inc.); *id.*, at 179–182, 322–323 (RAM Corp., Inc.); *id.*, at 148–153, 324–325 (John A. Sullivan). These dealers necessarily cannot establish that the elimination of the subsidy "terminate[d]" their franchises "prior to the conclusion of the term" stated in their franchise agreements. 15 U. S. C. § 2802(a)(1). Whether they ceased operations *after* their franchise agreements expired, moreover, is irrelevant. Indeed, in the Court of Appeals, the dealers abandoned any claim for constructive termination based on the subsequent franchise agreements. See Appellees' Brief in No. 05–2770 etc. (CA1), p. 40, n. 29.

One dealer did leave his franchise before his franchise agreement expired. App. 204, 330–331 (Stephen Pisarczyk). But that dealer not only continued to operate for seven months after the subsidy ended, *id.*, at 204, but also during that period entered into an agreement with Motiva to extend the term of his franchise agreement, *id.*, at 330–331. Moreover, that dealer had been planning to leave the service-station business before Motiva eliminated the subsidy, and he never claimed that his decision to leave had anything to do with Motiva's rent policies. See *id.*, at 202–207.

III

The second question we are asked to decide is whether a franchisee who is offered and signs a renewal agreement can nonetheless maintain a claim for "constructive nonrenewal" under the PMPA. For reasons similar to those given above, we agree with the Court of Appeals that a franchisee that chooses to accept a renewal agreement cannot thereafter assert a claim for unlawful nonrenewal under the Act.[11]

The plain text of the statute leaves no room for a franchisee to claim that a franchisor has unlawfully declined to renew a franchise relationship—constructively or otherwise—when the franchisee has in fact accepted a new franchise agreement. As relevant here, a franchisor violates the PMPA only when it "fail[s] to renew" a franchise relationship for a reason not provided for in the Act or after not providing the required notice. See 15 U. S. C. § 2802. The Act defines the term "fail to renew," in turn, as a "failure to reinstate, continue, or extend the franchise relationship." § 2801(14). Thus, the threshold requirement of any unlawful nonrenewal action—a requirement the franchisee bears the burden of establishing, see § 2805(c)—is that the franchisor did not "reinstate, continue, or renew" the franchise relationship once a franchise agreement expired. But if a franchisee signs a renewal agreement, the franchisor clearly has "reinstate[d], continue[d], or extend[ed]" the franchise relationship. True, the franchisee might find some of the terms in the new agreement objectionable. But the Act prohibits only unlawful "fail[ures] to renew" a franchise relationship, not renewals of a franchise relationship on terms that are less than favorable to the franchisee. A franchisee that signs a renewal agreement, in short, cannot carry the threshold burden of showing a "nonrenewal of the franchise relationship,"

[11] As is true with respect to the dealers' constructive termination claims, it is not necessary for us to decide in these cases whether the Act at all recognizes claims for "constructive nonrenewal." We therefore do not express a view on that question.

§ 2805(c), and thus necessarily cannot establish that the franchisor has violated the Act.

The dealers point out that several of them signed their renewal agreements "under protest," and they argue that they thereby explicitly preserved their ability to assert a claim for unlawful nonrenewal under the PMPA. That argument misunderstands the legal significance of signing a renewal agreement. Signing a renewal agreement does not constitute a waiver of a franchisee's legal rights—something that signing "under protest" can sometimes help avoid. See, *e. g.*, U. C. C. § 1–207, 1 U. L. A. 318. Instead, signing a renewal agreement negates the very possibility of a violation of the PMPA. When a franchisee signs a renewal agreement—even "under protest"—there has been no "fail[ure] to renew," and thus the franchisee has no cause of action under the Act. See 15 U. S. C. § 2805(a).

The Act's structure and purpose confirm this interpretation. By requiring franchisors to renew only the "franchise relationship," as opposed to the same franchise agreement, see § 2802; see also § 2801(2), the PMPA contemplates that franchisors can respond to market demands by proposing new and different terms at the expiration of a franchise agreement. To that end, the Act authorizes franchisors to decline to renew a franchise relationship if the franchisee refuses to accept changes or additions that are proposed "in good faith and in the normal course of business" and that are not designed to convert the service station to direct operation by the franchisor. § 2802(b)(3)(A). Additionally, the Act creates a procedural mechanism for resolving disputes over the legality of proposed new terms. If the parties cannot agree, the franchisor has the option of either modifying the objectionable terms or pursuing nonrenewal, in which case it must provide the franchisee with written notice well in advance of the date when the nonrenewal takes effect. § 2804(a)(2). Once the franchisee receives notice of nonrenewal, it can seek a preliminary injunction under the Act's

relaxed injunctive standard, maintaining the status quo while a court determines the lawfulness of the proposed changes. See § 2805(b)(2); *supra*, at 188–189.[12]

Allowing franchisees to pursue nonrenewal claims even after they have signed renewal agreements would undermine this procedural mechanism and, in the process, would frustrate franchisors' ability to propose new terms. Under the dealers' theory, franchisees have no incentive to object to burdensome new terms and seek a preliminary injunction if a franchisor pursues nonrenewal. Instead, a franchisee could simply sign the new franchise agreement and decide later whether to sue under the PMPA. Franchisees would then have the option of either continuing to operate under the new agreement or, if the terms of the agreement later proved unfavorable, bringing suit under the PMPA alleging that the newly imposed terms are unlawful. And because the PMPA has a 1-year statute of limitations, see § 2805(a), franchisees would retain that option for the entire first year of a new franchise agreement. Accepting the dealers' argument, therefore, would cast a cloud of uncertainty over all

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[12] The availability of preliminary injunctive relief under the Act also explains why the dealers are wrong to suggest that our holding will force franchisees "to choose between accepting an unlawful and coercive contract in order to stay in business [or] rejecting it and going out of business in order to preserve a cause of action." Respondents' Brief 51 (internal quotation marks omitted). A franchisee presented with "unlawful and coercive" terms can simply reject those terms and, if the franchisor pursues nonrenewal, seek a preliminary injunction under the Act once the franchisee receives notice of nonrenewal. Indeed, the PMPA substantially relaxes the normal standard for obtaining preliminary injunctive relief, § 2805(b)(2)(A)(ii), thus allowing a franchisee with anything close to a meritorious claim to obtain relief.

It is possible, of course, that a franchisor could fail to renew a franchise relationship *without* providing the statutorily required notice. But in that circumstance, a franchisee would not only have a sure-fire claim for unlawful nonrenewal, see § 2802(b)(1)(A), but also presumably could seek a preliminary injunction forcing the franchisor to resume providing the franchise elements for the duration of the litigation.

renewal agreements and could chill franchisors from proposing new terms in response to changing market conditions and consumer needs.

Finally, accepting the dealers' argument would greatly expand the PMPA's reach. Under the balance struck by the plain text of the statute, a franchisee faced with objectionable new terms must decide whether challenging those terms is worth risking the nonrenewal of the franchise relationship; if the franchisee rejects the terms and the franchisor seeks nonrenewal, the franchisee runs the risk that a court will ultimately determine that the proposed terms were lawful under the PMPA. See § 2802(b)(3)(A). That risk acts as a restraint, limiting the scope of franchisor liability under the Act to that with which Congress was most concerned: the imposition of arbitrary and unreasonable new terms on a franchisee that are designed to force an end to the petroleum franchise relationship. See, *e. g.*, *ibid.;* Comment, 32 Emory L. J., at 277–283. Allowing franchisees both to sign a franchise agreement and to pursue a claim under the PMPA would eliminate that restraint and thus permit franchisees to challenge a much broader range of franchisor conduct—conduct to which the dealer might object but not consider so serious as to risk the nonrenewal of the franchise by mounting a legal challenge. As explained, the PMPA was enacted to address the narrow areas of franchise terminations and nonrenewals, not to govern every aspect of the petroleum franchise relationship. See *supra*, at 186; *Dersch Energies*, 314 F. 3d, at 861. We thus decline to adopt an interpretation that would expand the Act in such a fashion.[13]

[13] It also is worth noting that, although the concept of "constructive nonrenewal" does not arise frequently in other areas of the law, the little authority on this concept supports our conclusion that a plaintiff who signs a new agreement cannot maintain a claim for constructive nonrenewal. See *American Cas. Co. of Reading, Pa.* v. *Baker*, 22 F. 3d 880, 892–894 (CA9 1994) (insured who accepts a successor insurance policy cannot maintain a claim for constructive nonrenewal of the previous policy); *American Cas. Co. of Reading, Pa.* v. *Continisio*, 17 F. 3d 62, 65–66 (CA3 1994) (same); *Adams* v. *Greenwood*, 10 F. 3d 568, 572 (CA8 1993) (same).

* * *

We hold that a franchisee who is offered and signs a renewed franchise agreement cannot maintain a claim for unlawful nonrenewal under the PMPA. We therefore affirm the judgment of the Court of Appeals with respect to the dealers' nonrenewal claims.

IV

The judgment of the Court of Appeals is reversed in part and affirmed in part. The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BLOATE *v.* UNITED STATES

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

No. 08–728. Argued October 6, 2009—Decided March 8, 2010

The Speedy Trial Act of 1974 (Act) requires a criminal defendant's trial to commence within 70 days of his indictment or initial appearance, 18 U. S. C. § 3161(c)(1), and entitles him to dismissal of the charges if that deadline is not met, § 3162(a)(2). As relevant here, the Act automatically excludes from the 70-day period "delay resulting from . . . proceedings concerning the defendant," § 3161(h)(1) (hereinafter subsection (h)(1)), and separately permits a district court to exclude "delay resulting from a continuance" it grants, provided the court makes findings required by § 3161(h)(7) (hereinafter subsection (h)(7)). Petitioner's indictment on federal firearm and drug possession charges started the 70-day clock on August 24, 2006. After petitioner's arraignment, the Magistrate Judge ordered the parties to file pretrial motions by September 13. On September 7, the court granted petitioner's motion to extend that deadline, but on the new due date, September 25, petitioner waived his right to file pretrial motions. On October 4, the Magistrate Judge found the waiver voluntary and intelligent. Over the next three months, petitioner's trial was delayed several times, often at petitioner's instigation. On February 19, 2007—179 days after he was indicted—he moved to dismiss the indictment, claiming that the Act's 70-day limit had elapsed. In denying the motion, the District Court excluded the time from September 7 through October 4 as pretrial motion preparation time. At trial, petitioner was found guilty on both counts and sentenced to concurrent prison terms. The Eighth Circuit affirmed the denial of the motion to dismiss, holding that the period from September 7 through October 4 was automatically excludable from the 70-day limit under subsection (h)(1).

Held: The time granted to *prepare* pretrial motions is not automatically excludable from the 70-day limit under subsection (h)(1). Such time may be excluded only when a district court grants a continuance based on appropriate findings under subsection (h)(7). Pp. 203–215.

(a) The delay at issue is governed by subsection (h)(1)(D) (hereinafter subparagraph (D)), the enumerated category that renders automatically excludable "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." This provision communicates Congress'

judgment that pretrial motion-related delay is automatically excludable *only* from the time a pretrial motion is filed through a specified hearing or disposition point, and that other pretrial motion-related delay is excludable only if it results in a continuance under subsection (h)(7). This limitation is significant because Congress knew how to define the boundaries of subsection (h)(1)'s enumerated exclusions broadly when it so desired. Although the period of delay the Government seeks to exclude in this case results from a proceeding governed by subparagraph (D), that period precedes the first day upon which Congress specified that such delay may be excluded automatically and thus is not automatically excludable. Pp. 204–207.

(b) This analysis resolves the automatic excludability inquiry because "[a] specific provision" (here, subparagraph (D)) "controls one[s] of more general application" (here, subsections (h)(1) and (h)(7)). *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407. A contrary result would depart from the statute in a manner that underscores the propriety of this Court's approach. Subsection (h)(1)'s phrase "including but not limited to" does not show that subsection (h)(1) permits automatic exclusion of delay related to an enumerated category of proceedings, but outside the boundaries set forth in the subparagraph expressly addressed to that category. That would confuse the illustrative nature of the subsection's list of categories with the contents of the categories themselves. Reading the "including but not limited to" clause to modify the contents of each subparagraph in the list as well as the list itself would violate settled statutory construction principles by ignoring subsection (h)(1)'s structure and grammar and in so doing rendering even the clearest of the subparagraphs indeterminate and virtually superfluous. See generally *id.*, at 410. Subsection (h)(1)'s context supports this Court's conclusion. Subsection (h)(7) provides that delay "resulting from a continuance granted by any judge" *may* be excluded, but only if the judge finds that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and records those findings. In setting forth the statutory factors justifying a subsection (h)(7) continuance, Congress twice recognized the importance of adequate pretrial preparation time. See §§3161(h)(7)(B)(ii), 3161(h)(7)(B)(iv). The Court's determination that the delay at issue is not automatically excludable gives full effect to subsection (h)(7), and respects its provisions for excluding certain types of delay only where a district court makes findings justifying the exclusion. The Court's precedents also support this reading of subsection (h)(1). See *Zedner* v. *United States*, 547 U. S. 489, 502. Pp. 207–213.

(c) The Act does not force a district court to choose between rejecting a defendant's request for time to prepare pretrial motions and risking

dismissal of the indictment if preparation time delays the trial. A court may still exclude preparation time under subsection (h)(7) by granting a continuance for that purpose based on recorded findings. Subsection (h)(7) provides "[m]uch of the Act's flexibility," *Zedner*, 547 U. S., at 498, giving district courts "discretion . . . to accommodate limited delays for case-specific needs," *id.*, at 499. The Government suggests that a district court may fail to make the necessary subsection (h)(7) findings, leading to a windfall gain for a defendant who induces delay beyond the 70-day limit. But dismissal need not represent a windfall. If the court dismisses the charges *without prejudice*, the Government may refile charges or reindict. In ruling on a motion to dismiss under the Act, the district court should consider, *inter alia*, the party responsible for the delay. Pp. 213–215.

(d) This Court does not consider whether any of the Act's other exclusions would apply to all or part of the September 7 through October 4 period that is not automatically excludable under subsection (h)(1). P. 215.

534 F. 3d 893, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed a concurring opinion, *post*, p. 215. ALITO, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 217.

Mark T. Stancil argued the cause for petitioner. With him on the briefs were *David T. Goldberg*, *Stephen R. Welby*, and *Daniel R. Ortiz*.

Matthew D. Roberts argued the cause for the United States. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, and *Deputy Solicitor General Dreeben*.*

JUSTICE THOMAS delivered the opinion of the Court.

The Speedy Trial Act of 1974 (Speedy Trial Act or Act), 18 U. S. C. § 3161 *et seq.*, requires that a criminal defendant's trial commence within 70 days after he is charged or makes

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**Ketanji Brown Jackson* and *Jeffrey T. Green* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

an initial appearance, whichever is later, see § 3161(c)(1), and entitles him to dismissal of the charges if that deadline is not met, § 3162(a)(2). The Act, however, excludes from the 70-day period delays due to certain enumerated events. § 3161(h) (2006 ed. and Supp. II). As relevant here, "delay resulting from . . . proceedings concerning the defendant" is automatically excludable from a Speedy Trial Act calculation. § 3161(h)(1) (hereinafter subsection (h)(1)).[1] In addition, "delay resulting from a continuance" granted by the district court may be excluded if the district court makes the findings required by § 3161(h)(7) (2006 ed., Supp. II) (hereinafter subsection (h)(7)).

This case requires us to decide the narrow question whether time granted to a party to *prepare* pretrial motions is automatically excludable from the Act's 70-day limit under subsection (h)(1), or whether such time may be excluded only if a court makes case-specific findings under subsection (h)(7). The Court of Appeals for the Eighth Circuit held that pretrial motion preparation time is automatically excludable under subsection (h)(1). 534 F. 3d 893, 898 (2008).[2] We granted certiorari, 556 U. S. 1181 (2009), and now reverse.

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[1] The excludability of delay "resulting from . . . proceedings" under subsection (h)(1) is "automatic" in the sense that a district court must exclude such delay from a Speedy Trial Act calculation without any further analysis as to whether the benefit of the delay outweighs its cost. For delays resulting from proceedings under subsection (h)(1), Congress already has determined that the benefit of such delay outweighs its cost to a speedy trial, regardless of the specifics of the case. The word "automatic" serves as a useful shorthand. See, *e. g.*, *United States* v. *Lucky*, 569 F. 3d 101, 106 (CA2 2009) ("Some exclusions are automatic. Other exclusions require judicial action" (citation omitted)).

[2] After the Eighth Circuit issued its decision below, Congress passed the Judicial Administration and Technical Amendments Act of 2008, 122 Stat. 4291, which made technical changes to the Speedy Trial Act, including the renumbering of several provisions. The amendments did not change the substance of any provision relevant here. Accordingly, in this opinion, including our discussions of the orders and decisions under review, we refer only to the current version of the Act.

I

A

On August 2, 2006, police officers surveilling an apartment building for drug activity saw petitioner and his girlfriend enter a car parked in front of the building and drive away. After observing petitioner commit several traffic violations, the officers stopped the vehicle. They approached the car and noticed two small bags of cocaine on petitioner's lap. After the officers read petitioner his *Miranda* warnings, petitioner made inculpatory statements. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Petitioner denied any association with the apartment building where the car had been parked, but his girlfriend admitted that she lived there and consented to a search of her residence. The officers who conducted the search uncovered several items that belonged to petitioner, including an identification card, cocaine, three firearms, ammunition, and a bulletproof vest. The police arrested petitioner the next day.

On August 24, a grand jury indicted petitioner for being a felon in possession of a firearm, in violation of 18 U. S. C. § 922(g)(1), and for knowing and intentional possession with intent to distribute more than five grams of cocaine, in violation of 21 U. S. C. § 841(a)(1). The August 24 indictment started the Speedy Trial Act's 70-day clock. See 18 U. S. C. § 3161(c)(1). After petitioner's arraignment on September 1, a Magistrate Judge entered a scheduling order requiring, *inter alia*, that the parties file pretrial motions by September 13.

On September 7, petitioner filed a motion to extend the deadline to file pretrial motions from September 13 to September 21. The Magistrate Judge granted the motion and extended the deadline by an extra four days beyond petitioner's request, to September 25. On September 25, however, petitioner filed a "Waiver of Pretrial Motions" advising the court that he did not wish to file any pretrial motions.

On October 4, the Magistrate Judge held a hearing to consider petitioner's "waiver," at which petitioner confirmed that he wished to waive his right to file pretrial motions. After a colloquy, the Magistrate Judge found that petitioner's waiver was voluntary and intelligent.

Over the next three months, petitioner's trial was delayed for several reasons. Though these delays are not directly relevant to the question presented here, we recount them to explain the full context in which that question arises. On November 8, petitioner moved to continue the trial date, stating that his counsel needed additional time to prepare for trial. The District Court granted the motion and reset the trial for December 18.

The parties then met informally and prepared a plea agreement, which they provided to the court. The District Court scheduled a change of plea hearing for December 20. At the hearing, however, petitioner declined to implement the agreement and requested a new attorney. The District Court rescheduled the trial for February 26, 2007, granted petitioner's attorney's subsequent motion to withdraw, and appointed new counsel.

On February 19, 2007—179 days after petitioner was indicted—petitioner moved to dismiss the indictment, claiming that the Act's 70-day limit had elapsed. The District Court denied the motion. In calculating how many of the 179 days counted toward the 70-day limit, the District Judge excluded the period from September 7 through October 4 as "within the extension of time granted to file pretrial motions." Order in No. 4:06CR518–SNL (ED Mo.), Doc. 44, p. 2.[3]

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[3] In addition, the District Judge excluded the continuance granted on November 9 (resetting the trial for December 18) under § 3161(h)(7)(A) (2006 ed., Supp. II), and excluded the time from November 9 through December 20 as delay resulting from a plea agreement under § 3161(h)(1)(G). He further excluded the time from December 20 through February 26 "as it . . . resulted from [petitioner's] election not to implement a plea agreement, and his request to the court to have new counsel appointed for

In late February, a matter arose in an unrelated case on the District Court's docket, which required the court to reschedule petitioner's trial. After obtaining the consent of the parties and finding that a continuance would serve the public interest, the District Court continued petitioner's trial from February 26 to March 5, 2007. Petitioner's 2-day trial began on that date. The jury found petitioner guilty on both counts, and the District Court later sentenced him to concurrent 30-year terms of imprisonment.

B

Petitioner appealed his convictions and sentence to the Eighth Circuit, which affirmed the denial of his motion to dismiss for a Speedy Trial Act violation. As relevant, the Court of Appeals agreed with the District Court that the time from September 7 (the original deadline for filing pretrial motions) through October 4 (when the trial court held a hearing on petitioner's decision to waive the right to file pretrial motions) was excludable from the Act's 70-day limit. Although the District Court did not identify which provision of the Act supported this exclusion, the Court of Appeals held that "pretrial motion preparation time" is automatically excludable under subsection (h)(1)—which covers "delay resulting from other proceedings concerning the defendant"—as long as "the [district] court specifically grants time for that purpose." 534 F. 3d, at 897.[4] In reaching this conclu-

him." Order in No. 4:06CR518–SNL, Doc. 44, at 3. The judge stated on the record that these continuances were necessary to ensure that "the ends of justice could more properly be served" and "obviously outweighed the best interest of the public and the defendant to a Speedy Trial." *Ibid.*

[4] In addition, the Court of Appeals affirmed the District Court's order excluding the time from November 9 to, and including, December 18 and from December 20 to, and including, February 23 as delays resulting from continuances under §§3161(h)(7) and 3161(h)(7)(B)(iv), respectively. The Court of Appeals did not address whether to exclude December 19. Nor did it decide whether to exclude the delay from February 23 to March 5,

sion, the Eighth Circuit joined seven other Courts of Appeals that interpret subsection (h)(1) the same way.[5] Two Courts of Appeals, the Fourth and Sixth Circuits, interpret subsection (h)(1) differently, holding that time for preparing pretrial motions is outside subsection (h)(1)'s scope.[6] We granted certiorari to resolve this conflict.

II

As noted, the Speedy Trial Act requires that a criminal defendant's trial commence within 70 days of a defendant's initial appearance or indictment, but excludes from the 70-day period days lost to certain types of delay. Section 3161(h) specifies the types of delays that are excludable from the calculation. Some of these delays are excludable only if the district court makes certain findings enumerated in the statute. See § 3161(h)(7). Other delays are automatically excludable, *i. e.*, they may be excluded without district court findings. As relevant here, subsection (h)(1) requires the automatic exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" periods of delay resulting from eight enumerated subcategories of proceedings.[7] The Government con-

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because even if those days were included, "only 58 days passed between [petitioner]'s indictment and trial, fewer than the 70 allowed by the Speedy Trial Act." 534 F. 3d, at 900.

[5] See *United States* v. *Oberoi*, 547 F. 3d 436, 448–451 (CA2 2008); 534 F. 3d 893, 897–898 (CA8 2008) (case below); *United States* v. *Mejia*, 82 F. 3d 1032, 1035–1036 (CA11 1996); *United States* v. *Lewis*, 980 F. 2d 555, 564 (CA9 1992); *United States* v. *Mobile Materials, Inc.*, 871 F. 2d 902, 912–915 *(per curiam)*, opinion supplemented on other grounds on rehearing, 881 F. 2d 866 (CA10 1989) *(per curiam); United States* v. *Wilson*, 835 F. 2d 1440, 1444–1445 (CADC 1987); *United States* v. *Tibboel*, 753 F. 2d 608, 610 (CA7 1985); *United States* v. *Jodoin*, 672 F. 2d 232, 237–239 (CA1 1982).

[6] See *United States* v. *Jarrell*, 147 F. 3d 315, 317–318 (CA4 1998); *United States* v. *Moran*, 998 F. 2d 1368, 1370–1371 (CA6 1993).

[7] The full text of subsection (h)(1) reads as follows:

"(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in

tends that the time the District Court granted petitioner to prepare his pretrial motions is automatically excludable under subsection (h)(1). We disagree, and conclude that such time may be excluded only when a district court enters appropriate findings under subsection (h)(7).

A

The eight subparagraphs in subsection (h)(1) address the automatic excludability of delay generated for certain enumerated purposes. Thus, we first consider whether the delay at issue in this case is governed by one of these subparagraphs. It is.

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computing the time within which the trial of any such offense must commence:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

"(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

"(B) delay resulting from trial with respect to other charges against the defendant;

"(C) delay resulting from any interlocutory appeal;

"(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

"(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

"(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

"(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

"(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

The delay at issue was granted to allow petitioner sufficient time to file pretrial motions.[8] Subsection (h)(1)(D) (2006 ed., Supp. II) (hereinafter subparagraph (D)) renders automatically excludable "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Read, as it must be, in the context of subsection (h), this text governs the automatic excludability of delays "resulting" from a specific category of "proceedings concerning the defendant," namely, proceedings involving pretrial motions.[9] Because the delay at issue here results from a deci-

[8] See Defendant's Request for Additional Time To File Pre-trial Motions in No. 4:06CR518–SNL (TCM) (ED Mo.), Doc. 19; Order in No. 4:06CR518–SNL (ED Mo.), Doc. 44 (granting same).

[9] The dissent argues that this conclusion lacks "force" because "[i]t is at least doubtful . . . that the delay at issue in the present case is delay 'resulting from [a] pretrial motion.'" *Post*, at 220 (opinion of ALITO, J.). According to the dissent, "delay 'resulting from' a pretrial motion is delay that occurs as a consequence of such a motion," which the "type of delay involved in the present case . . . does not." *Post*, at 221 (arguing that the delay in this case instead "occurs as a consequence of the court's granting of a defense request for an extension of time").

The dissent's position, which rests upon a dictionary definition of two isolated words, does not account for the governing statutory context. For the reasons we explain, the text and structure of subsection (h) support our conclusion that subparagraph (D) governs the automatic excludability of delays "resulting from" proceedings involving pretrial motions. As the dissent concedes, defining "resulting from" to mean "as a consequence of" does not foreclose our interpretation. That is because the dissent's definition of "resulting from" leaves ample room to conclude that the delay at issue here is "a consequence of" the category of proceedings covered by subparagraph (D), whether one views the delay "as a consequence of" a proceeding involving pretrial motions, or "as a consequence of" a pretrial motion itself (the defense request for additional time). At bottom, the dissent's position is not that our interpretation is foreclosed by the Act; it is that the dissent's interpretation is preferable. We disagree because the dissent's interpretation, among other things, fails to account fully for the text and structure of subsection (h)(1) and renders much of subsection (h)(7) a nullity.

sion granting time to prepare pretrial motions, if not from a pretrial motion itself (the defendant's request for additional time), it is governed by subparagraph (D). But that does not make the delay at issue here automatically excludable.

Subparagraph (D) does not subject all pretrial motion-related delay to automatic exclusion. Instead, it renders automatically excludable only the delay that occurs "*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of" the motion. (Emphasis added.) In so doing, the provision communicates Congress' judgment that delay resulting from pretrial motions is automatically excludable, *i. e.*, excludable without district court findings, *only* from the time a motion is filed through the hearing or disposition point specified in the subparagraph, and that other periods of pretrial motion-related delay are excludable only when accompanied by district court findings.[10]

This limitation is significant because Congress knew how to define the boundaries of an enumerated exclusion broadly when it so desired. Subsection (h)(1)(A) (2006 ed.) (hereinafter subparagraph (A)), for example, provides for the automatic exclusion of "delay resulting from any proceeding, *including* any examinations, to determine the mental competency or physical capacity of the defendant." (Emphasis added.) With the word "including," Congress indicated that other competency-related proceedings besides "examinations" might fall within subparagraph (A)'s automatic exclu-

[10] This conclusion flows not only from subparagraph (D)'s text, but also from its structure. As noted, subparagraph (D) excludes from the 70-day period "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." In this case, the comma after the first phrase indicates that the second phrase modifies the scope of excludable delay referred to in the first. Thus, subparagraph (D)'s automatic exclusion for delay "resulting from" a pretrial motion is limited to delay that occurs from the filing of the motion through the endpoints identified in the provision.

sion. In subparagraph (D), by contrast, Congress declined to use an expansive or illustrative term such as "including," and provided instead that only pretrial motion-related delay "from the filing" of a motion to the hearing or disposition point specified in the provision is automatically excludable from the Act's 70-day limit.

Thus, although the period of delay the Government seeks to exclude in this case results from a proceeding governed by subparagraph (D), that period precedes the first day upon which Congress specified that such delay may be automatically excluded. The result is that the pretrial motion preparation time at issue in this case is not automatically excludable.[11]

B

The foregoing analysis resolves our inquiry into automatic excludability because "[a] specific provision" (here, subparagraph (D)) "controls one[s] of more general application" (here, subsections (h)(1) and (h)(7)). *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407 (1991). In arguing that this principle applies, but requires a result different from the one we reach, the dissent (like the Government and several Courts of Appeals) departs from the statute in a manner that underscores the propriety of our approach.

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There is no question that subparagraph (D) is more specific than the "general" language in subsection (h)(1), *post*, at 218, 222, or that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment," *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S.

[11] Whether the defendant actually files a pretrial motion for which he requests additional time is irrelevant to this analysis. Even if he files such a motion, that filing may not be used to bootstrap into the period of automatically excludable delay *pre*-filing preparation time that subparagraph (D) does not render automatically excludable.

204, 208 (1932). We part company with the dissent because we conclude that subparagraph (D) governs the period of delay at issue in this case. The dissent does not object to this conclusion on the ground that it is foreclosed by the statute. See *post*, at 221 (asserting that the delay at issue in this case is "not necessarily" covered by subparagraph (D)). Instead, it joins the Government in asserting that the Act is amenable to another interpretation that would avoid the "strange result" that "petitioner may be entitled to dismissal of the charges against him because his attorney persuaded a Magistrate Judge to give the defense additional time to prepare pretrial motions and thus delayed the commencement of his trial." *Post*, at 217. This argument takes aim at an exaggerated target. Because we conclude that the type of delay at issue here is excludable under subsection (h)(7), courts can in future cases easily avoid the result the dissent decries, a result that is not certain even in this case. See *infra*, at 214–215. And even if dismissal is ultimately required on remand, a desire to avoid this result does not justify reading subsection (h)(1) (and specifically its reference to "other proceedings concerning the defendant") to permit automatic exclusion of delay resulting from virtually any decision to continue a deadline.

The dissent first argues that the delay in this case is automatically excludable under subsection (h)(1) because the provision's use of the phrase "including but not limited to" shows that subsection (h)(1) permits automatic exclusion of delays beyond those covered by its enumerated subparagraphs. See *post*, at 219; see also *United States* v. *Oberoi*, 547 F. 3d 436, 450 (CA2 2008). This argument confuses the illustrative nature of subsection (h)(1)'s list of categories of excludable delay (each of which is represented by a subparagraph) with the contents of the categories themselves. That the list of categories is illustrative rather than exhaustive in no way undermines our conclusion that a delay that falls *within* the category of delay addressed by subparagraph (D) is governed by the limits in that subparagraph. The "in-

cluding but not limited to" clause would affect our conclusion only if one read it to modify the contents of subparagraph (D) as well as the list itself. As noted, such a reading would violate settled principles of statutory construction because it would ignore the structure and grammar of subsection (h)(1), and in so doing render even the clearest of the subparagraphs indeterminate and virtually superfluous. See *Gozlon-Peretz*, *supra*, at 410; *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks omitted)). Our reading avoids these problems by treating the list as illustrative, but construing each of the eight subparagraphs in (h)(1) to govern, conclusively unless the subparagraph itself indicates otherwise, see, *e. g.*, § 3161(h)(1)(A); *supra*, at 206–207, the automatic excludability of the delay resulting from the category of proceedings it addresses.

The dissent responds that, even if subparagraph (D)'s limits are conclusive rather than merely illustrative, we should automatically exclude the delay at issue here under subsection (h)(1)'s opening clause, see *post*, at 218, because it is not "clear" that the delay is governed by the more specific (and restrictive) language in subparagraph (D). *Post*, at 222. We decline this invitation to use the alleged uncertainty in subparagraph (D)'s scope as a justification for disregarding its limits and instead expanding, through liberal interpretation of subsection (h)(1)'s generic opening clause,[12] what the

[12] The dissent argues that the relevant "proceeding" in this case is the District Court's disposition of petitioner's motion for additional time to file pretrial motions. See *post*, at 218. If that were correct, any order disposing of a motion—including a pretrial motion under subparagraph (D)—would be a separate "proceeding," and any resulting delay would be automatically excludable. The dissent's reading renders superfluous the two provisions in subsection (h)(7) that require findings for the exclusion of time necessary for "adequate preparation for pretrial proceedings," § 3161(h)(7)(B)(ii), and "effective preparation," § 3161(h)(7)(B)(iv). See also *infra*, at 211.

dissent itself describes as the automatic exclusion "exceptio[n]" to the Act's 70-day period and the Act's "general rule" requiring "ends-of-justice findings for continuances." *Post*, at 227.

On the dissent's reading of subsection (h)(1), a court could extend by weeks or months, without any finding that the incursion on the Act's timeliness guarantee is justified, the entire portion of a criminal proceeding for which the Act sets a default limit of 70 days. The problem with this reading is clear: It relies on an interpretation of subsection (h)(1) that admits of no principled, text-based limit on the definition of a "proceedin[g] concerning the defendant," and thus threatens the Act's manifest purpose of ensuring speedy trials by construing the Act's automatic exclusion exceptions in a manner that could swallow the 70-day rule. This approach is not justified, much less compelled, by the textual ambiguities and legislative history upon which the dissent relies. Nor is it justified by the prospect, however appealing, of reaching a different result in this case. Hence our conclusion that the text and structure of subsection (h)(1) do not permit automatic exclusion of the delay at issue in this case.

2

Our conclusion is further supported by subsection (h)(1)'s context, particularly neighboring subsection (h)(7). Subsection (h)(7) provides that delays "resulting from a continuance granted by any judge" *may* be excluded, but only if the judge finds that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial" and records those findings. In setting forth the statutory factors that justify a continuance under subsection (h)(7), Congress twice recognized the importance of adequate pretrial preparation time. See § 3161(h)(7)(B)(ii) (requiring a district court to consider whether the "unusual" or "complex" nature of a case makes it "unreasonable to ex-

pect *adequate preparation* for pretrial proceedings or for the trial itself within the time limits" (emphasis added)); § 3161(h)(7)(B)(iv) (requiring a district court to consider in other cases "[w]hether the failure to grant such a continuance . . . would deny counsel for the defendant or the attorney for the Government the *reasonable time necessary for effective preparation*, taking into account the exercise of due diligence" (emphasis added)). Our determination that the delay at issue here is not automatically excludable gives full effect to subsection (h)(7), and respects its provisions for excluding certain types of delay only where a district court makes findings justifying the exclusion.[13] Cf. *post*, at 227 (construing subsection (h)(1) in a manner that could encompass, and govern, delays expressly within subsection (h)(7)'s purview).

3

Finally, our Speedy Trial Act precedents support our reading of subsection (h)(1). We recently explained that the Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice. We thus held that a defendant may not opt out of the Act even if he believes it would be in his interest; "[a]llowing prospective waivers would seriously undermine the Act because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act,

[13] Had Congress wished courts to exclude pretrial motion preparation time automatically, it could have said so. As noted, subsection (h)(7) twice refers to preparation time to explain the kinds of continuances that a court may grant in the interests of justice. See §§ 3161(h)(7)(B)(ii), (h)(7)(B)(iv). Congress easily could have referred to preparation time similarly in subsection (h)(1). See, *e. g.*, Speedy Trial Act Amendments Act of 1979, H. R. 3630, 96th Cong., 1st Sess., § 5(c) (1979) (proposing to exclude under subparagraph (D) all "delay resulting from *the preparation* and service of pretrial motions and responses and from hearings thereon" (emphasis added)). Congress did not do so, and we are bound to enforce only the language that Congress and the President enacted.

to the detriment of the public interest." *Zedner* v. *United States*, 547 U. S. 489, 502 (2006).[14]

Courts of Appeals that have read subsection (h)(1) to exclude automatically pretrial motion preparation time have reasoned that their interpretation is necessary to provide defendants adequate time to build their defense. See, *e. g.*, *United States* v. *Mobile Materials, Inc.*, 871 F. 2d 902, 913 *(per curiam)*, opinion supplemented on other grounds on rehearing, 881 F. 2d 866 (CA10 1989) *(per curiam)*. Yet these same courts have recognized that reading subsection (h)(1) to exclude *all* time for preparing pretrial motions would undermine the guarantee of a speedy trial, and thus harm the public interest we have recognized in preserving that guarantee even where one or both parties to a proceeding would be willing to waive it. See *Zedner*, *supra*, at 502. To avoid a result so inconsistent with the statute's purpose—*i. e.*, "to avoid creating a big loophole in the statute," *United States* v. *Tibboel*, 753 F. 2d 608, 610 (CA7 1985)—these courts have found it necessary to craft limitations on the automatic exclusion for pretrial motion preparation time that their interpretation of subsection (h)(1) otherwise would allow. See, *e. g.*, *ibid.* (stating that pretrial motion preparation time may be automatically excluded under subsection (h)(1) only when "*the judge has expressly granted a party time for that purpose*" (emphasis added)); *Oberoi*, 547 F. 3d, at 450 ("This . . . qualification prevents abuse. Without it, either party 'could

[14] Our interpretation of the Act accords with this and other precedents in a way the dissent's interpretation does not. In *Henderson* v. *United States*, 476 U. S. 321, 322 (1986), for example, we carefully examined the text of § 3161(h)(1)(F) (now codified as subparagraph (D)) to determine whether certain periods of pretrial motion-related delay were automatically excludable. Such careful parsing would seem unnecessary were the dissent right that subparagraph (D) does not conclusively define the maximum period of excludable delay for the category of pretrial motion-related proceedings and that such delay may simply be excluded under subsection (h)(1).

delay trial indefinitely merely by working on pretrial motions right up to the eve of trial' ").

The fact that courts reading subsection (h)(1) to exclude preparation time have imposed extratextual limitations on excludability to avoid "creating a big loophole in the statute," *Tibboel*, *supra*, at 610, underscores the extent to which their interpretation—and the dissent's—strays from the Act's text and purpose. As noted, subsection (h)(7) expressly accounts for the possibility that a district court would need to delay a trial to give the parties adequate preparation time. An exclusion under subsection (h)(7) is not automatic, however, and requires specific findings. Allowing district courts to exclude automatically such delays would redesign this statutory framework.

C

We also note that some of the Courts of Appeals that have interpreted subsection (h)(1) to exclude automatically pretrial motion preparation time have reasoned that a contrary reading of that provision would lay "a trap for trial judges" by forcing them to risk a Speedy Trial Act violation if they wish to grant a defendant's request for additional time to prepare a pretrial motion, *United States* v. *Wilson*, 835 F. 2d 1440, 1444 (CADC 1987); see also *Oberoi*, *supra*, at 450.

We acknowledge that it would be unpalatable to interpret the Speedy Trial Act to "trap" district courts for accommodating a defendant's request for additional time to prepare pretrial motions, particularly in a case like this. Petitioner instigated all of the pretrial delays except for the final continuance from February 26 to March 5. And the record clearly shows that the Magistrate Judge and the District Court diligently endeavored to accommodate petitioner's requests—granting his motion for an extension of time to decide whether to file pretrial motions, his motion for a continuance, and his motion for a new attorney and for time to allow this new attorney to become familiar with the case. Fortunately, we can abide by the limitations Congress im-

posed on the statutory rights at issue here without interpreting the Act in a manner that would trap trial courts.

For the reasons we explained above, neither subparagraph (D) nor subsection (h)(1) automatically excludes time granted to prepare pretrial motions. This conclusion does not lay a "trap for trial judges" because it limits (in a way the statute requires) only automatic exclusions. In considering any request for delay, whether the exclusion of time will be automatic or not, trial judges always have to devote time to assessing whether the reasons for the delay are justified, given both the statutory and constitutional requirement of speedy trials. Placing these reasons in the record does not add an appreciable burden on these judges. Neither are district courts forced to choose between rejecting a defendant's request for time to prepare pretrial motions and risking dismissal of the indictment if preparation time delays the trial. Instead, a district court may exclude preparation time under subsection (h)(7) if it grants a continuance for that purpose based on recorded findings "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Subsection (h)(7) provides "[m]uch of the Act's flexibility," *Zedner*, 547 U. S., at 498, and gives district courts "discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs," *id.*, at 499. The statutory scheme thus ensures that district courts may grant necessary pretrial motion preparation time without risking dismissal.

Still, the Government suggests that, in some cases, a district court may fail to make the findings necessary for an exclusion under subsection (h)(7), leading to a windfall gain for a defendant who induces delay beyond the Act's 70-day limit. Dismissal, however, need not represent a windfall. A district court may dismiss the charges *without prejudice*, thus allowing the Government to refile charges or reindict the defendant. 18 U. S. C. § 3162(a)(1). In ruling upon a motion to dismiss under the Act, a district court should con-

sider, among other factors, the party responsible for the delay. See *ibid.* ("In determining whether to dismiss the case with or without prejudice, the [district] court shall consider, among others, each of the following factors: the seriousness of the offense; *the facts and circumstances of the case which led to the dismissal;* and the impact of a reprosecution on the administration of this chapter and on the administration of justice" (emphasis added)); see also *United States* v. *Taylor*, 487 U. S. 326, 343 (1988) ("Seemingly ignored were the brevity of the delay and the consequential lack of prejudice to respondent, as well as respondent's own illicit contribution to the delay").

III

Based on this analysis, we hold that the 28-day period from September 7 through October 4, which includes the additional time granted by the District Court for pretrial motion preparation, is not automatically excludable under subsection (h)(1). The Court of Appeals did not address whether any portion of that time might have been otherwise excludable. Nor did the Government assert in its merits brief that another provision of the Act could support exclusion, presenting the argument that September 25 through October 4 could be excluded separately only in its brief in opposition to certiorari and during oral argument. We therefore do not consider whether any other exclusion would apply to all or part of the 28-day period. Instead, 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 GINSBURG, concurring.

In its brief in opposition to Bloate's petition for certiorari, the Government argued that the indictment against Bloate need not be dismissed even if, as the Court today holds, the additional time Bloate gained to prepare pretrial motions

does not qualify for automatic exclusion from the Speedy Trial Act's 70-day limit. I join the Court's opinion on the understanding that nothing in the opinion bars the Eighth Circuit from considering, on remand, the Government's argument that the indictment, and convictions under it, remain effective.

Bloate moved, on September 7, 2006, to extend the deadline for filing pretrial motions. The Magistrate Judge granted Bloate's request that same day, extending the deadline from September 13 to September 25. Having gained more time, Bloate decided that pretrial motions were unnecessary after all. Accordingly, on September 25, he filed a proposed waiver of his right to file such motions. On October 4, the Magistrate Judge accepted the waiver following a hearing at which the judge found the waiver knowing and voluntary. As urged by the Government, even if the clock continued to run from September 7,

> "it stopped on September 25, when [Bloate] filed a pleading advising the court that he had decided not to raise any issues by pretrial motion. . . . Although not labeled a pretrial motion, that pleading required a hearing . . . and served essentially as a motion for leave to waive the right to file pretrial motions. . . . The [Speedy Trial Act] clock thus stopped . . . under 18 U. S. C. 3161(h)(1)[(D)] until the matter was heard by the court on October 4, 2006." Brief in Opposition 11–12.

By the Government's measure, excluding the time from September 25 through October 4 would reduce the number of days that count for Speedy Trial Act purposes to 65, 5 days short of the Act's 70-day threshold. See *id.*, at 12.

The Government reiterated this contention at oral argument. "[E]ven if the time starting on September 7th [i]s not excluded," counsel said, Bloate's September 25 filing "trigger[ed] its own exclusion of time" until the hearing held by the Magistrate Judge on October 4. Tr. of Oral Arg. 34.

See also *id.*, at 45–48. This argument, the Government suggested, "should be taken into account on any remand." *Id.*, at 34. See also *id.*, at 43–44 ("[I]f the Court thinks that an incorrect amount of time . . . was . . . excluded, . . . the appropriate thing to do in that circumstance would be for the Court to leave that open on remand, assuming that it's . . . preserved.").

The question presented and the parties' merits briefs address only whether time granted to prepare pretrial motions is automatically excludable under 18 U. S. C. § 3161(h)(1) (2006 ed. and Supp. II). As a court of ultimate review, we are not positioned to determine, in the first instance, and without full briefing and argument, whether the time from September 25 to October 4 should be excluded from the Speedy Trial Act calculation. But the Eighth Circuit is not similarly restricted. It may therefore consider, after full airing, the Government's argument that Bloate's indictment should not be dismissed despite his success in this Court.*

JUSTICE ALITO, with whom JUSTICE BREYER joins, dissenting.

The Court's interpretation of the Speedy Trial Act of 1974 (Speedy Trial Act or Act) is not supported by the text or the legislative history of the Act. Under the Court's interpretation, petitioner may be entitled to dismissal of the charges against him because his attorney persuaded a Magistrate Judge to give the defense additional time to prepare pretrial motions and thus delayed the commencement of his trial. The Speedy Trial Act does not require this strange result.

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*Bloate contends that the Government forfeited this argument by earlier failing to urge exclusion of this discrete period in the District Court or the Eighth Circuit. Reply to Brief in Opposition 10–11; Tr. of Oral Arg. 58. Whether the Government preserved this issue and, if it did not, whether any exception to the ordinary forfeiture principle applies are matters within the Eighth Circuit's ken.

I

A

The Speedy Trial Act generally requires a federal criminal trial to begin within 70 days after the defendant is charged or appears in court, but certain pretrial periods are excluded from the 70-day calculation. See 18 U. S. C. § 3161 (2006 ed. and Supp. II). The provision at issue here, § 3161(h)(1), automatically excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight specific types of delay that are set out in subparagraphs (A)–(H). Eight Courts of Appeals have held [1]—and I agree—that a delay resulting from the granting of a defense request for additional time to complete pretrial motions is a delay "resulting from [a] proceedin[g] concerning the defendant" and is thus automatically excluded under § 3161(h)(1).

B

In considering the question presented here, I begin with the general language of § 3161(h)(1), which, as noted, automatically excludes any "delay resulting from other proceedings concerning the defendant." (For convenience, I will refer to this portion of the statute as "subsection (h)(1).") The delay resulting from the granting of a defense request for an extension of time to complete pretrial motions falls comfortably within the terms of subsection (h)(1).

First, the granting of such a defense request qualifies as a "proceeding." A court proceeding is defined as "[a]n act or step that is part of a larger action" and "an act done by the

[1] *United States* v. *Oberoi*, 547 F. 3d 436, 448–451 (CA2 2008); 534 F. 3d 893, 897–898 (CA8 2008) (case below); *United States* v. *Mejia*, 82 F. 3d 1032, 1035–1036 (CA11 1996); *United States* v. *Lewis*, 980 F. 2d 555, 564 (CA9 1992); *United States* v. *Mobile Materials, Inc.*, 871 F. 2d 902, 912–915 *(per curiam)*, opinion supplemented on other grounds on rehearing, 881 F. 2d 866 (CA10 1989) *(per curiam)*; *United States* v. *Wilson*, 835 F. 2d 1440, 1444–1445 (CADC 1987); *United States* v. *Tibboel*, 753 F. 2d 608, 610 (CA7 1985); *United States* v. *Jodoin*, 672 F. 2d 232, 237–239 (CA1 1982).

authority or direction of the court." Black's Law Dictionary 1324 (9th ed. 2009) (hereinafter Black's Law) (internal quotation marks omitted). The granting of a defense request for an extension of time to prepare pretrial motions constitutes both "[a]n act or step that is part of [the] larger [criminal case]" and "an act done by the authority or direction of the court." Second, delay caused by the granting of such an extension is obviously "delay resulting from" the successful extension request.

C

The Court does not contend that the granting of a defense request for time to prepare pretrial motions falls outside the plain meaning of subsection (h)(1), but the Court holds that § 3161(h)(1)(D) (2006 ed., Supp. II) (hereinafter subparagraph (D)) narrows the meaning of subsection (h)(1). Subparagraph (D) sets out one of the eight categories of delay that are specifically identified as "delay resulting from [a] proceedin[g] concerning the defendant," but as noted, this list is preceded by the phrase "including but not limited to." "When 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded." 2A N. Singer & J. Singer, Sutherland on Statutes and Statutory Construction § 47.23, p. 417 (7th ed. 2007). See *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U. S. 569, 577 (1994); *Herb's Welding, Inc.* v. *Gray*, 470 U. S. 414, 423, n. 9 (1985); *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 100 (1941); Black's Law 831 ("The participle *including* typically indicates a partial list"). And the inclusion in subsection (h)(1) of the additional phrase "not limited to" reinforces this point. See *United States* v. *Tibboel*, 753 F. 2d 608, 610 (CA7 1985).

Because subparagraph (D) follows the phrase "including but not limited to," the Court has a steep hurdle to clear to show that this subparagraph narrows the meaning of the general rule set out in subsection (h)(1). The Court's argument is that subparagraph (D) governs not just "delay result-

ing from any pretrial motion," § 3161(h)(1)(D), but also delay resulting from "proceedings *involving* pretrial motions," *ante*, at 205, and n. 9 (emphasis added), and "all pretrial motion-*related* delay," *ante*, at 206 (emphasis added). In the Court's view, Congress has expressed a judgment that if a period of "pretrial motion-related delay" does not fall within the express terms of subparagraph (D), then it is "excludable only when accompanied by district court findings." *Ibid.* Thus, since subparagraph (D) does not provide for the exclusion of delay resulting from the granting of a defense request for more time to prepare pretrial motions, the Court holds that such delay is not excluded from the 70-day calculation. The Court's analysis, however, is not supported by either the text of subparagraph (D) or the circumstances that gave rise to its enactment.

D

The Court's argument would have some force if it were clear that the delay involved in the present case is "delay resulting from [a] pretrial motion." § 3161(h)(1)(D). It could then be argued that subparagraph (D) reflects a legislative decision to provide for the automatic exclusion of delay resulting from a pretrial motion only if that delay occurs during the period "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *Ibid.*[2]

It is at least doubtful, however, that the delay at issue in the present case is delay "resulting from [a] pretrial motion." *Ibid.*[3] The phrase "resulting from" means "proceed[ing],

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[2] The Court hints that the defense's request for additional time might itself be a pretrial motion within the meaning of § 3161(h)(1)(D). Neither party relies on this theory. The Court of Appeals found that "Bloate never filed a pretrial motion." 534 F. 3d, at 897.

[3] This much is clear from the Court's own language. The Court writes that "although the period of delay the Government seeks to exclude in this case *results from a proceeding* governed by subparagraph (D), that period precedes the first day upon which Congress specified that *such*

spring[ing], or aris[ing] as a consequence, effect, or conclusion." Webster's Third New International Dictionary 1937 (1971). Thus, delay "resulting from" a pretrial motion is delay that occurs as a consequence of such a motion. The type of delay involved in the present case, however, does not occur as a consequence of a pretrial motion; rather, it occurs as a consequence of the court's granting of a defense request for an extension of time. The particular facts of this case sharply illustrate this point because petitioner never filed pretrial motions.[4]

It is telling that the Court elides the statutory phrase "resulting from" and substitutes a broader phrase of its own invention. The Court writes that "pretrial motion-related delay" that is not captured by subparagraph (D)'s text is "excludable only when accompanied by district court findings." *Ante*, at 206. See also *ibid.* ("Subparagraph (D) does not subject all pretrial motion-related delay to automatic exclusion"); *ante*, at 207 ("[O]nly pretrial motion-related delay 'from the filing' of a motion to the hearing or disposition point specified in the provision is automatically excludable"); *ante*, at 212, n. 14 ("pretrial motion-related delay"); *ibid.* ("pretrial motion-related proceedings"). But "pretrial motion-related delay" is not necessarily delay "resulting from" a pretrial motion.

Even if it is possible to read the statutory phrase "resulting from" to mean "related [to]," see *ante*, at 206, there are at least two good reasons for rejecting that reading. First, because subparagraphs (A)–(H) are meant to be illustrative, those provisions should not be interpreted as limiting unless

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delay may be automatically excluded." *Ante*, at 207 (emphasis added). Subparagraph (D) does not speak of delay that results from a "proceeding," *ibid.*; subsection (h)(1), however, does, see § 3161(h)(1) (2006 ed. and Supp. II).

[4] But even if petitioner had filed pretrial motions, the delay resulting from the granting of the extension still would not be delay "resulting from" the motion.

the limitation is very clear. Second, the Court's interpretation of subparagraph (D) leads to an anomalous result that Congress is unlikely to have intended. Because subparagraph (D) automatically excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," it is clear that subparagraph (D) automatically excludes delay resulting from the granting of *a prosecution request* for additional time to respond to a defendant's pretrial motions. The Court has not identified any reason why Congress might have wanted to provide an automatic exclusion for delay resulting from the granting of a prosecution request for additional time to respond to a defendant's pretrial motions but not for delay resulting from the granting of the defendant's request for additional time to prepare those very motions. Since there is nothing to suggest that Congress intended such a strange, asymmetrical result, the Court's strained interpretation of subparagraph (D) should be rejected. Subparagraph (D) should be read to apply only to delay "resulting from [a] pretrial motion," and because the delay involved here does not result from a pretrial motion, there is no basis for inferring that subparagraph (D) was meant to take that delay outside the scope of the general language of subsection (h)(1).

E

The circumstances surrounding the adoption of the current version of subparagraph (D) in 1979 point to the same conclusion. That language was adopted to *expand* the reach of the exclusion. As originally enacted, the relevant provision of the Act excluded only "delay resulting from hearings on pretrial motions," 88 Stat. 2078, and courts had interpreted this language literally to exclude only time actually devoted to hearings. See, *e. g.*, *United States* v. *Lewis*, 425 F. Supp. 1166, 1171 (Conn. 1977); *United States* v. *Conroy*, No. 77 Cr. 670 (CHT), 1978 U. S. Dist. LEXIS 19296, *4 (SDNY, Mar. 1,

1978); accord, *United States* v. *Simms*, 508 F. Supp. 1175, 1177–1178 (WD La. 1979). The House Judiciary Committee stated that the language on which the Court now relies was added "to avoid an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing." H. R. Rep. No. 96–390, p. 10 (1979). Similarly, the Senate Judiciary Committee expressed frustration with what it described as the courts' "unnecessarily inflexible" interpretation of the Act. S. Rep. No. 96–212, p. 18 (1979) (hereinafter S. Rep.). See also *id.*, at 26. Congress' expansion of the exclusion set out in subparagraph (D) so that it covers, not just the time taken up by hearings on pretrial motions, but all delay resulting from pretrial motions does not support the inference that Congress wanted the type of delay at issue in this case to count against the Speedy Trial Act's 70-day period.

Contending that Congress could have been more explicit if it "wished courts to exclude pretrial motion preparation time automatically," the Court cites as an example a legislative proposal by the Department of Justice to provide for an express exclusion of preparation time for pretrial motions. *Ante*, at 211, n. 13. The Court is correct that Congress did not choose this option, but the Court's argument misses the point.

First, it bears emphasizing that the Justice Department's proposal did not simply exclude delay caused by a successful defense request for additional time to prepare pretrial motions. That is the delay in dispute here. Instead, the Justice Department's proposal excluded all "delay resulting from the preparation and service of pretrial motions and responses and from hearings thereon." S. 961, 96th Cong., 1st Sess., § 5 (1979) (as introduced).

Second, the reasons given in the Senate Judiciary Committee Report for rejecting the Justice Department proposal do not apply when the delay results from the granting of a defense request such as the one at issue here. The Senate

Committee Report noted that, when excluding time for the preparation of pretrial motions, it will be "quite difficult to determine a point at which preparation actually begins." S. Rep., at 34. But when a district court grants a defendant's motion for time to prepare pretrial motions, that concern is not present. See *United States* v. *Oberoi*, 547 F. 3d 436, 451 (CA2 2008) (noting the importance of the District Court's expressly stopping the speedy trial clock to create a point from which to measure preparation time).[5] In addition, the Committee expressed the view that "in routine cases, preparation time should not be excluded." S. Rep., at 34. However, cases in which a district court accedes to a defense request for more than the usual amount of time for the completion of pretrial motions are by definition not routine.

Third, there is no reason why Congress should have supposed that the language that Congress and the President enacted did not reach delay resulting from the granting of the defendant's request for additional time to prepare pretrial motions. As explained above, *supra*, at 219, 220–222, such delay results from a proceeding concerning the defendant and is not delay resulting from a pretrial motion.

In sum, (1) delay resulting from the granting of a defense motion for an extension of time to file pretrial motions falls within the general rule, set out in subsection (h)(1), that automatically excludes delay "resulting from [a] proceedin[g] concerning the defendant"; (2) the subparagraphs that follow, which are preceded by the phrase "including but not limited to," are illustrative, not exhaustive; and (3) neither the text

[5] The Court incorrectly states that the Courts of Appeals that have read subsection (h)(1) to exclude preparation time for pretrial motions have found it necessary to "impos[e] extratextual limitations on excludability," namely, that the trial judge must expressly grant an extension of the time for the completion of pretrial motions. See *ante*, at 213. This requirement, however, springs from the language of subsection (h)(1), for it is the granting of the extension request that constitutes the "proceedin[g] concerning the defendant" that triggers the exclusion under subsection (h)(1). See *supra*, at 218.

of subparagraph (D) nor the circumstances surrounding its adoption clearly reflect an intent to narrow the scope of the general rule set out in subsection (h)(1). For these reasons, I would hold that the delay in question here is automatically excluded.

II

The Court advances several additional arguments in support of its analysis, but none is persuasive.

A

Two of these arguments hinge on the Court's unjustifiably broad interpretation of subparagraph (D), *i. e.*, that it covers all "pretrial motion-related delay." First, the Court reasons that under a contrary interpretation, "a court could extend by weeks or months, without any finding that the incursion on the Act's timeliness guarantee is justified, the entire portion of a criminal proceeding for which the Act sets a default limit of 70 days." *Ante*, at 210. But the same is true of the Court's interpretation. Even under an interpretation that automatically excludes delay "*only* from the time a motion is filed through the hearing or disposition point," *ante*, at 206, there appears to be no reason why a district court may not, in its discretion, extend the automatically excludable period of time under subparagraph (D) through any number of means, including: (1) extending the time to file an opposition brief, see Tr. of Oral Arg. 4; (2) extending the time to file a reply brief, see *United States* v. *Latham*, No. 82–CR–890, 1983 U. S. Dist. LEXIS 14219, *1–*3 (ND Ill., Aug. 30, 1983); (3) allowing prehearing supplemental briefing, see *United States* v. *Faison*, No. 06–4332, 2007 U. S. App. LEXIS 23298, *6–*9 (CA4, Oct. 4, 2007) *(per curiam);* (4) deferring the hearing on a pretrial motion, see *United States* v. *Riley*, 991 F. 2d 120, 124 (CA4 1993); (5) conducting multiple hearings on the motion or motions, *e. g.*, *United States* v. *Boone*, Crim. No. 00–3 (JBS), 2002 WL 31761364, *20, n. 12 (D NJ, Dec. 6, 2002); or (6) allowing the filing of

posthearing submissions, see *Henderson* v. *United States*, 476 U. S. 321, 324 (1986). Indeed, in *Henderson* we held that 295 days of delay resulting from the filing of a pretrial motion were automatically excludable, and we noted that "Congress was aware of the breadth of the exclusion it was enacting." *Id.*, at 327.[6] The Court's suggestion that its interpretation is necessary to protect the Act's "timeliness guarantee," *ante*, at 210, is illusory.

For a similar reason, the Court's interpretation is not supported by the rule of construction that "'[a] specific provision' . . . 'controls one[s] of more general application.'" *Ante*, at 207. This rule applies only when specific and general statutory provisions conflict. *National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.*, 534 U. S. 327, 335–336 (2002). Here, there is no conflict because, even if subparagraph (D) governs "delay resulting from any pretrial motion," there is no basis for concluding that subparagraph (D) governs all "pretrial motion-related delay."

B

Contrary to the Court's claim, its decision is not supported by § 3161(h)(7)(A) (2006 ed., Supp. II), which excludes "delay resulting from a continuance" provided that the trial court "sets forth, in the record of the case, . . . its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." One might argue that a trial judge grants a "continuance" whenever the judge postpones a trial date, even when the postponement is the direct result of a proceeding that falls squarely within the language of subsection (h)(1) or one of the specific illustrative

[6] That the delay in *Henderson* was delay "resulting from [a] pretrial motion," § 3161(h)(1)(D); see 476 U. S., at 322, 330–331, distinguishes that case from the scenario here, where no pretrial motion has been filed and the delay in question "results from a proceeding" that, in the Court's view, is "governed by subparagraph (D)." *Ante*, at 207. Cf. *ante*, at 212, n. 14.

subparagraphs that follow. See § 3161(h)(7)(A) ("[a]ny period of delay resulting from a continuance"). But such a reading would render subsection (h)(1) and subparagraphs (A)–(H) meaningless if it were true that all continuances required ends-of-justice findings. The plain terms of subsection (h)(1) refute this interpretation and show that Congress intended for some periods of delay that postpone the trial date to be automatically excludable.

Viewed in their proper context, subsection (h)(1) and its subparagraphs carve out exceptions to the general rule of § 3161(h)(7)(A) requiring ends-of-justice findings for continuances. See, *e. g.*, *United States* v. *Aviles-Alvarez*, 868 F. 2d 1108, 1112 (CA9 1989) (noting that when pretrial motion delay is automatically excluded, the District Court "does not have to make findings or consider any factors"). A period of delay resulting from a continuance requires ends-of-justice findings only when it does not also fall within the subset of automatically excludable delay defined by subsection (h)(1). When a period of delay resulting from a continuance does qualify for automatic exclusion, a court ordinarily should give effect to the more specific provisions of subsection (h)(1). See *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407 (1991) ("A specific provision controls one of more general application"). Cf. *ante*, at 207–208.

For the reasons discussed, see *supra*, at 218–219, the granting of a defense request for an extension of time to complete pretrial motions is a "proceedin[g] concerning the defendant" within the meaning of subsection (h)(1). It may also qualify as a "continuance" within the meaning of § 3161(h)(7)(A) if the delay has the effect of pushing back the trial date. But a court should resolve the conflict by applying the more specific provision of subsection (h)(1). This result is faithful not only to the plain language of the statute, but to its overall structure of providing a class of exceptions to the general rule that continuances require ends-of-justice findings. And it also recognizes that when defense counsel

argues that adequate pretrial motions cannot be completed within the time allotted and is granted an extension, it will generally go without saying that the judge has considered whether the ends of justice will be served by the extension, and requiring the judge to recite this determination on the record will often be an empty exercise.

III

The Court does not believe that its interpretation will have serious adverse consequences because trial judges, by making the on-the-record findings required under § 3161(h)(7) (2006 ed., Supp. II), may exclude delay resulting from the granting of a defense request for an extension to file pretrial motions. As this case illustrates, however, there will be cases in which busy district judges and magistrate judges will fail to make those findings, and indictments will be dismissed for no good reason. If requiring findings on the record were cost and risk free, Congress would not have provided for the automatic exclusion of the broad category of delay encompassed by § 3161(h)(1) (2006 ed. and Supp. II).

The Court notes that, when a Speedy Trial Act violation occurs because of delay caused by an extension requested by the defense, a district court may dismiss the indictment without prejudice. But as we have recognized, even when a new indictment may be obtained, "substantial delay well may make reprosecution . . . unlikely." *United States* v. *Taylor*, 487 U. S. 326, 342 (1988). Dismissal without prejudice is "not a toothless sanction," *ibid.*, and it is particularly inappropriate when brought about by a criminal defendant's own delay.

IV

For these reasons, I would hold that the delay at issue in this case is automatically excluded for Speedy Trial Act purposes, and I would therefore affirm the decision of the Court of Appeals.

Syllabus

MILAVETZ, GALLOP & MILAVETZ, P. A., ET AL. *v.* UNITED STATES

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

No. 08–1119. Argued December 1, 2009—Decided March 8, 2010*

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended the Bankruptcy Code to define a class of bankruptcy professionals termed "debt relief agenc[ies]." 11 U. S. C. § 101(12A). That class includes, with limited exceptions, "any person who provides any bankruptcy assistance to an assisted person . . . for . . . payment . . . , or who is a bankruptcy petition preparer." *Ibid.* The BAPCPA prohibits such professionals from "advis[ing] an assisted person . . . to incur more debt in contemplation of [filing for bankruptcy] . . . ." § 526(a)(4). It also requires them to disclose in their advertisements for certain services that the services are with respect to or may involve bankruptcy relief, §§ 528(a)(3), (b)(2)(A), and to identify themselves as debt relief agencies, §§ 528(a)(4), (b)(2)(B).

The plaintiffs in this litigation—a law firm and others (collectively Milavetz)—filed a preenforcement suit seeking declaratory relief, arguing that Milavetz is not bound by the BAPCPA's debt-relief-agency provisions and therefore can freely advise clients to incur additional debt and need not make the requisite disclosures in its advertisements. The District Court found that "debt relief agency" does not include attorneys and that §§ 526 and 528 are unconstitutional as applied to that class of professionals. The Eighth Circuit affirmed in part and reversed in part, rejecting the District Court's conclusion that attorneys are not "debt relief agenc[ies]"; upholding application of § 528's disclosure requirements to attorneys; and finding § 526(a)(4) unconstitutional because it broadly prohibits debt relief agencies from advising assisted persons to incur *any* additional debt in contemplation of bankruptcy even when the advice constitutes prudent prebankruptcy planning.

Held:

1. Attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the BAPCPA. By definition, "bankruptcy assistance" includes several services commonly performed by attorneys, *e. g.*, providing "advice, counsel, [or] document preparation,"

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*Together with No. 08–1225, *United States* v. *Milavetz, Gallop & Milavetz, P. A., et al.*, also on certiorari to the same court.

§ 101(4A). Moreover, in enumerating specific exceptions to the debt-relief-agency definition, Congress indicated no intent to exclude attorneys. See §§ 101(12A)(A)–(E). Milavetz relies on the fact that § 101(12A) does not expressly include attorneys in advocating a narrower understanding. On that reading, only a bankruptcy petition preparer would qualify—an implausibility given that a "debt relief agency" is "any person who provides any bankruptcy assistance . . . or who is a bankruptcy petition preparer," *ibid.* Milavetz's other arguments for excluding attorneys are also unpersuasive. Pp. 235–239.

2. Section 526(a)(4) prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose. The statute's language, together with its purpose, makes a narrow reading of § 526(a)(4) the natural one. *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472, supports this conclusion. The Court in that case read now-repealed § 96(d), which authorized reexamination of a debtor's attorney's fees payment "in contemplation of the filing of a petition," to require that the portended bankruptcy have "induce[d]" the transfer at issue, *id.*, at 477, understanding inducement to engender suspicion of abuse. The Court identified the "controlling question" as "whether the thought of bankruptcy was the impelling cause of the transaction," *ibid.* Given the substantial similarities between §§ 96(d) and 526(a)(4), the controlling question under the latter is likewise whether the impelling reason for "advis[ing] an assisted person . . . to incur more debt" was the prospect of filing for bankruptcy. In practice, advice impelled by the prospect of filing will generally consist of advice to "load up" on debt with the expectation of obtaining its discharge. The statutory context supports the conclusion that § 526(a)(4)'s prohibition primarily targets this type of conduct. The Court rejects Milavetz's arguments for a more expansive view of § 526(a)(4) and its claim that the provision, narrowly construed, is impermissibly vague. Pp. 239–248.

3. Section 528's disclosure requirements are valid as applied to Milavetz. Consistent with Milavetz's characterization, the Court presumes that this is an as-applied challenge. Because § 528 is directed at misleading commercial speech and imposes only a disclosure requirement rather than an affirmative limitation on speech, the less exacting scrutiny set out in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, governs. There, the Court found that, while unjustified or unduly burdensome disclosure requirements offend the First Amendment, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*, at 651. Section 528's requirements share the essential features of the rule challenged

in *Zauderer*. The disclosures are intended to combat the problem of inherently misleading commercial advertisements, and they entail only an accurate statement of the advertiser's legal status and the character of the assistance provided. Moreover, they do not prevent debt relief agencies from conveying any additional information through their advertisements. *In re R. M. J.*, 455 U. S. 191, distinguished. Because § 528's requirements are "reasonably related" to the Government's interest in preventing consumer deception, the Court upholds those provisions as applied to Milavetz. Pp. 248–253.

541 F. 3d 785, affirmed in part, reversed in part, and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined, in which SCALIA, J., joined except for footnote 3, and in which THOMAS, J., joined except for Part III–C. SCALIA, J., *post*, p. 253, and THOMAS, J., *post*, p. 255, filed opinions concurring in part and concurring in the judgment.

G. Eric Brunstad, Jr., argued the cause for petitioners in No. 08–1119 and respondents in No. 08–1225. With him on the briefs were *Collin O'Connor Udell*, *Michael J. Newman*, *Joshua Richards*, and *Alan S. Milavetz*, *pro se*.

William M. Jay argued the cause for the United States in both cases. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Mark B. Stern*, *Ramona D. Elliott*, and *P. Matthew Sutko*.†

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to cor-

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†Briefs of *amici curiae* urging reversal in No. 08–1119 were filed for the American Bar Association by *Carolyn B. Lamm*, *Lisa Hill Fenning*, and *Craig Goldblatt;* and for the Commercial Law League of America by *William H. Schorling*.

Briefs of *amici curiae* were filed in both cases for the National Association of Consumer Bankruptcy Attorneys et al. by *Jonathan S. Massey*, *Barry S. Feigenbaum*, and *Julie Nepveu;* and for Public Good et al. by *Seth E. Mermin*.

rect perceived abuses of the bankruptcy system. Among the reform measures the Act implemented are a number of provisions that regulate the conduct of "debt relief agenc[ies]"—*i. e.*, professionals who provide bankruptcy assistance to consumer debtors. See 11 U. S. C. §§ 101(3), (12A). These consolidated cases present the threshold question whether attorneys are debt relief agencies when they provide qualifying services. Because we agree with the Court of Appeals that they are, we must also consider whether the Act's provisions governing debt relief agencies' advice to clients, § 526(a)(4), and requiring them to make certain disclosures in their advertisements, §§ 528(a) and (b)(2), violate the First Amendment rights of attorneys. Concluding that the Court of Appeals construed § 526(a)(4) too expansively, we reverse its judgment that the provision is unconstitutionally overbroad. Like the Court of Appeals, we uphold § 528's disclosure requirements as applied in these consolidated cases.

I

In order to improve bankruptcy law and practice, Congress enacted through the BAPCPA a number of provisions directed at the conduct of bankruptcy professionals. Some of these measures apply to the broad class of bankruptcy professionals termed "debt relief agenc[ies]." That category includes, with limited exceptions, "any person who provides any bankruptcy assistance to an assisted person in return for . . . payment . . . , or who is a bankruptcy petition preparer." § 101(12A).[1] "Bankruptcy assistance" refers to goods or ser-

[1] Congress excluded from the definition of "debt relief agency" any "officer, director, employee, or agent of a person who provides [bankruptcy] assistance"; any "nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986"; "a creditor of [an] assisted person" who is helping that person "to restructure any debt owed . . . to the creditor"; "a depository institution"; or "an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity." §§ 101(12A)(A)–(E).

vices "provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding" in bankruptcy. § 101(4A). An "assisted person" is someone with limited nonexempt property whose debts consist primarily of consumer debts. § 101(3). The BAPCPA subjects debt relief agencies to a number of restrictions and requirements, as set forth in §§ 526, 527, and 528. As relevant here, § 526(a) establishes several rules of professional conduct for persons qualifying as debt relief agencies. Among them, § 526(a)(4) states that a debt relief agency shall not "advise an assisted person . . . to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title."

Section 528 requires qualifying professionals to include certain disclosures in their advertisements. Subsection (a) provides that debt relief agencies must "clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public . . . that the services or benefits are with respect to bankruptcy relief under this title." § 528(a)(3). It also requires them to include the following, "or a substantially similar statement": "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." § 528(a)(4). Subsection (b) requires essentially the same disclosures in advertisements "indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." § 528(b)(2). Debt relief agencies advertising such services must disclose "that the assistance may involve bankruptcy relief," § 528(b)(2)(A), and must

identify themselves as "debt relief agenc[ies]" as required by § 528(a)(4), see § 528(b)(2)(B).

II

The plaintiffs in this litigation—the law firm Milavetz, Gallop & Milavetz, P. A.; the firm's president, Robert J. Milavetz; a bankruptcy attorney at the firm, Barbara Nilva Nevin; and two of the firm's clients (collectively Milavetz)—filed a pre-enforcement suit in Federal District Court seeking declaratory relief with respect to the Act's debt-relief-agency provisions. Milavetz asked the court to hold that it is not bound by these provisions and thus may freely advise clients to incur additional debt and need not identify itself as a debt relief agency in its advertisements.

Milavetz first argued that attorneys are not "debt relief agenc[ies]" as that term is used in the BAPCPA. In the alternative, Milavetz sought a judgment that §§ 526(a)(4) and 528(a)(4) and (b)(2) are unconstitutional as applied to attorneys. The District Court agreed with Milavetz that the term "debt relief agency" does not include attorneys, App. to Pet. for Cert. in No. 08–1119, p. A–15, but only after finding that §§ 526 and 528—provisions expressly applicable only to debt relief agencies—are unconstitutional as applied to this class of professionals.

The Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. 541 F. 3d 785 (2008). Relying on the Act's plain language, the court unanimously rejected the District Court's conclusion that attorneys are not "debt relief agenc[ies]" within the meaning of the Act. The Court of Appeals also parted ways with the District Court concerning the constitutionality of § 528. Concluding that the disclosures are intended to prevent consumer deception and are "reasonably related" to that interest, the court upheld the application of § 528's disclosure requirements to attorneys. *Id.*, at 796–797 (citing *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985)).

A majority of the Eighth Circuit panel, however, agreed with the District Court that § 526(a)(4) is invalid. Determining that § 526(a)(4) "broadly prohibits a debt relief agency from advising an assisted person . . . to incur *any* additional debt when the assisted person is contemplating bankruptcy," even when that advice constitutes prudent pre-bankruptcy planning not intended to abuse the bankruptcy laws, 541 F. 3d, at 793, the majority held that § 526(a)(4) could not withstand either strict or intermediate scrutiny. In dissent, Judge Colloton argued that § 526(a)(4) should be read narrowly to prevent only advice to abuse the bankruptcy system, noting that this construction would avoid most constitutional difficulties. See *id.*, at 799 (opinion concurring in part and dissenting in part).

In light of a conflict among the Courts of Appeals,[2] we granted certiorari to resolve the question of § 526(a)(4)'s scope. 556 U. S. 1281 (2009). We also agreed to consider the threshold question whether attorneys who provide bankruptcy assistance to assisted persons are "debt relief agenc[ies]" within the meaning of § 101(12A) and the related question whether § 528's disclosure requirements are constitutional.

III

A

We first consider whether the term "debt relief agency" includes attorneys. If it does not, we need not reach the other questions presented, as §§ 526 and 528 govern only the conduct of debt relief agencies, and Milavetz challenges the validity of those provisions based on their application to attorneys. The Government contends that "debt relief

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[2] Compare 541 F. 3d 785, 794 (CA8 2008) (case below), with *Hersh* v. *United States ex rel. Mukasey*, 553 F. 3d 743, 761, 764 (CA5 2008) (holding that § 526(a)(4) can be narrowly construed to prohibit only advice to abuse or manipulate the bankruptcy system and that, so construed, it is constitutional).

agency" plainly includes attorneys, while Milavetz urges that it does not. We conclude that the Government has the better view.

As already noted, a debt relief agency is "any person who provides any bankruptcy assistance to an assisted person" in return for payment. § 101(12A). By definition, "bankruptcy assistance" includes several services commonly performed by attorneys. Indeed, some forms of bankruptcy assistance, including the "provi[sion of] legal representation with respect to a case or proceeding," § 101(4A), may be provided only by attorneys. See § 110(e)(2) (prohibiting bankruptcy petition preparers from providing legal advice). Moreover, in enumerating specific exceptions to the definition of debt relief agency, Congress gave no indication that it intended to exclude attorneys. See §§ 101(12A)(A)–(E). Thus, as the Government contends, the statutory text clearly indicates that attorneys are debt relief agencies when they provide qualifying services to assisted persons.[3]

In advocating a narrower understanding of that term, Milavetz relies heavily on the fact that § 101(12A) does not expressly include attorneys. That omission stands in contrast, it argues, to the provision's explicit inclusion of "bankruptcy petition preparer[s]"—a category of professionals that excludes attorneys and their staff, see § 110(a)(1). But Mila-

[3] Although reliance on legislative history is unnecessary in light of the statute's unambiguous language, we note the support that record provides for the Government's reading. Statements in a Report of the House Committee on the Judiciary regarding the Act's purpose indicate concern with abusive practices undertaken by attorneys as well as other bankruptcy professionals. See, *e. g.*, H. R. Rep. No. 109–31, pt. 1, p. 5 (2005) (hereinafter H. R. Rep.). And the legislative record elsewhere documents misconduct by attorneys. See, *e. g.*, Hearings on H. R. 3150 before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 105th Cong., 2d Sess., pt. III, p. 95 (1998) (hereinafter 1998 Hearings). (While the 1998 Hearings preceded the BAPCPA's enactment by several years, they form part of the record cited by the 2005 House Report. See H. R. Rep., at 7.)

vetz does not contend, nor could it credibly, that only professionals expressly included in the definition are debt relief agencies. On that reading, no professional other than a bankruptcy petition preparer would qualify—an implausible reading given that the statute defines "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person . . . *or* who is a bankruptcy petition preparer." § 101(12A) (emphasis added). The provision's silence regarding attorneys thus avails Milavetz little. Cf. *Heintz* v. *Jenkins*, 514 U. S. 291, 294 (1995) (holding that "debt collector" as used in the Fair Debt Collection Practices Act, 15 U. S. C. § 1692a(6), includes attorneys notwithstanding the definition's lack of an express reference to lawyers or litigation).

Milavetz's other arguments for excluding attorneys similarly fail to persuade us to disregard the statute's plain language. Milavetz contends that 11 U. S. C. § 526(d)(2)'s instruction that §§ 526, 527, and 528 should not "be deemed to limit or curtail" States' authority to "determine and enforce qualifications for the practice of law" counsels against reading "debt relief agency" to include attorneys, as the surest way to protect the States' role in regulating the legal profession is to make the BAPCPA's professional conduct rules inapplicable to lawyers. We find that § 526(d)(2) supports the opposite conclusion, as Congress would have had no reason to enact that provision if the debt-relief-agency provisions did not apply to attorneys. Milavetz's broader claim that reading § 101(12A) to include attorneys impermissibly trenches on an area of traditional state regulation also lacks merit. Congress and the bankruptcy courts have long overseen aspects of attorney conduct in this area of substantial federal concern. See, *e. g.*, *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472, 477–479 (1933) (finding broad authorization in former § 96(d) (1934 ed.) (repealed 1978) for courts to examine the reasonableness of a debtor's prepetition attorney's fees).

Milavetz next argues that § 101(12A)'s exception for any "officer, director, employee, or agent of a person who provides" bankruptcy assistance is revealing for its failure to include "partners." § 101(12A)(A). In light of that omission, it contends, treating attorneys as debt relief agencies will obligate entire law firms to comply with §§ 526, 527, and 528 based on the conduct of a single partner, while the agents and employees of debt relief agencies not typically organized as partnerships are shielded from those requirements. Given that the partnership structure is not unique to law firms, however, it is unclear why the exclusion would be revealing of Congress' intent only with respect to attorneys. In any event, partnerships are themselves "person[s]" under the BAPCPA, see § 101(41), and can qualify as "debt relief agenc[ies]" when they meet the criteria set forth in § 101(12A). Moreover, a partnership's employees and agents are exempted from § 101(12A) in the same way as the employees and agents of other organizations. To the extent that partners may be subject to the debt-relief-agency provisions by association, that result is consistent with the joint responsibilities that typically flow from the partnership structure, cf. *Strang* v. *Bradner*, 114 U. S. 555, 561 (1885). Accordingly, we decline to attribute the significance Milavetz suggests to § 101(12A)(A)'s failure to include partners among the exempted actors.[4]

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[4] Reviving an argument that Milavetz abandoned, *amici* contend that § 527(b) undermines the Government's reading of § 101(12A) because it requires a debt relief agency to inform an assisted person of his right to hire an attorney, and it would be nonsensical to require attorneys to provide such notice. See Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 34. This argument fails on its own terms. Even if § 101(12A) excluded attorneys, as Milavetz contends, § 527(b) would still produce the result of which its *amici* complain, as that provision also requires a debt relief agency to inform assisted persons that they "'can get help in some localities from a bankruptcy petition preparer,'" and there is no question that bankruptcy petition preparers are debt relief agencies and thus subject to that requirement. It is in any

All else failing, Milavetz urges that the canon of constitutional avoidance requires us to read "debt relief agency" to exclude attorneys in order to forestall serious doubts as to the validity of §§ 526 and 528. The avoidance canon, however, "is a tool for choosing between competing plausible interpretations of a statutory text." *Clark* v. *Martinez*, 543 U. S. 371, 381 (2005). In applying that tool, we will consider only those constructions of a statute that are "'fairly possible.'" *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78 (1982). For the reasons already discussed, the text and statutory context of § 101(12A) foreclose a reading of "debt relief agency" that excludes attorneys. Accordingly, we hold that attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies within the meaning of the BAPCPA.

B

Having concluded that attorneys are debt relief agencies when they provide qualifying services, we next address the scope and validity of § 526(a)(4). Characterizing the statute as a broad, content-based restriction on attorney-client communications that is not adequately tailored to constrain only speech the Government has a substantial interest in restricting, the Eighth Circuit found the rule substantially overbroad. 541 F. 3d, at 793–794, and n. 10. For the reasons that follow, we reject that conclusion.

Section 526(a)(4) prohibits a debt relief agency from "advis[ing] an assisted person" either "to incur more debt in contemplation of" filing for bankruptcy "or to pay an attorney or bankruptcy petition preparer fee or charge for services" performed in preparation for filing. Only the first of these prohibitions is at issue. In debating the correctness of the Court of Appeals' decision, the parties first dispute

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event not absurd to require debt relief agencies—whether attorneys or bankruptcy petition preparers—to inform prospective clients of their options for obtaining bankruptcy-assistance services.

the provision's scope. The Court of Appeals concluded that "§ 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person . . . to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Id.*, at 793. Under that reading, an attorney is prohibited from providing all manner of "beneficial advice—even if the advice could help the assisted person avoid filing for bankruptcy altogether." *Ibid.*

Agreeing with the Court of Appeals, Milavetz contends that § 526(a)(4) prohibits a debt relief agency from advising a client to incur any new debt while considering whether to file for bankruptcy. Construing the provision more broadly still, Milavetz contends that § 526(a)(4) forbids not only affirmative advice but also any discussion of the advantages, disadvantages, or legality of incurring more debt. Like the panel majority's, Milavetz's reading rests primarily on its view that the ordinary meaning of the phrase "in contemplation of" bankruptcy encompasses any advice given to a debtor with the awareness that he might soon file for bankruptcy, even if the advice seeks to obviate the need to file. Milavetz also maintains that if § 526(a)(4) were construed more narrowly, as urged by the Government and the dissent below, it would be so vague as to inevitably chill some protected speech.

The Government continues to advocate a narrower construction of the statute, urging that Milavetz's reading is untenable and that its vagueness concerns are misplaced. The Government contends that § 526(a)(4)'s restriction on advice to incur more debt "in contemplation of" bankruptcy is most naturally read to forbid only advice to undertake actions to abuse the bankruptcy system. Focusing first on the provision's text, the Government points to sources indicating that the phrase "in contemplation of" bankruptcy has long been, and continues to be, associated with abusive conduct. For instance, Black's Law Dictionary 336 (8th ed. 2004) (hereinafter Black's) defines "contemplation of bankruptcy" as "[t]he

thought of declaring bankruptcy because of the inability to continue current financial operations, often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding." Use of the phrase by Members of Congress illustrates that traditional coupling. See, *e. g.*, S. Rep. No. 98–65, p. 9 (1983) (discussing the practice of "'loading up' [on debt] in contemplation of bankruptcy"); Report of the Commission on the Bankruptcy Laws of the United States, H. R. Doc. No. 93–137, pt. I, p. 11 (1973) ("[T]he most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge"). The Government also points to early American and English judicial decisions to corroborate its contention that "in contemplation of" bankruptcy signifies abusive conduct. See, *e. g.*, *In re Pearce*, 19 F. Cas. 50, 53 (No. 10,873) (D Vt. 1843); *Morgan* v. *Brundrett*, 5 B. & Ad. 288, 296–297, 110 Eng. Rep. 798, 801 (K. B. 1833) (Parke, J.).

To bolster its textual claim, the Government relies on § 526(a)(4)'s immediate context. According to the Government, the other three subsections of § 526(a) are designed to protect debtors from abusive practices by debt relief agencies: Section 526(a)(1) requires debt relief agencies to perform all promised services; § 526(a)(2) prohibits them from making or advising debtors to make false or misleading statements in bankruptcy; and § 526(a)(3) prohibits them from misleading debtors regarding the costs or benefits of bankruptcy. When § 526(a)(4) is read in context of these debtor-protective provisions, the Government argues, construing it to prevent debt relief agencies from giving advice that is beneficial to both debtors and their creditors seems particularly nonsensical.

Finally, the Government contends that the BAPCPA's remedies for violations of § 526(a)(4) similarly corroborate its narrow reading. Section 526(c) provides remedies for a debt

relief agency's violation of § 526, § 527, or § 528. Among the actions authorized, a debtor may sue the attorney for remittal of fees, actual damages, and reasonable attorney's fees and costs; a state attorney general may sue for a resident's actual damages; and a court finding intentional abuse may impose an appropriate civil penalty. § 526(c). The Government also relies on the Fifth Circuit's decision in *Hersh* v. *United States ex rel. Mukasey*, 553 F. 3d 743 (2008), and Judge Colloton's dissent below for the observation that "Congress's emphasis on actual damages for violations of section 526(a)(4) strongly suggests that Congress viewed that section as aimed at advice to debtors which if followed would have a significant risk of harming the debtor." *Id.*, at 760; see 541 F. 3d, at 800 (opinion concurring in part and dissenting in part). By contrast, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." *Ibid.;* see *Hersh*, 553 F. 3d, at 760.

Milavetz contends that the Government's sources actually undermine its claim that the phrase "in contemplation of" bankruptcy necessarily refers to abusive conduct. Specifically, Milavetz argues that these authorities illustrate that "in contemplation of" bankruptcy is a neutral phrase that only implies abusive conduct when attached to an additional, proscriptive term. As Black's states, the phrase is "*often coupled with* action designed to thwart the distribution of assets" in bankruptcy, Black's 336 (emphasis added), but it carries no independent connotation of abuse. In support of that conclusion, Milavetz relies on our decision in *Pender*, 289 U. S. 472, contending that we construed "in contemplation of" bankruptcy in that case to describe "conduct with a view to a probable bankruptcy filing and nothing more." Brief for Milavetz 61.

After reviewing these competing claims, we are persuaded that a narrower reading of § 526(a)(4) is sounder, although we do not adopt precisely the view the Government advo-

cates. The Government's sources show that the phrase "in contemplation of" bankruptcy has so commonly been associated with abusive conduct that it may readily be understood to prefigure abuse. As used in § 526(a)(4), however, we think the phrase refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system. In light of our decision in *Pender*, and in context of other sections of the Code, we conclude that § 526(a)(4) prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose.

Pender addressed the meaning of former § 96(d), which authorized reexamination of a debtor's payment of attorney's fees "in contemplation of the filing of a petition." Recognizing "'the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him,'" 289 U. S., at 478 (quoting *In re Wood & Henderson*, 210 U. S. 246, 253 (1908)), we read "in contemplation of . . . filing" in that context to require that the portended bankruptcy have "induce[d]" the transfer at issue, 289 U. S., at 477, understanding inducement to engender suspicion of abuse. In so construing the statute, we identified the "controlling question" as "whether the thought of bankruptcy was the impelling cause of the transaction." *Ibid.* Given the substantial similarities between §§ 96(d) and 526(a)(4), we think the controlling question under the latter provision is likewise whether the impelling reason for "advis[ing] an assisted person . . . to incur more debt" was the prospect of filing for bankruptcy.

To be sure, there are relevant differences between the provision at issue in *Pender* and the one now under review. Most notably, the inquiry in *Pender* was as to payments made on the eve of bankruptcy, whereas § 526(a)(4) regards advice to incur additional debts. Consistent with that difference, under § 96(d) a finding that a payment was made "in contemplation of" filing resolved only a threshold inquiry triggering further review of the reasonableness of the pay-

ment; the finding thus supported an inference of abuse but did not conclusively establish it. By contrast, advice to incur more debt because of bankruptcy, as prohibited by § 526(a)(4), will generally consist of advice to "load up" on debt with the expectation of obtaining its discharge—*i. e.*, conduct that is abusive *per se*.

The statutory context supports the conclusion that § 526(a)(4)'s prohibition primarily targets this type of abuse. Code provisions predating the BAPCPA already sought to prevent the practice of loading up on debt prior to filing. Section 523(a)(2), for instance, addressed the attendant risk of manipulation by preventing the discharge of debts obtained by false pretenses and making debts for purchases of luxury goods or services presumptively nondischargeable. See §§ 523(a)(2)(A) and (C) (2000 ed.). The BAPCPA increased the risk of such abuse, however, by providing a new mechanism for determining a debtor's ability to repay. Pursuant to the "means tes[t]," § 707(b)(2)(D) (2006 ed.), a debtor's petition for Chapter 7 relief is presumed abusive (and may therefore be dismissed or converted to a structured repayment plan under Chapter 13) if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See §§ 707(b)(2)(A)(i)–(iv). The test promotes debtor accountability but also enhances incentives to incur additional debt prior to filing, as payments on secured debts offset a debtor's monthly income under the formula. Other amendments effected by the BAPCPA reflect a concern with this practice. For instance, Congress amended § 523(a)(2) to expand the exceptions to discharge by lowering the threshold amount of new debt a debtor must assume to trigger the presumption of abuse under § 523(a)(2)(C), and it extended the relevant prefiling window. See § 310, 119 Stat. 84. In context, § 526(a)(4) is best understood to provide an additional safeguard against the practice of loading up on debt prior to filing.

The Government's contextual arguments provide additional support for the view that § 526(a)(4) was meant to prevent this type of conduct. The companion rules of professional conduct in §§ 526(a)(1)–(3) and the remedies for their violation in § 526(c) indicate that Congress was concerned with actions that threaten to harm debtors or creditors. Unlike the reasonable financial advice the Eighth Circuit's broad reading would proscribe, advice to incur more debt because of bankruptcy presents a substantial risk of injury to both debtors and creditors. See *Hersh*, 553 F. 3d, at 760–761. Specifically, the incurrence of such debt stands to harm a debtor if his prepetition conduct leads a court to hold his debts nondischargeable, see § 523(a)(2), convert his case to another chapter, or dismiss it altogether, see § 707(b), thereby defeating his effort to obtain bankruptcy relief. If a debt, although manipulatively incurred, is not timely identified as abusive and therefore is discharged, creditors will suffer harm as a result of the discharge and the consequent dilution of the bankruptcy estate. By contrast, the prudent advice that the Eighth Circuit's view of the statute forbids would likely benefit both debtors and creditors and at the very least should cause no harm. See *id.*, at 760; 541 F. 3d, at 800 (Colloton, J., concurring in part and dissenting in part). For all of these reasons, we conclude that § 526(a)(4) prohibits a debt relief agency only from advising an assisted person to incur more debt when the impelling reason for the advice is the anticipation of bankruptcy.

That "[n]o other solution yields as sensible a" result further persuades us of the correctness of this narrow reading. *United States* v. *Granderson*, 511 U. S. 39, 55 (1994). It would make scant sense to prevent attorneys and other debt relief agencies from advising individuals thinking of filing for bankruptcy about options that would be beneficial to both those individuals and their creditors. That construction serves none of the purposes of the Bankruptcy Code or the amendments enacted through the BAPCPA. Milavetz itself

acknowledges that its expansive view of § 526(a)(4) would produce absurd results; that is one of its bases for arguing that "debt relief agency" should be construed to exclude attorneys. Because the language and context of § 526(a)(4) evidence a more targeted purpose, we can avoid the absurdity of which Milavetz complains without reaching the result it advocates.

For the same reason, we reject Milavetz's suggestion that § 526(a)(4) broadly prohibits debt relief agencies from discussing covered subjects instead of merely proscribing affirmative advice to undertake a particular action. Section 526(a)(4) by its terms prevents debt relief agencies only from "advis[ing]" assisted persons "to incur" more debt. Covered professionals remain free to "tal[k] fully and candidly *about* the incurrence of debt in contemplation of filing a bankruptcy case." Brief for Milavetz 73. Section 526(a)(4) requires professionals only to avoid instructing or encouraging assisted persons to take on more debt in that circumstance. Cf. ABA Model Rule of Professional Conduct 1.2(d) (2009) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"). Even if the statute were not clear in this regard, we would reach the same conclusion about its scope because the inhibition of frank discussion serves no conceivable purpose within the statutory scheme. Cf. *Johnson* v. *United States*, 529 U. S. 694, 706, n. 9 (2000).[5]

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[5] If read as Milavetz advocates, § 526(a)(4) would seriously undermine the attorney-client relationship. Earlier this Term, we acknowledged the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion. See *Mohawk Industries*,

Finally, we reject Milavetz's contention that, narrowly construed, § 526(a)(4) is impermissibly vague. Milavetz urges that the concept of abusive prefiling conduct is too indefinite to withstand constitutional scrutiny and that uncertainty regarding the scope of the prohibition will chill protected speech. We disagree.

Under our reading of the statute, of course, the prohibited advice is not defined in terms of abusive prefiling conduct but rather the incurrence of additional debt when the impelling reason is the anticipation of bankruptcy. Even if the test depended upon the notion of abuse, however, Milavetz's claim would be fatally undermined by other provisions of the Bankruptcy Code, to which that concept is no stranger. As discussed above, the Code authorizes a bankruptcy court to decline to discharge fraudulent debts, see § 523(a)(2), or to dismiss a case or convert it to a case under another chapter if it finds that granting relief would constitute abuse, see § 707(b)(1). Attorneys and other professionals who give debtors bankruptcy advice must know of these provisions and their consequences for a debtor who in bad faith incurs additional debt prior to filing. Indeed, § 707(b)(4)(C) states that an attorney's signature on bankruptcy filings "shall constitute a certification that the attorney has" determined that the filing "does not constitute an abuse under [§ 707(b)(1)]." Against this backdrop, it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive prefiling conduct could chill attorney speech or inhibit the attorney-client relationship. Our construction of § 526(a)(4) to prevent only advice principally motivated by the prospect of bankruptcy further ensures that professionals cannot unknowingly run afoul of

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Inc. v. *Carpenter*, 558 U. S. 100, 108 (2009). Reiterating the significance of such dialogue, we note that § 526(a)(4), as narrowly construed, presents no impediment to "'full and frank'" discussions. *Ibid.* (quoting *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981)).

its proscription.[6] Because the scope of the prohibition is adequately defined, both on its own terms and by reference to the Code's other provisions, we reject Milavetz's vagueness claim.

As the foregoing shows, the language of the statute, together with other evidence of its purpose, makes this narrow reading of § 526(a)(4) not merely a plausible interpretation but the more natural one. Accordingly, we reject the Eighth Circuit's conclusion and hold that a debt relief agency violates § 526(a)(4) only when the impetus of the advice to incur more debt is the expectation of filing for bankruptcy and obtaining the attendant relief. Because our reading of the statute supplies a sufficient ground for reversing the Court of Appeals' decision, and because Milavetz challenges the constitutionality of the statute, as narrowed, only on vagueness grounds, we need not further consider whether the statute so construed withstands First Amendment scrutiny.

C

Finally, we address the validity of § 528's challenged disclosure requirements. Our first task in resolving this question is to determine the contours of Milavetz's claim. Although

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[6] The hypothetical questions Milavetz posits regarding the permissibility of advice to incur debt in certain circumstances, see Brief for Milavetz 48–51, are easily answered by reference to whether the expectation of filing for bankruptcy (and obtaining a discharge) impelled the advice. We emphasize that awareness of the possibility of bankruptcy is insufficient to trigger § 526(a)(4)'s prohibition. Instead, that provision proscribes only advice to incur more debt that is principally motivated by that likelihood. Thus, advice to refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor's interest rates or improve his ability to repay is not prohibited, as the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause. Advice to incur additional debt to buy groceries, pay medical bills, or make other purchases "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor," § 523(a)(2)(C)(ii)(II), is similarly permissible.

the nature of its challenge is not entirely clear from the briefing or decisions below, counsel for Milavetz insisted at oral argument that this is "not a facial challenge; it's an as-applied challenge." Tr. of Oral Arg. 26. We will approach the question consistent with Milavetz's characterization.[7]

We next consider the standard of scrutiny applicable to § 528's disclosure requirements. The parties agree, as do we, that the challenged provisions regulate only commercial speech. Milavetz contends that our decision in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), supplies the proper standard for reviewing these requirements. The Court in that case held that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny—that is, they must "directly advanc[e]" a substantial governmental interest and be "n[o] more extensive than is necessary to serve that interest." *Id.*, at 566. Contesting Milavetz's premise, the Government maintains that § 528 is directed at *misleading* commercial speech. For that reason, and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, the Government contends that the less exacting scrutiny described in *Zauderer* governs our review. We agree.

Zauderer addressed the validity of a rule of professional conduct that required attorneys who advertised contingency-fee services to disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs. Noting that First Amendment protection for commercial speech is justified in large part by the information's value to consumers, the Court concluded that an attorney's

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[7] In so doing, we note that our ability to evaluate § 528's validity as applied to Milavetz is constrained by the lack of a developed record. Because the parties have introduced no exhibits or other evidence to ground our analysis, we are guided in this preenforcement challenge only by Milavetz's status—*i. e.*, as a law firm or attorney—and its general claims about the nature of its advertisements.

constitutionally protected interest in *not* providing the required factual information is "minimal." 471 U. S., at 651. Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.*

The challenged provisions of § 528 share the essential features of the rule at issue in *Zauderer.* As in that case, § 528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information.

The same characteristics of § 528 that make it analogous to the rule in *Zauderer* serve to distinguish it from those at issue in *In re R. M. J.*, 455 U. S. 191 (1982), to which the Court applied the intermediate scrutiny of *Central Hudson.* The ethical rules addressed in *R. M. J.* prohibited attorneys from advertising their practice areas in terms other than those prescribed by the State Supreme Court and from announcing the courts in which they were admitted to practice. See 455 U. S., at 197–198. Finding that the restricted statements were not inherently misleading and that the State had failed to show that the appellant's advertisements were themselves likely to mislead consumers, see *id.*, at 205, the Court applied *Central Hudson*'s intermediate scrutiny and invalidated the restrictions as insufficiently tailored to any substantial state interest, 455 U. S., at 205–206. In so holding, the Court emphasized that States retain authority to regulate inherently misleading advertisements, particularly

through disclosure requirements, and it noted that advertisements for professional services pose a special risk of deception. See *id.*, at 203, 207.

Milavetz makes much of the fact that the Government in these consolidated cases has adduced no evidence that its advertisements are misleading. *Zauderer* forecloses that argument: "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" 471 U. S., at 652–653 (quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 391–392 (1965)). Evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost, see 1998 Hearings, pt. III, at 86, 90–94, is adequate to establish that the likelihood of deception in these cases "is hardly a speculative one," 471 U. S., at 652.

Milavetz alternatively argues that the term "debt relief agency" is confusing and misleading and that requiring its inclusion in advertisements cannot be "reasonably related" to the Government's interest in preventing consumer deception, as *Zauderer* requires. *Id.*, at 651. This contention amounts to little more than a preference on Milavetz's part for referring to itself as something other than a "debt relief agency"—*e. g.*, an attorney or a law firm. For several reasons, we conclude that this preference lacks any constitutional basis. First, Milavetz offers no evidence to support its claim that the label is confusing. Because § 528 by its terms applies only to debt relief agencies, the disclosures are necessarily accurate to that extent: Only debt relief agencies must identify themselves as such in their advertisements. This statement provides interested observers with pertinent information about the advertiser's services and client obligations.

Other information that Milavetz must or may include in its advertisements for bankruptcy-assistance services pro-

vides additional assurance that consumers will not misunderstand the term. The required statement that the advertiser "'help[s] people file for bankruptcy relief'" gives meaningful context to the term "debt relief agency." And Milavetz may further identify itself as a law firm or attorney. Section 528 also gives Milavetz flexibility to tailor the disclosures to its individual circumstances, as long as the resulting statements are "substantially similar" to the statutory examples. §§ 528(a)(4) and (b)(2)(B).

Finally, we reject Milavetz's argument that § 528 is not reasonably related to any governmental interest because it applies equally to attorneys who represent creditors, as Milavetz sometimes does. The required disclosures, Milavetz contends, would be counterfactual and misleading in that context. This claim is premised on an untenable reading of the statute. We think it evident from the definition of "assisted person"—which is stated in terms of the person's debts, see § 101(3)—and from the text and structure of the debt-relief-agency provisions in §§ 526, 527, and 528 that those provisions, including § 528's disclosure requirements, govern only professionals who offer bankruptcy-related services to consumer debtors. Section 528 is itself expressly concerned with advertisements pertaining to "bankruptcy assistance services," "the benefits of bankruptcy," "excessive debt, debt collection pressure, or inability to pay any consumer debt," §§ 528(a)(3) and (b)(2). Moreover, like the other debt-relief-agency provisions, that section is codified in a subchapter of the Bankruptcy Code entitled "debtor's duties and benefits." 11 U. S. C., ch. 5, subch. II. In context, reading § 528 to govern advertisements aimed at creditors would be as anomalous as the result of which Milavetz complains. Once again, we decline Milavetz's invitation to adopt a view of the statute that is contrary to its plain meaning and would produce an absurd result.

Because § 528's requirements that Milavetz identify itself as a debt relief agency and include certain information about

its bankruptcy-assistance and related services are "reasonably related to the [Government's] interest in preventing deception of consumers," *Zauderer*, 471 U. S., at 651, we uphold those provisions as applied to Milavetz.

IV

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit is affirmed as to §§ 101(12A) and 528 and reversed as to § 526(a)(4), and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I join the opinion of the Court, except for footnote 3, which notes that the legislative history supports what the statute unambiguously says. The Court first notes that statements in the Report of the House Committee on the Judiciary "indicate concern with abusive practices undertaken by attorneys." *Ante*, at 236, n. 3. Perhaps, but only the concern of the author of the Report. Such statements tell us nothing about what the statute means, since (1) we do not know that the members of the Committee read the Report, (2) it is almost certain that they did not vote on the Report (that is not the practice), and (3) even if they did read and vote on it, they were not, after all, those who made this law. The statute before us is a law because its text was approved by a majority vote of the House and the Senate, and was signed by the President. Even indulging the extravagant assumption that Members of the House other than members of its Committee on the Judiciary read the Report (and the further extravagant assumption that they agreed with it), the Members of the Senate could not possibly have read it, since it did not exist when the Senate passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. And the President surely had more important things to do.

The footnote's other source of legislative history is truly mystifying. For the proposition that "the legislative record elsewhere documents misconduct by attorneys" which was presumably the concern of *Congress*, the Court cites a reproduction of a tasteless advertisement that was (1) an attachment to the written statement of a *witness*, (2) in a hearing held seven years prior to this statute's passage, (3) before a Subcommittee of the House considering a *different* consumer bankruptcy reform bill that never passed.* "Elsewhere" indeed.

The Court acknowledges that nothing can be gained by this superfluous citation (it admits the footnote is "unnecessary in light of the statute's unambiguous language," *ante*, at 236, n. 3). But much can be lost. Our cases have said that legislative history is irrelevant when the statutory text is clear. See, *e. g.*, *United States* v. *Gonzales*, 520 U. S. 1, 6 (1997); *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992). The footnote advises conscientious attorneys that this is not true, and that they must spend time and their clients' treasure combing the annals of legislative history in *all* cases: to buttress their case where the statutory text is unambiguously in their favor; and to attack an unambiguous text that is against them. If legislative history is relevant to confirm that a clear text means what it says, it is presumably relevant to show that an apparently clear text does not mean what it seems to say. Even for those who believe in the legal fiction that committee reports reflect congressional intent, footnote 3 is a bridge too far.

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*The Court protests that the earlier hearing was "part of the record cited by the 2005 House Report," *ante*, at 236, n. 3. The page it cites, however, does nothing more than note that the earlier hearing took place, see H. R. Rep. No. 109–31, pt. 1, p. 7 (2005). Are we to believe that this brought to the attention of the Committee (much less of the whole Congress) an attachment to the testimony of one of the witnesses at that long-ago hearing? Of course not. That legislative history shows what "Congress" intended is a fiction requiring no support in reality.

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

I concur in the judgment and join all but Part III–C of the Court's opinion. I agree with the Court that 11 U. S. C. § 528's advertising disclosure requirements survive First Amendment scrutiny on the record before us. I write separately because different reasons lead me to that conclusion.

I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 522–523 (1996) (opinion concurring in part and concurring in judgment) (discussing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980)). In this case, the Court applies a still lower standard of scrutiny to review a law that compels the disclosure of commercial speech—*i. e.*, the rule articulated in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), that laws that require the disclosure of factual information in commercial advertising may be upheld so long as they are "reasonably related" to the government's interest in preventing consumer deception, *id.*, at 651.

I am skeptical of the premise on which *Zauderer* rests—that, in the commercial-speech context, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," *id.*, at 652, n. 14; see *id.*, at 650 (citing "material differences between disclosure requirements and outright prohibitions on speech"). We have refused in other contexts to attach any "constitutional significance" to the difference between regulations that compel protected speech and regulations that restrict it. See, *e. g.*, *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988). I see no reason why that difference should acquire constitutional significance merely because the regulations at issue involve commercial speech. See *Glickman*

v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 480–481 (1997) (Souter, J., dissenting) (arguing that "commercial speech is . . . subject to [this] First Amendment principle: that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny"); *id.*, at 504 (THOMAS, J., dissenting); cf. *United States* v. *United Foods, Inc.*, 533 U. S. 405, 419 (2001) (THOMAS, J., concurring) (stating that regulations that compel funding for commercial advertising "must be subjected to the most stringent First Amendment scrutiny").

Accordingly, I would be willing to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures.[1] Because no party asks us to do so here, however, I agree with the Court that the *Zauderer* standard governs our review of the challenge to § 528 brought by the Milavetz law firm and the other plaintiffs in this action (hereinafter Milavetz).

Yet even under *Zauderer*, we "have not presumptively endorsed" laws requiring the use of "government-scripted dis-

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[1] I have no quarrel with the principle that advertisements that are false or misleading, or that propose an illegal transaction, may be proscribed. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 520 (1996) (opinion concurring in part and concurring in judgment). Furthermore, I acknowledge this Court's longstanding assumption that a consumer-fraud regulation that compels the disclosure of certain factual information in advertisements may intrude less significantly on First Amendment interests than an outright prohibition on all advertisements that have the potential to mislead. See, *e. g.*, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976); *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651–652, n. 14 (1985); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796, n. 9 (1988); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 565 (1980). But even if that assumption is correct, I doubt that it justifies an entirely different standard of review for regulations that compel, rather than suppress, commercial speech.

claimers" in commercial advertising. See *Borgner* v. *Florida Bd. of Dentistry*, 537 U. S. 1080, 1082 (2002) (THOMAS, J., dissenting from denial of certiorari). *Zauderer* upheld the imposition of sanctions against an attorney under a rule of professional conduct that required advertisements for contingency-fee services to disclose that losing clients might be responsible for litigation fees and costs. See 471 U. S., at 650–653. Importantly, however, Zauderer's advertisement was found to be misleading on its face, and the regulation in that case did not mandate the specific form or text of the disclosure. *Ibid.* Thus, *Zauderer* does not stand for the proposition that the government can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake. In other words, a bare assertion by the government that a disclosure requirement is "intended" to prevent consumer deception, standing alone, is not sufficient to uphold the requirement as applied to all speech that falls within its sweep. See *ante*, at 250.

Instead, our precedents make clear that regulations aimed at false or misleading advertisements are permissible only where "the particular advertising is *inherently likely* to deceive or where the record indicates that a particular form or method of advertising has *in fact* been deceptive." *In re R. M. J.*, 455 U. S. 191, 202 (1982) (emphasis added); see *Zauderer*, *supra*, at 651 ("recogniz[ing] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment"). Therefore, a disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, possess these traits. See *R. M. J.*, *supra*, at 202; *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 143, 146–147 (1994).

I do not read the Court's opinion to hold otherwise. See *ante*, at 250. Accordingly, and with that understanding,

I turn to the question whether Milavetz's challenge to § 528's disclosure requirements survives *Zauderer* scrutiny on the record before us.

As the Court notes, the posture of Milavetz's challenge inhibits our review of its First Amendment claim. See *ante*, at 249, n. 7. Milavetz challenged § 528's constitutionality before the statute had ever been enforced against any of the firm's advertisements. Although Milavetz purports to challenge § 528 only "'as-applied'" to its own advertising, see *ante*, at 248–249, it did not introduce any evidence or exhibits to substantiate its claim. Thus, no court has seen a sampling of Milavetz's advertisements or even a declaration describing their contents and the media through which Milavetz seeks to transmit them. As a consequence, Milavetz's nominal "as-applied" challenge appears strikingly similar to a facial challenge.

We generally disapprove of such challenges because they "often rest on speculation" and require courts to engage in "'premature interpretation of statutes on the basis of factually barebones records.'" *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (quoting *Sabri* v. *United States*, 541 U. S. 600, 609 (2004)). Milavetz's claim invites the same problems. Milavetz alleges that § 528's disclosure requirements are unconstitutional as applied to its advertisements because its advertisements are not misleading and because the disclaimer required by § 528 will create, rather than reduce, confusion for Milavetz's potential clients. That may well be true. But because no record evidence of Milavetz's advertisements exists to guide our review, we can only speculate about the ways in which the statute might be applied to Milavetz's speech.

When forced to determine the constitutionality of a statute based solely on such conjecture, we will uphold the law if there is any "conceivabl[e]" manner in which it can be enforced consistent with the First Amendment. *Washington*

State Grange, supra, at 456. In this case, both parties agree that § 528's disclosure requirements cover, at a minimum, deceptive advertisements that promise to "'wipe out'" debts without mentioning bankruptcy as the means of accomplishing this goal.[2] Brief for Milavetz 82, 86; Brief for United States 60–62. As a result, there is at least one set of facts on which the statute could be constitutionally applied. Thus, I agree with the Court that Milavetz's challenge to § 528 must fail.

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[2] At oral argument, Milavetz's counsel declined to describe Milavetz's challenge to § 528 as a facial overbreadth claim, Tr. of Oral Arg. 25–26, and Milavetz's briefs make no such contention. But even viewing Milavetz's argument as a claim that § 528 is facially overbroad because it applies to nonmisleading advertisements for bankruptcy-related services, such an argument must fail. First, as noted, Milavetz acknowledges that § 528 can be constitutionally applied to deceptive bankruptcy-related advertisements and, thus, at least one "set of circumstances exists under which [§ 528] would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). Second, Milavetz does not attempt to argue that § 528's unconstitutional applications are "substantial" in number when judged in relation to this "plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449–450, and n. 6 (2008) (internal quotation marks omitted).

Syllabus

UNITED STUDENT AID FUNDS, INC. *v.* ESPINOSA

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

No. 08–1134. Argued December 1, 2009—Decided March 23, 2010

A plan proposed under Bankruptcy Code (Code) Chapter 13 becomes effective upon confirmation, see 11 U. S. C. §§ 1324, 1325, and will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires, see § 1328(a). A debtor may obtain a discharge of government-sponsored student loan debts only if failure to discharge that debt would impose an "undue hardship" on the debtor and his dependents. §§ 523(a)(8); 1328. Bankruptcy courts must make this undue hardship determination in an adversary proceeding, see Fed. Rule Bkrtcy. Proc. 7001(6), which the party seeking the determination must initiate by serving a summons and complaint on his adversary, see Rules 7003, 7004, 7008. Respondent Espinosa's plan proposed repaying the principal on his student loan debt and discharging the interest once the principal was repaid, but he did not initiate the required adversary proceeding. The student loan creditor, petitioner United, received notice of the plan from the Bankruptcy Court and did not object to the plan or to Espinosa's failure to initiate the required proceeding. The Bankruptcy Court confirmed the plan without holding such a proceeding or making a finding of undue hardship. Once Espinosa paid his student loan principal, the court discharged the interest. A few years later, the Department of Education sought to collect that interest. In response, Espinosa asked the court to enforce the confirmation order by directing the Department and United to cease any collection efforts. United opposed the motion and filed a cross-motion under Federal Rule of Civil Procedure 60(b)(4), seeking to set aside as void the confirmation order because the plan provision authorizing discharge of Espinosa's student loan interest was inconsistent with the Code and the Bankruptcy Rules, and because United's due process rights were violated when Espinosa failed to serve it with the required summons and complaint. Rejecting those arguments, the Bankruptcy Court granted Espinosa's motion in relevant part and denied the cross-motion. The District Court reversed, holding that United was denied due process when the confirmation order was issued without the required service. The Ninth Circuit ultimately reversed. It concluded that by confirming Espinosa's plan without first finding undue hardship in an adversary proceeding, the Bankruptcy Court at most committed a legal error that United might

have successfully appealed, but that such error was no basis for setting aside the order as void under Rule 60(b)(4). It also held that Espinosa's failure to serve United was not a basis upon which to declare the judgment void because United received actual notice of the plan and failed to object.

Held:

1. The Bankruptcy Court's confirmation order is not void under Rule 60(b)(4). Pp. 268–276.

(a) That order was a final judgment from which United did not appeal. Such finality ordinarily would "stan[d] in the way of challenging [the order's] enforceability," *Travelers Indemnity Co.* v. *Bailey*, 557 U. S. 137, 140. However, Rule 60(b)(4) allows a party to seek relief from a final judgment that "is void," but only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. United's alleged error falls in neither category. Conceding that the Bankruptcy Court had jurisdiction to enter the confirmation order, United contends that the judgment is void because United did not receive adequate notice of Espinosa's proposed discharge. Espinosa's failure to serve the summons and complaint as required by the Bankruptcy Rules deprived United of a right granted by a procedural rule. United could have timely objected to this deprivation and appealed from an adverse ruling on its objection. But this deprivation did not amount to a violation of due process, which requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314. Here, United's actual notice of the filing and contents of Espinosa's plan more than satisfied its due process rights. Thus, Espinosa's failure to make the required service does not entitle United to relief under Rule 60(b)(4). Pp. 268–272.

(b) Contrary to United's claim, the confirmation order is not void because the Bankruptcy Court lacked statutory authority to confirm Espinosa's plan absent an undue hardship finding under § 523(a)(8). Such failure is not on par with the jurisdictional and notice failings that define void judgments qualifying for Rule 60(b)(4) relief. Section 523(a)(8) does not limit a bankruptcy court's jurisdiction over student loan debts or impose requirements that, if violated, would result in a denial of due process. Instead, it requires a court to make a certain finding before confirming a student loan debt's discharge. That this requirement is "'self-executing,'" *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440, 450, means only that the bankruptcy court

must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation order void for Rule 60(b)(4) purposes. Although the Bankruptcy Court's failure to find undue hardship was a legal error, the confirmation order is enforceable and binding on United because it had actual notice of the error and failed to object or timely appeal. Pp. 273–276.

2. The Ninth Circuit erred in holding that bankruptcy courts must confirm a plan proposing the discharge of a student loan debt without an undue hardship determination in an adversary proceeding unless the creditor timely raises a specific objection. A Chapter 13 plan proposing such a discharge without the required determination violates §§ 1328(a)(2) and 523(a)(8). Failure to comply with this self-executing requirement should prevent confirmation even if the creditor fails to object, or to appear in the proceeding at all, since a bankruptcy court may confirm only a plan that, *inter alia*, complies with the "applicable provisions" of the Code. § 1325(a)(1). Neither the Code nor the Rules prevent parties from stipulating to the underlying facts of undue hardship or prevent the creditor from waiving service of a summons and complaint. Pp. 276–278.

3. Expanding the availability of Rule 60(b)(4) relief is not an appropriate prophylaxis for discouraging unscrupulous debtors from filing Chapter 13 plans proposing to dispense with the undue hardship requirement in hopes that the bankruptcy court will overlook the proposal and the creditor will not object. Such bad-faith efforts should be deterred by the specter of penalties that "[d]ebtors and their attorneys face . . . under various provisions for engaging in improper conduct in bankruptcy proceedings," *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 644. And Congress may enact additional provisions to address any difficulties should existing sanctions prove inadequate. Pp. 278–279.

553 F. 3d 1193, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.

Madeleine C. Wanslee argued the cause for petitioner. With her on the briefs were *Charles W. Wirken*, *Séan P. O'Brien*, *R. Ted Cruz*, *Allyson N. Ho*, and *David B. Boodt.*

Toby J. Heytens argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *William Kanter*, and *Peter R. Maier.*

Michael J. Meehan argued the cause for respondent. With him on the brief was *James L. Robinson, Jr.**

JUSTICE THOMAS delivered the opinion of the Court.

Under Chapter 13 of the Bankruptcy Code (Code), a debtor may obtain a discharge of certain government-sponsored student loan debts only if failure to discharge that debt would impose an "undue hardship" on the debtor and his dependents. 11 U. S. C. §§ 523(a)(8), 1328. The Federal Rules of Bankruptcy Procedure require bankruptcy courts to make this undue hardship determination in an adversary

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*Briefs of *amici curiae* urging reversal were filed for the State of Oregon et al. by *John R. Kroger,* Attorney General of Oregon, *Mary H. Williams,* Deputy Attorney General, *Jerome Lidz,* Solicitor General, and *Carolyn G. Wade,* Assistant Attorney General, by *Richard S. Gebelein,* Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Daniel S. Sullivan* of Alaska, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.,* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Rob McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; for the Educational Credit Management Corp. by *Julie K. Swedback;* for the International Municipal Lawyers Association by *Charles W. Thompson* and *Robert J. Kerwin;* and for the National Council of Higher Education Loan Programs, Inc., by *Steven L. Thomas.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Chapter Thirteen Trustees by *Henry E. Hildebrand III;* for the National Association of Consumer Bankruptcy Attorneys by *Henry J. Sommer;* for Richard Aaron et al. by *Richard Lieb;* and for G. Eric Brunstad, Jr., by *Mr. Brunstad, pro se,* and *Collin O'Connor Udell.*

Rafael I. Pardo, pro se, filed a brief as *amicus curiae.*

proceeding, see Rule 7001(6), which the party seeking the determination must initiate by serving a summons and complaint on his adversary, see Rules 7003, 7004, 7008. The debtor in this case filed a plan with the Bankruptcy Court that proposed to discharge a portion of his student loan debt, but he failed to initiate the adversary proceeding as required for such discharge. The creditor received notice of, but did not object to, the plan, and failed to file an appeal after the Bankruptcy Court subsequently confirmed the plan. Years later, the creditor filed a motion under Federal Rule of Civil Procedure 60(b)(4) asking the Bankruptcy Court to rule that its order confirming the plan was void because the order was issued in violation of the Code and Rules. We granted certiorari to resolve a disagreement among the Courts of Appeals as to whether an order that confirms the discharge of a student loan debt in the absence of an undue hardship finding or an adversary proceeding, or both, is a void judgment for Rule 60(b)(4) purposes.

I

Between 1988 and 1989, respondent Francisco Espinosa obtained four federally guaranteed student loans for a total principal amount of $13,250. In 1992, Espinosa filed a bankruptcy petition under Chapter 13. That chapter permits individual debtors to develop a plan to repay all or a portion of their debts over a period of time specified in the plan. See *Nobelman* v. *American Savings Bank*, 508 U. S. 324, 327 (1993); see also §§ 301(a), 1321; Fed. Rule Bkrtcy. Proc. 3015(b). A proposed bankruptcy plan becomes effective upon confirmation, see §§ 1324, 1325, and will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires, see § 1328(a).

Espinosa's plan listed his student loan debt as his only specific indebtedness. App. 15–18. The plan proposed to repay only the principal on that debt, stating that the remainder—the accrued interest—would be discharged once Espinosa repaid the principal. *Id.*, at 26.

As the Federal Rules of Bankruptcy Procedure require, the clerk of the Bankruptcy Court mailed notice and a copy of Espinosa's plan to petitioner United Student Aid Funds, Inc. (United), the creditor to whom Espinosa owed the student loan debt.[1] *Id.*, at 34; see Rules 2002(b), (g)(2), 3015(d). In boldface type immediately below the caption, the plan stated: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." *Id.*, at 23. The plan also noted the deadlines for filing a proof of claim or an objection to the plan. *Id.*, at 26–27.

United received this notice and, in response, filed a proof of claim for $17,832.15, an amount representing both the principal and the accrued interest on Espinosa's student loans. *Id.*, at 35. United did not object to the plan's proposed discharge of Espinosa's student loan interest without a determination of undue hardship, nor did it object to Espinosa's failure to initiate an adversary proceeding to determine the dischargeability of that debt.

In May 1993, the Bankruptcy Court confirmed Espinosa's plan without holding an adversary proceeding or making a finding of undue hardship. One month later, the Chapter 13 trustee mailed United a form notice stating that "[t]he amount of the claim filed differs from the amount listed for payment in the plan" and that "[y]our claim will be paid as listed in the plan." *Id.*, at 44. The form also apprised United that if United "wishe[d] to dispute the above stated treatment of the claim," it had the "responsibility" to notify the trustee within 30 days. *Ibid.* United did not respond to that notice.

In May 1997, Espinosa completed the payments on his student loan principal, as required by the plan. Shortly there-

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[1] United is a guaranty agency that administers the collection of federally guaranteed student loans in accordance with regulations promulgated by the United States Department of Education. See, *e. g.*, 34 CFR § 682.200 *et seq.* (2009).

after, the Bankruptcy Court discharged Espinosa's student loan interest.[2]

In 2000, the United States Department of Education commenced efforts to collect the unpaid interest on Espinosa's student loans.[3] In response, Espinosa filed a motion in 2003 asking the Bankruptcy Court to enforce its 1997 discharge order by directing the Department and United to cease all efforts to collect the unpaid interest on his student loan debt.

United opposed that motion and filed a cross-motion under Federal Rule of Civil Procedure 60(b)(4) seeking to set aside as void the Bankruptcy Court's 1993 order confirming Espinosa's plan. United made two arguments in support of its motion. First, United claimed that the provision of Espinosa's plan authorizing the discharge of his student loan interest was inconsistent with the Code, which requires a court to find undue hardship before discharging a student loan debt, §§ 523(a)(8), 1328(a), and with the Bankruptcy Rules, which require the court to make the undue hardship finding in an adversary proceeding, see Rule 7001(6). Second, United argued that its due process rights had been violated because Espinosa failed to serve it with the summons and complaint the Bankruptcy Rules require as a prerequisite to an adversarial proceeding. See Rules 7003, 7004, 7008.

The Bankruptcy Court rejected both arguments, granted Espinosa's motion in relevant part, denied United's cross-motion, and ordered all claimants to cease and desist their collection efforts. United sought review in the District Court, which reversed. That court held that United was de-

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[2] The discharge order contained an apparent clerical error that the courts below considered and addressed in adjudicating these proceedings. See n. 4, *infra*.

[3] After Espinosa completed payments under the plan, United assigned Espinosa's loans to the Department under a reinsurance agreement. After these proceedings began, United requested and received a recall of the loans from the Department. App. to Pet. for Cert. 63.

nied due process because the confirmation order was issued without service of the summons and complaint the Bankruptcy Rules require.

Espinosa appealed to the Court of Appeals for the Ninth Circuit, which issued an initial *per curiam* opinion remanding the case to the Bankruptcy Court to consider correcting an apparent clerical error in its discharge order.[4] 530 F. 3d 895, 899 (2008). The Bankruptcy Court corrected the error, after which the Court of Appeals resubmitted the case and reversed the judgment of the District Court. The Court of Appeals concluded that by confirming Espinosa's plan without first finding undue hardship in an adversary proceeding, the Bankruptcy Court at most committed a legal error that United might have successfully appealed, but that any such legal error was not a basis for setting aside the confirmation order as void under Rule 60(b). 553 F. 3d 1193, 1198–1202

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[4] The one-page discharge order contained a paragraph that purported to exclude "'any debt . . . for a student loan'" from the discharge. 530 F. 3d 895, 896 (CA9 2008). That provision appeared irreconcilable with the confirmation order, which contemplated the discharge of the interest on Espinosa's student loan debt. Suggesting that the Bankruptcy Court may have automatically generated the discharge order without tailoring it to the terms of the confirmation order, the Court of Appeals remanded the case to the Bankruptcy Court to consider amending the discharge order to conform to the confirmation order. *Id.*, at 899; see Fed. Rule Civ. Proc. 60(a) (authorizing a court to "correct a clerical mistake or a mistake arising from oversight or omission"). On remand, the Bankruptcy Court found that the text of its discharge order excepting Espinosa's student loan debt from discharge "was inserted because of a clerical mistake" and struck that language from the order. App. 48.

Although certain *amici* press the point, United has not challenged the substance of the Bankruptcy Court's amendment to the order or asked us to consider whether such amendment was proper under Rule 60(a). See Brief for Petitioner 42; Reply Brief for Petitioner 20. Thus, we express no view on those issues. See *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 97, n. 4 (1991) (noting that "we do not ordinarily address issues raised only by *amici*").

(2008).[5] In addition, the Court of Appeals held that although Espinosa's failure to serve United with a summons and complaint before seeking a discharge of his student loan debt violated the Bankruptcy Rules, this defect in service was not a basis upon which to declare the judgment void because United received actual notice of Espinosa's plan and failed to object. See *id.*, at 1202–1205.[6]

We granted certiorari. 557 U. S. 903 (2009).

II

A discharge under Chapter 13 "is broader than the discharge received in any other chapter." 8 Collier on Bankruptcy ¶ 1328.01, p. 1328–5 (rev. 15th ed. 2008). Chapter 13 nevertheless restricts or prohibits entirely the discharge of certain types of debts. As relevant here, § 1328(a) provides that when a debtor has completed the repayments required by a confirmed plan, a bankruptcy court "shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except," *inter alia*, "any debt . . . of the kind specified in [§ 523(a)(8)]." § 1328(a)(2). Section 523(a)(8), in turn, specifies certain student loan debts "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[7] As noted, the Bankruptcy Rules re-

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[5] In so doing, the Court of Appeals disagreed with two other Courts of Appeals. See *In re Mersmann*, 505 F. 3d 1033, 1047–1049 (CA10 2007) (en banc); *Whelton* v. *Educational Credit Management Corp.*, 432 F. 3d 150, 154 (CA2 2005).

[6] Three Courts of Appeals have reached the opposite conclusion on similar facts. See *In re Ruehle*, 412 F. 3d 679, 682–684 (CA6 2005); *In re Hanson*, 397 F. 3d 482, 486 (CA7 2005); *In re Banks*, 299 F. 3d 296, 302–303 (CA4 2002).

[7] Section 523 provides:

"(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

quire a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors. See *supra*, at 266. We must decide whether the Bankruptcy Court's order confirming Espinosa's plan is "void" under Federal Rule of Civil Procedure 60(b)(4) because the Bankruptcy Court confirmed the plan without complying with these requirements.[8]

A

The Bankruptcy Court's order confirming Espinosa's proposed plan was a final judgment, see *In re Optical Technologies, Inc.*, 425 F. 3d 1294, 1300 (CA11 2005), from which United did not appeal. Ordinarily, "the finality of [a] Bankruptcy Court's orders following the conclusion of direct review" would "stan[d] in the way of challenging [their] enforceability." *Travelers Indemnity Co.* v. *Bailey*, 557 U. S. 137, 140 (2009). Rule 60(b), however, provides an "exception to finality," *Gonzalez* v. *Crosby*, 545 U. S. 524, 529 (2005), that "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circum-

. . . . .

"(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

"(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

"(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

"(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual."

[8] Because United brought this action on a motion for relief from judgment under Rule 60(b)(4), our holding is confined to that provision. We express no view on the terms upon which other provisions of the Bankruptcy Rules may entitle a debtor or creditor to postjudgment relief.

stances," *id.*, at 528. Specifically, Rule 60(b)(4)—the provision under which United brought this motion—authorizes the court to relieve a party from a final judgment if "the judgment is void."[9]

A void judgment is a legal nullity. See Black's Law Dictionary 1822 (3d ed. 1933); see also *id.*, at 1709 (9th ed. 2009). Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. See Restatement (Second) of Judgments 22 (1980); see generally *id.*, § 12. The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule.

"A judgment is not void," for example, "simply because it is or may have been erroneous." *Hoult* v. *Hoult*, 57 F. 3d 1, 6 (CA1 1995); 12 J. Moore et al., Moore's Federal Practice § 60.44[1][a], pp. 60–150 to 60–151 (3d ed. 2007) (hereinafter Moore's). Similarly, a motion under Rule 60(b)(4) is not a substitute for a timely appeal. *Kocher* v. *Dow Chemical Co.*,

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[9] Subject to certain exceptions, Bankruptcy Rule 9024 makes Rule 60(b) applicable to Chapter 13 proceedings. One such exception provides that "a complaint to revoke an order confirming a plan may be filed only within the time allowed by" 11 U. S. C. § 1330. Fed. Rule Bkrtcy. Proc. 9024. Section 1330(a) imposes a 180-day time limit for a party to seek revocation of a confirmation order "procured by fraud." Courts of Appeals disagree as to whether a Rule 60(b)(4) motion should be treated as a "complaint to revoke" a plan subject to § 1330's time limit and substantive limitation to motions based on fraud. Compare *Whelton*, *supra*, at 156, n. 2, with *In re Fesq*, 153 F. 3d 113, 119, and n. 8 (CA3 1998). We need not settle that question, however, because the parties did not raise it in the courts below. And even under a theory that would treat United's Rule 60(b)(4) motion as a "complaint to revoke" the plan, United's failure to file its motion within § 1330(a)'s 180-day deadline and its failure to seek relief on the basis of fraud did not deprive those courts—and does not deprive us—of authority to consider the motion on the merits because those limitations are not jurisdictional. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515–516 (2006); *Reed Elsevier, Inc.* v. *Muchnick*, *ante*, at 167.

132 F. 3d 1225, 1229 (CA8 1997); see Moore's § 60.44[1][a], at 60–150. Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. See *United States* v. *Boch Oldsmobile, Inc.*, 909 F. 2d 657, 661 (CA1 1990); Moore's § 60.44[1][a]; 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2862, p. 331 (2d ed. 1995 and Supp. 2009); cf. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 376 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172 (1938). The error United alleges falls in neither category.

1

Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an "arguable basis" for jurisdiction. *Nemaizer* v. *Baker*, 793 F. 2d 58, 65 (CA2 1986); see, *e. g.*, *Boch Oldsmobile*, *supra*, at 661–662 ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void" (brackets and internal quotation marks omitted)).

This case presents no occasion to engage in such an "arguable basis" inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void because United does not argue that the Bankruptcy Court's error was jurisdictional. Reply Brief for Petitioner 5, 11. Such an argument would fail in any event. First, § 523(a)(8)'s statutory requirement that a bankruptcy court find undue hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction. See, *e. g.*, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515–516 (2006). Sec-

ond, the requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Bankruptcy Rules, see Rule 7001(6), which are "procedural rules adopted by the Court for the orderly transaction of its business" that are "not jurisdictional." *Kontrick* v. *Ryan*, 540 U. S. 443, 454 (2004) (internal quotation marks omitted).

2

Although United concedes that the Bankruptcy Court had jurisdiction to enter the order confirming Espinosa's plan, United contends that the court's judgment is void under Rule 60(b)(4) because United did not receive adequate notice of Espinosa's proposed discharge of his student loan interest. Specifically, United argues that the Bankruptcy Court violated United's due process rights by confirming Espinosa's plan despite Espinosa's failure to serve the summons and complaint the Bankruptcy Rules require for the commencement of an adversary proceeding. We disagree.

Espinosa's failure to serve United with a summons and complaint deprived United of a right granted by a procedural rule. See Fed. Rule Bkrtcy. Proc. 7004(b)(3). United could have timely objected to this deprivation and appealed from an adverse ruling on its objection. But this deprivation did not amount to a violation of United's constitutional right to due process. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950); see also *Jones* v. *Flowers*, 547 U. S. 220, 225 (2006) ("[D]ue process does not require actual notice . . . "). Here, United received *actual* notice of the filing and contents of Espinosa's plan. This more than satisfied United's due process rights. Accordingly, on these facts, Espinosa's failure to serve a summons and complaint does not entitle United to relief under Rule 60(b)(4).

B

Unable to demonstrate a jurisdictional error or a due process violation, United and the Government, as *amicus*, urge us to expand the universe of judgment defects that support Rule 60(b)(4) relief. Specifically, they contend that the Bankruptcy Court's confirmation order is void because the court lacked statutory authority to confirm Espinosa's plan absent a finding of undue hardship. In support of this contention, they cite the text of § 523(a)(8), which provides that student loan debts guaranteed by governmental units are not dischargeable "*unless*" a court finds undue hardship. (Emphasis added.) They argue that this language imposes a "'self-executing' limitation on the effect of a discharge order" that renders the order legally unenforceable, and thus void, if it is not satisfied. Brief for United States as *Amicus Curiae* 18 (quoting *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440, 450 (2004)); Brief for Petitioner 23–24. In addition, United cites § 1325(a)(1), which instructs bankruptcy courts to confirm only those plans that comply with "the . . . applicable provisions" of the Code. Reading these provisions in tandem, United argues that an order confirming a plan that purports to discharge a student loan debt without an undue hardship finding is "doubly beyond the court's authority and therefore void." *Id.*, at 13.

We are not persuaded that a failure to find undue hardship in accordance with § 523(a)(8) is on par with the jurisdictional and notice failings that define void judgments that qualify for relief under Rule 60(b)(4). As noted, § 523(a)(8) does not limit the bankruptcy court's jurisdiction over student loan debts.[10] *Supra*, at 272; see *Hood*, 541 U. S., at 447 (noting

[10] Sections 1328(a) and 523(a)(8) provide that student loan debt *is* dischargeable in a Chapter 13 proceeding if a court makes a finding of undue hardship. In contrast, other provisions in Chapter 13 provide that certain other debts are *not* dischargeable under *any* circumstances. See, *e. g.*, §§ 523(a)(1)(B), (C) (specified tax debts); § 523(a)(5) (domestic support obligations); § 523(a)(9) (debts "caused by" the debtor's unlawful operation of

that "[b]ankruptcy courts have exclusive jurisdiction over a debtor's property"). Nor does the provision impose requirements that, if violated, would result in a denial of due process. Instead, § 523(a)(8) requires a court to make a certain finding before confirming the discharge of a student loan debt. It is true, as we explained in *Hood*, that this requirement is "'self-executing.'" *Id.*, at 450.[11] But that means

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a vehicle while intoxicated). We express no view on the conditions under which an order confirming the discharge of one of these types of debt could be set aside as void.

[11] The Government suggests that § 523(a)(8)'s "self-executing" nature derives in part from the text of § 523(a), which states that "[a] discharge under section 727 . . . or 1328(b) of this title *does not discharge* an individual debtor from any debt," including the student loan debts specified in paragraph (8) (emphasis added); see Brief for United States as *Amicus Curiae* 18; see also Reply Brief for Petitioner 1–2. That is not what we concluded in *Hood* and, in this case, would be irrelevant in any event.

In *Hood*, we described as "'self-executing'" paragraph (8)'s instruction that student loan debt not be discharged "unless" an undue hardship determination is made. 541 U. S., at 450. The "does not discharge" language in § 523(a), which applies generally to every enumerated paragraph in that section—and to which we never referred in *Hood*—was not relevant to our analysis. That is evident from the authority we cited to support our description of § 523(a)(8)'s condition as "'self-executing.'" *E. g.*, *id.*, at 450 (citing S. Rep. No. 95–989, p. 79 (1978), which states that "*[p]aragraph (8)* . . . is intended to be self-executing" insofar as "the lender or institution is not required to file a complaint to determine the nondischargeability of any student loan" (emphasis added)).

In any event, the "does not discharge" language in § 523(a) is inapplicable to this case. Section 523(a) provides that "[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of [the Code] does not discharge an individual debtor from" the debts described in § 523(a)'s enumerated paragraphs. But Espinosa did not seek a discharge under "section 727, 1141, 1228(a), 1228(b), or 1328(b)." He sought a discharge under § 1328(a), which provides that, upon completion of a Chapter 13 plan, a bankruptcy court "shall grant the debtor a discharge of all debts provided for by the plan . . . , except any debt . . . of the kind specified in . . . paragraph . . . (5), *(8)*, or (9) of section 523(a)." (Emphasis added.) Section 1328(a) thus incorporates by reference *paragraph (8)* of § 523(a), including that para-

only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation order void for purposes of Rule 60(b)(4).[12]

Given the Code's clear and self-executing requirement for an undue hardship determination, the Bankruptcy Court's failure to find undue hardship before confirming Espinosa's plan was a legal error. See Part III, *infra*. But the order remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal.

United's response—that it had no obligation to object to Espinosa's plan until Espinosa served it with the summons and complaint the Bankruptcy Rules require, Brief for Petitioner 33—is unavailing. Rule 60(b)(4) does not provide a license for litigants to sleep on their rights. United had actual notice of the filing of Espinosa's plan, its contents, and the Bankruptcy Court's subsequent confirmation of the plan. In addition, United filed a proof of claim regarding Espinosa's student loan debt, thereby submitting itself to the Bankruptcy Court's jurisdiction with respect to that claim. See *Langenkamp* v. *Culp*, 498 U. S. 42, 44 (1990) *(per curiam)*. United therefore forfeited its arguments regarding the validity of service or the adequacy of the Bankruptcy Court's procedures by failing to raise a timely objection in that court.

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graph's self-executing requirement for an undue hardship determination, but does not incorporate the "does not discharge" text of § 523(a) itself.

[12] United relies on our decisions in *United States ex rel. Wilson* v. *Walker*, 109 U. S. 258 (1883), and *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348 (1920), to argue otherwise. Those authorities are not controlling because they predate Rule 60(b)(4)'s enactment and because we interpreted the statutes at issue in those cases as stripping courts of *jurisdiction*—either over the parties, *id.*, at 354–356, or the res, *Wilson*, *supra*, at 265–266—and United concedes that the statutory limit in this case is not jurisdictional. See *supra*, at 272.

Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute. Where, as here, a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief. We thus agree with the Court of Appeals that the Bankruptcy Court's confirmation order is not void.

III

In issuing its judgment, however, the Court of Appeals looked beyond the narrow question whether the Bankruptcy Court's order confirming Espinosa's plan was void under Rule 60(b)(4). It canvassed other bankruptcy court decisions within the Circuit that presented a different question—whether a bankruptcy court presented with a debtor's plan that proposes to discharge a student loan debt, in the absence of an adversary proceeding to determine undue hardship, should confirm the plan despite its failure to comply with the Code and Rules. The Court of Appeals noted that some Bankruptcy Courts had declined to confirm such plans "even when the creditor fail[ed] to object to the plan." 553 F. 3d, at 1205. The court disapproved that practice and overruled those cases, stating that bankruptcy courts *must* confirm a plan proposing the discharge of a student loan debt without a determination of undue hardship in an adversary proceeding unless the creditor timely raises a specific objection. *Ibid.* This, we think, was a step too far.

As Espinosa concedes, Tr. of Oral Arg. 31, 36, a Chapter 13 plan that proposes to discharge a student loan debt without a determination of undue hardship violates §§ 1328(a)(2) and 523(a)(8). Failure to comply with this self-executing requirement should prevent confirmation of the plan even if the creditor fails to object, or to appear in the proceeding

at all. See *Hood*, 541 U. S., at 450.[13] That is because § 1325(a)(1) instructs a bankruptcy court to confirm a plan only if the court finds, *inter alia*, that the plan complies with the "applicable provisions" of the Code. § 1325(a) (providing that a bankruptcy court "shall confirm a plan" if the plan "complies with the provisions of" Chapter 13 and with "other applicable provisions of this title"); see *Johnson* v. *Home State Bank*, 501 U. S. 78, 87 (1991); see also § 105(a) (authorizing bankruptcy courts to issue "any order, process, or judgment that is necessary or appropriate to carry out" the Code's provisions).[14] Thus, contrary to the Court of Appeals' assertion, the Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of §§ 1328(a)(2) and 523(a)(8).[15]

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[13] This is essential to preserve the distinction between Congress' treatment of student loan debts in § 523(a)(8) and debts listed elsewhere in § 523. Section 523(a)(8) renders student loan debt presumptively nondischargeable "unless" a determination of undue hardship is made. In contrast, the debts listed in § 523(c), which include certain debts obtained by fraud or "willful and malicious injury by the debtor," § 523(a)(6), are presumptively *dischargeable* "unless" the creditor requests a hearing to determine the debt's dischargeability. The Court of Appeals' approach would subject student loan debt to the same rules as the debts specified in § 523(c), notwithstanding the evident differences in the statutory framework for discharging the two types of debt.

[14] In other contexts, we have held that courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers to suit. See *Day* v. *McDonough*, 547 U. S. 198, 202, 209 (2006) (statute of limitations); *Granberry* v. *Greer*, 481 U. S. 129, 134 (1987) (habeas corpus petitioner's exhaustion of state remedies). Section 1325(a) does more than codify this principle; it *requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.

[15] Bankruptcy courts appear to be well aware of this statutory obligation. See, *e. g.*, *In re Mammel*, 221 B. R. 238, 239 (Bkrtcy. Ct. ND Iowa 1998) ("[W]hether or not an objection is presently lodged in this case, the Court retains the authority to review this plan and deny confirmation if it fails to comply with the confirmation standards of the Code").

We are mindful that conserving assets is an important concern in a bankruptcy proceeding. We thus assume that, in some cases, a debtor and creditor may agree that payment of a student loan debt will cause the debtor an undue hardship sufficient to justify discharge. In such a case, there is no reason that compliance with the undue hardship requirement should impose significant costs on the parties or materially delay confirmation of the plan. Neither the Code nor the Rules prevent the parties from stipulating to the underlying facts of undue hardship, and neither prevents the creditor from waiving service of a summons and complaint. See Fed. Rule Bkrtcy. Proc. 7004; Fed. Rule Civ. Proc. 4(k). But, to comply with § 523(a)(8)'s directive, the bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding. See *supra,* at 275.

IV

United argues that our failure to declare the Bankruptcy Court's order void will encourage unscrupulous debtors to abuse the Chapter 13 process by filing plans proposing to dispense with the undue hardship requirement in the hopes the bankruptcy court will overlook the proposal and the creditor will not object. In the event the objectionable provision is discovered, United claims, the debtor can withdraw the plan and file another without penalty.

We acknowledge the potential for bad-faith litigation tactics. But expanding the availability of relief under Rule 60(b)(4) is not an appropriate prophylaxis. As we stated in *Taylor* v. *Freeland & Kronz*, 503 U. S. 638 (1992), "[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings," *id.*, at 644; see Fed. Rule Bkrtcy. Proc. 9011. The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required. And to the extent existing sanc-

tions prove inadequate to this task, Congress may enact additional provisions to address the difficulties United predicts will follow our decision.

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The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

Syllabus

GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON

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

No. 08–304. Argued November 30, 2009—Decided March 30, 2010

The False Claims Act (FCA) authorizes both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent payment claims to the United States, but it bars *qui tam* actions based upon the public disclosure of allegations or transactions in, *inter alia*, "a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation." 31 U. S. C. § 3730(e)(4)(A). Here, federal contracts provided that two North Carolina counties would remediate areas damaged by flooding and that the Federal Government would shoulder most of the costs. Respondent Wilson, then an employee of a local government body involved in this effort, alerted local and federal officials about possible fraud. Both the county and the State issued reports identifying potential irregularities in the contracts' administration. Subsequently, Wilson filed a *qui tam* action, alleging, as relevant here, that petitioners, county conservation districts and local and federal officials, knowingly submitted false payment claims in violation of the FCA. The District Court ultimately dismissed for lack of jurisdiction because Wilson had not refuted that her action was based upon allegations publicly disclosed in the county and state reports, which it held were "administrative" reports under the FCA's public disclosure bar. In reversing, the Fourth Circuit concluded that only federal administrative reports may trigger the public disclosure bar.

Held: The reference to "administrative" reports, audits, and investigations in § 3730(e)(4)(A) encompasses disclosures made in state and local sources as well as federal sources. Pp. 285–302.

(a) Section 3730(e)(4)(A) specifies three categories of disclosures that can deprive federal courts of jurisdiction over *qui tam* suits. The language at issue is contained in the second category (Category 2). Pp. 285–286.

(b) The FCA's plain text does not limit "administrative" to federal sources. Because that term modifies "report, hearing, audit, or investigation" in a provision about "the public disclosure" of fraud on the United States, it is most naturally read to describe government agency

activities. But since "administrative" is not itself modified by "federal," there is no immediately apparent basis for excluding state and local agency activities from its ambit. The interpretive maxim *noscitur a sociis*—"a word may be known by the company it keeps," *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519—does not support the Fourth Circuit's more limited view. In Category 2, "administrative" is sandwiched between the federal terms "congressional" and "[GAO]," but these items are too few and too disparate to qualify as "a string of statutory terms," *S. D. Warren Co.* v. *Maine Bd. of Environmental Protection*, 547 U. S. 370, 378, or "items in a list," *Beecham* v. *United States*, 511 U. S. 368, 371, for *noscitur a sociis* purposes. Furthermore, evaluating "administrative" within the public disclosure bar's larger scheme, the Court observes that Category 2's terms are themselves sandwiched between phrases in Category 1 ("criminal, civil, or administrative hearing") and Category 3 ("news media") that are generally understood to include nonfederal sources; and Category 1 contains the same term ("administrative") that is at issue. Even if Category 1 were best understood to refer to adjudicative proceedings and Category 2 to legislative or quasi-legislative activities, state and local administrative sources of a legislative-type character are presumably just as public, and just as likely to put the Federal Government on notice of a potential fraud, as state and local administrative hearings of an adjudicatory character. The FCA's overall federal focus shines no light on the specific question whether the public disclosure bar extends to nonfederal contexts. And the fact that state legislative sources are not included in § 3730(e)(4)(A) carries no clear implications for the status of state administrative sources. Pp. 286–293.

(c) The legislative record does not support an exclusively federal interpretation of "administrative." The current § 3730(e)(4)(A) was enacted to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits. How exactly the statute came to strike this balance as it did is uncertain, as significant substantive changes—including the introduction of "administrative" in Category 2—were inserted without floor debate or other discussion, as "technical" amendments. Though Congress wanted "to strengthen the Government's hand in fighting false claims," *Cook County* v. *United States ex rel. Chandler*, 538 U. S. 119, 133–134, and encourage more *qui tam* suits, it also determined to bar a subset of those suits that it deemed unmeritorious or downright harmful. The question here concerns that subset's precise scope; and on that matter, the record is all but opaque, leaving no "evident legislative purpose" to guide resolution of this discrete issue, *United States* v. *Bornstein*, 423 U. S. 303, 310. Pp. 293–299.

(d) Respondent's additional arguments in favor of limiting "administrative" to federal sources are unpersuasive. Pp. 299–302.

528 F. 3d 292, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined, and in which SCALIA, J., joined except as to Part IV. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 302. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 303.

Christopher G. Browning, Jr., Solicitor General of North Carolina, argued the cause for petitioners. With him on the briefs were *Roy Cooper*, Attorney General, *Zeyland G. McKinney, Jr.*, and *Sean F. Perrin.*

Mark T. Hurt argued the cause for respondent. With him on the brief was *Brian S. McCoy.*

Douglas Hallward-Driemeier argued the cause for the United States as *amicus curiae* in support of respondent. With him on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Stewart*, *Douglas N. Letter*, and *Stephanie R. Marcus.**

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Pennsylvania et al. by *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, *Calvin R. Koons*, Senior Deputy Attorney General, and *John G. Knorr III*, Chief Deputy Attorney General, by *Richard S. Gebelein*, Acting Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Daniel S. Sullivan* of Alaska, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Thomas J. Miller* of Iowa, *Steve Six* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jon Bruning* of Nebraska, *Michael A. Delaney* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Henry McMaster* of South Carolina, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; for the Chamber of Commerce of the United States of America et al. by *Malcolm J. Harkins III, James F. Segroves, Robin S. Conrad,* and *Amar D. Sarwal;* for the National League

JUSTICE STEVENS delivered the opinion of the Court.

Since its enactment during the Civil War, the False Claims Act, 31 U. S. C. §§3729–3733, has authorized both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States. The Act now contains a provision barring *qui tam* actions based upon the public disclosure of allegations or transactions in certain specified sources. §3730(e)(4)(A). The question before us is whether the reference to "administrative" reports, audits, and investigations in that provision encompasses disclosures made in state and local sources as well as federal sources. We hold that it does.[1]

I

In 1995 the United States Department of Agriculture (USDA) entered into contracts with two counties in North Carolina authorizing them to perform, or to hire others to perform, cleanup and repair work in areas that had suffered extensive flooding. The Federal Government agreed to shoulder 75 percent of the contract costs. Respondent Karen T. Wilson was at that time an employee of the Graham

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of Cities et al. by *Richard Ruda* and *Dan Himmelfarb;* and for the Washington Legal Foundation et al. by *John T. Boese*, *Douglas W. Baruch*, *Daniel J. Popeo*, and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law and Justice by *Jay Alan Sekulow* and *Walter M. Weber;* and for the Taxpayers Against Fraud Education Fund by *Robert L. Vogel* and *Joseph E. B. White.*

[1] On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act, Pub. L. 111–148, 124 Stat. 119. Section 10104(j)(2) of this legislation replaces the prior version of 31 U. S. C. §3730(e)(4) with new language. The legislation makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners' claimed defense to a *qui tam* suit. See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 948 (1997). Throughout this opinion, we use the present tense in discussing the statute as it existed at the time this case was argued.

County Soil and Conservation District, a special-purpose government body that had been delegated partial responsibility for coordinating and performing the remediation effort. Suspecting possible fraud in connection with this effort, Wilson voiced her concerns to local officials in the summer of 1995. She also sent a letter to, and had a meeting with, agents of the USDA.

Graham County officials began an investigation. An accounting firm hired by the county performed an audit and, in 1996, issued a report (Audit Report) that identified several potential irregularities in the county's administration of the contracts. Shortly thereafter, the North Carolina Department of Environment, Health, and Natural Resources issued a report (DEHNR Report) identifying similar problems. The USDA's Office of Inspector General eventually issued a third report that contained additional findings.

In 2001 Wilson filed this action, alleging that petitioners, the Graham County and Cherokee County Soil and Water Conservation Districts and a number of local and federal officials, violated the False Claims Act (FCA) by knowingly submitting false claims for payment pursuant to the 1995 contracts. She further alleged that petitioners retaliated against her for aiding the federal investigation of those false claims. Following this Court's review of the statute of limitations applicable to Wilson's retaliation claim, *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409 (2005), the Court of Appeals ordered that that claim be dismissed as time barred. 424 F. 3d 437 (CA4 2005). On remand, the District Court subsequently dismissed Wilson's *qui tam* action for lack of jurisdiction. App. to Pet. for Cert. 95a–105a. The court found that Wilson had failed to refute that her action was based upon allegations publicly disclosed in the Audit Report and the DEHNR Report. *Id.*, at 95a–98a. Those reports, the District Court determined, constituted "administrative . . . report[s], . . . audit[s], or investigation[s]" within the

meaning of the FCA's public disclosure bar, 31 U. S. C. § 3730(e)(4)(A).

The Court of Appeals reversed the judgment of the District Court because the reports had been generated by state and local entities. "[O]nly *federal* administrative reports, audits or investigations," the Fourth Circuit concluded, "qualify as public disclosures under the FCA." 528 F. 3d 292, 301 (2008) (emphasis added). The Circuits having divided over this issue,[2] we granted certiorari to resolve the conflict. 557 U. S. 918 (2009).

II

We have examined the FCA's *qui tam* provisions in several recent opinions.[3] At issue in this case is the FCA's public disclosure bar, which deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels. The statute contains three categories of jurisdiction-stripping disclo-

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[2] Compare 528 F. 3d, at 301–307 (limiting this portion of the public disclosure bar to federal sources), and *United States ex rel. Dunleavy* v. *County of Delaware*, 123 F. 3d 734, 745–746 (CA3 1997) (same), with *United States ex rel. Bly-Magee* v. *Premo*, 470 F. 3d 914, 918–919 (CA9 2006) (concluding that state and local sources may qualify), cert. denied, 552 U. S. 1165 (2008), and *Battle* v. *Board of Regents for State of Ga.*, 468 F. 3d 755, 762 (CA11 2006) *(per curiam)* (assuming without analysis that state audits may qualify). The Eighth Circuit appears to have taken a "middle road" on this issue, 528 F. 3d, at 301, holding that disclosures made in nonfederal forums may count as "'administrative . . . report[s]'" or "'audit[s]'" under § 3730(e)(4)(A) in some instances, as when they relate to "a cooperative federal-state program through which the federal government provides financial assistance," *Hays* v. *Hoffman*, 325 F. 3d 982, 989, cert. denied, 540 U. S. 877 (2003).

[3] See, *e. g.*, *Rockwell Int'l Corp.* v. *United States*, 549 U. S. 457 (2007) (construing § 3730(e)(4)(A)'s original source exception); *Cook County* v. *United States ex rel. Chandler*, 538 U. S. 119 (2003) (holding that local governments are subject to *qui tam* liability); *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765 (2000) (holding that States are not subject to private FCA actions).

sures. Following the example of the Court of Appeals, see 528 F. 3d, at 300–301, we have inserted Arabic numerals to identify these categories:

> "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or [3] from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source[4] of the information." § 3730(e)(4)(A) (footnote omitted).

This dispute turns on the meaning of the adjective "administrative" in the second category (Category 2): whether it embraces only forums that are federal in nature, as respondent alleges, or whether it extends to disclosures made in state and local sources such as the DEHNR Report and the Audit Report, as petitioners allege.

In debating this question, petitioners have relied primarily on the statute's text whereas respondent and the Solicitor General, as her *amicus*, have relied heavily on considerations of history and policy. Although there is some overlap among the three types of argument, it is useful to discuss them separately. We begin with the text.

III

The term "administrative" "may, in various contexts, bear a range of related meanings," *Chandler* v. *Judicial Council of Tenth Circuit*, 398 U. S. 74, 103, n. 8 (1970) (Harlan, J., concurring in denial of writ), pertaining to private bodies as

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[4] A separate statutory provision defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U. S. C. § 3730(e)(4)(B).

well as to governmental bodies. When used to modify the nouns "report, hearing, audit, or investigation," in the context of a statutory provision about "the public disclosure" of fraud on the United States, the term is most naturally read to describe the activities of governmental agencies. See Black's Law Dictionary 49 (9th ed. 2009) (hereinafter Black's) (defining "administration," "[i]n public law, [as] the practical management and direction of the executive department and its agencies"). Given that "administrative" is not itself modified by "federal," there is no immediately apparent textual basis for excluding the activities of state and local agencies (or their contractors) from its ambit. As the Court of Appeals recognized, "the statute by its express terms does not limit its reach to federal administrative reports or investigations." 528 F. 3d, at 301. "[T]here is nothing inherently federal about the word 'administrative,' and Congress did not define the term in the FCA." *Id.*, at 302.

The Court of Appeals' conclusion that "administrative" nevertheless reaches only federal sources rested on its application of the interpretive maxim *noscitur a sociis*. See *id.*, at 302–305. This maxim, literally translated as "'it is known by its associates,'" Black's 1160, counsels lawyers reading statutes that "a word may be known by the company it keeps," *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923). All participants in this litigation acknowledge that the terms "congressional" and "[GAO]" are federal in nature; Congress is the Legislative Branch of the Federal Government,[5] and the GAO is a federal agency.[6] Relying on

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[5] See U. S. Const., Art. I, § 1; *id.*, § 4, cl. 1 (distinguishing "State . . . Legislature[s]" from "the Congress").

[6] The statute refers to the GAO, mistakenly, as the "Government Accounting Office." It is undisputed that the intended referent was the *General* Accounting Office, now renamed the Government Accountability Office. See 31 U. S. C. § 3730, p. 254, n. 2 (compiler's note); 528 F. 3d 292, 300, n. 4 (CA4 2008); *United States ex rel. Mistick PBT* v. *Housing Authority of Pittsburgh*, 186 F. 3d 376, 387 (CA3 1999) (Alito, J.), cert. denied,

our opinions in *S. D. Warren Co.* v. *Maine Bd. of Environmental Protection*, 547 U. S. 370 (2006), and *Beecham* v. *United States*, 511 U. S. 368 (1994), the Court of Appeals reasoned that "the placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." 528 F. 3d, at 302. In so holding, the Court of Appeals embraced what we might call the Sandwich Theory of the Third Circuit. Both courts "'f[ou]nd it hard to believe that the drafters of this provision intended the word "administrative" to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character.'" *Ibid.* (quoting *United States ex rel. Dunleavy* v. *County of Delaware*, 123 F. 3d 734, 745 (CA3 1997)).

We find this use of *noscitur a sociis* unpersuasive. A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating. Although this list may not be "completely disjunctive," 528 F. 3d, at 302—it refers to "congressional, administrative, or [GAO]" sources, § 3730(e)(4)(A), rather than "congressional, *or* administrative, or [GAO]" sources—neither is it completely harmonious. The substantive connection, or fit, between the terms "congressional," "administrative," and "GAO" is not so tight or so self-evident as to demand that we "rob" any one of them "of its independent and ordinary significance." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 338–339 (1979); see also *Russell*, 261 U. S., at 519 ("That a word may be known by the company it keeps is . . . not an invariable rule, for the word may have a character of its own not to be submerged by its association"). The adjectives in Cat-

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529 U. S. 1018 (2000); see also *Mistick*, 186 F. 3d, at 398 (Becker, C. J., dissenting) (noting that courts have "frequently" made the same scrivener's error). We have described the GAO as "an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress." *Bowsher* v. *Merck & Co.*, 460 U. S. 824, 844 (1983).

egory 2 are too few and too disparate to qualify as "a string of statutory terms," *S. D. Warren Co.*, 547 U. S., at 378, or "items in a list," *Beecham*, 511 U. S., at 371, in the sense that we used those phrases in the cited cases.[7]

More importantly, we need to evaluate "administrative" within the larger scheme of the public disclosure bar. Both parties acknowledge, as they must, that "[s]tatutory language has meaning only in context," *Graham County Soil*, 545 U. S., at 415; where they differ is in determining the relevant context. The Sandwich Theory presupposes that Category 2 is the only piece of § 3730(e)(4)(A) that matters. We agree with petitioners, however, that *all* of the sources listed in § 3730(e)(4)(A) provide interpretive guidance. All of these sources drive at the same end: specifying the types of disclosures that can foreclose *qui tam* actions. In light of the public disclosure bar's grammatical structure, it may be convenient and even clarifying to parse the list of sources into three categories. But it does not follow that we should

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[7] In *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303 (1961), the Court applied the *noscitur a sociis* maxim in construing a statutory provision that referred to "'[i]ncome resulting from exploration, discovery, or prospecting,'" *id.*, at 305 (quoting § 456(a)(2)(B) of the Internal Revenue Code of 1939). JUSTICE SOTOMAYOR contends that "the three terms in Category 2 are no more 'distinct' or 'disparate' than the phrase at issue in *Jarecki*." *Post*, at 305–306 (dissenting opinion) (citation omitted). We disagree. Whether taken in isolation or in context, the phrase "congressional, administrative, or GAO" is not as cohesive as the phrase "exploration, discovery, or prospecting." That is one reason why *noscitur a sociis* proved illuminating in *Jarecki*, and why it is less helpful in this case. On their "face," the terms "exploration," "discovery," and "prospecting" all describe processes of searching, seeking, speculating; the centrality of such activities to "the oil and gas and mining industries" gave a clue that it was those industries Congress had in mind when it drafted the provision. 367 U. S., at 307 (internal quotation marks omitted). The terms "congressional," "administrative," and "GAO" do not share any comparable core of meaning—or indeed any "common feature" at all, *post*, at 306—apart from a governmental connotation. It takes the Sandwich Theory to graft a federal limitation onto "administrative."

treat these categories as islands unto themselves. Courts have a "duty to construe statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 568 (1995).

When we consider the entire text of the public disclosure bar, the case for limiting "administrative" to federal sources becomes significantly weaker. The "news media" referenced in Category 3 plainly have a broader sweep. The Federal Government funds certain media outlets, and certain private outlets have a national focus; but no one contends that Category 3 is limited to these sources. There is likewise no textual basis for assuming that the "criminal, civil, or administrative hearing[s]" listed in Category 1 must be federal hearings.[8] Of the numerous types of sources that serve a common function in § 3730(e)(4)(A), then, only two are distinctly federal in nature, while one (the news media) is distinctly nonfederal in nature.

If the Court of Appeals was correct that the term "administrative" encompasses state and local sources in Category 1, see 528 F. 3d, at 303, it becomes even harder to see why the term would not do the same in Category 2. See *Erlenbaugh* v. *United States*, 409 U. S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context"). Respondent and the Solicitor General assert that § 3730(e)(4)(A)'s two references to "administrative" can be distinguished because Category 1 is best understood to refer to adjudicative proceedings, whereas Category 2 is best understood to refer to legislative or quasi-legislative activities such as rulemaking, oversight, and investigations. See Brief for Respondent 16–18; Brief

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[8] A number of lower courts have concluded that, as used in Category 1, "'hearing' is roughly synonymous with 'proceeding.'" *United States ex rel. Springfield Terminal R. Co.* v. *Quinn*, 14 F. 3d 645, 652 (CADC 1994); see also 1 J. Boese, Civil False Claims and *Qui Tam* Actions § 4.02[B], p. 4–59, and n. 231 (3d ed. 2006) (hereinafter Boese); C. Sylvia, The False Claims Act: Fraud Against the Government § 11:35, p. 642 (2004) (hereinafter Sylvia).

for United States as *Amicus Curiae* 25–26 (hereinafter Brief for United States). Yet even if this reading were correct, state and local administrative reports, hearings, audits, and investigations of a legislative-type character are presumably just as public, and just as likely to put the Federal Government on notice of a potential fraud, as state and local administrative hearings of an adjudicatory character.[9]

Respondent and the Solicitor General try to avoid this inference, and to turn a weakness into a strength, by further averring that the sources listed in Category 1 are themselves only federal. See Brief for Respondent 23–24; Brief for United States 25–26. No court has ever taken such a view of these sources. See 528 F. 3d, at 303 (citing cases from the Third, Fourth, Fifth, Ninth, and Eleventh Circuits and stating that "[t]he courts have easily concluded that [Category 1] applies to state-level hearings"); Sylvia § 11:37, at 643, n. 1 (citing additional cases).[10] The arguments in favor of read-

[9] See *Bly-Magee*, 470 F. 3d, at 918 ("Indeed, the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures [in Category 1] and then, in the next breath, excluded state administrative reports as sources"); *In re Natural Gas Royalties Qui Tam Litigation*, 467 F. Supp. 2d 1117, 1143–1144 (Wyo. 2006) ("There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures. To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying public disclosure status to a formal public report of a state government agency").

[10] Following the Court of Appeals, see 528 F. 3d, at 303, respondent asserts that only the Ninth Circuit, in *A–1 Ambulance Serv., Inc.* v. *California*, 202 F. 3d 1238, 1244 (2000), has explicitly considered and rejected the argument that Category 1 is limited to federal sources. Brief for Respondent 23–24. At least one other Circuit, however, has done the same, see *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F. 3d 1156, 1161, n. 6 (CA10 1999), and no lower court, as far as we are aware, has so much as suggested that an alternative construction might be

ing a federal limitation into Category 1 are supported, if at all, by legislative history and policy; they find no support in the statute's text.

Moving from the narrow lens of the Sandwich Theory to a bird's-eye view, respondent and the Solicitor General also maintain that the "exclusively federal focus" of the FCA counsels against reading the public disclosure bar to encompass nonfederal sources. Brief for Respondent 10, 18; Brief for United States 13. The FCA undoubtedly has a federal focus. But so does every other federal statute. And as respondent and the Solicitor General elsewhere acknowledge, quite a few aspects of the FCA, including a reference to "administrative" proceedings in § 3733(*l*)(7)(A)[11] and the reference to "news media" in § 3730(e)(4)(A) itself, are not just federal. In any event, the "federal focus" of the statute, as a whole, does not shine light on the specific question whether the public disclosure bar extends to certain nonfederal contexts. It is the fact of "public disclosure"—not Federal Government creation or receipt—that is the touchstone of § 3730(e)(4)(A).

Respondent and the Solicitor General make one last argument grounded in the statutory text: It would be anomalous, they say, for state and local administrative reports to count as public disclosures, when state legislative reports do not. See Brief for Respondent 15; Brief for United States 15–16. Yet neither respondent nor the Solicitor General disputes the contention of petitioners and their *amici* that, at the time the public disclosure bar was enacted in 1986, Congress

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viable. Moreover, the Third, Fifth, and Eleventh Circuit cases cited by the Court of Appeals postdate *A–1 Ambulance* and *Dunleavy,* 123 F. 3d 734, both of which put litigants and courts on notice of the possibility that § 3730(e)(4)(A) might be limited to federal sources.

[11] On its face, § 3733(*l*)(7)(A) is silent as to whether it includes nonfederal proceedings. Respondent and the Solicitor General suggest that it does, though they fairly argue that this provision, relating to civil investigative demands, has little if any relevance to the case at hand. See Brief for Respondent 21, n. 8; Brief for United States 31–32.

rarely gave state legislatures a meaningful role in administering or overseeing federally funded programs. See Brief for Petitioners 36–39; Brief for National League of Cities et al. as *Amici Curiae* 8–13. As in the instant case, the Federal Government was far more likely to enter into contracts with, and to provide moneys to, state and local executive agencies. Whether or not state legislative sources *should* have been included in § 3730(e)(4)(A), their exclusion therefore carries no clear implications for the status of state administrative sources.

In sum, although the term "administrative" may be sandwiched in Category 2 between terms that are federal in nature, those terms are themselves sandwiched between phrases that have been generally understood to include nonfederal sources; and one of those phrases, in Category 1, contains the exact term that is the subject of our inquiry. These textual clues negate the force of the *noscitur a sociis* canon, as it was applied by the Court of Appeals.[12] We are not persuaded that the associates with which "administrative" keeps company in § 3730(e)(4)(A) endow it with an exclusively federal character.

IV

As originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring

[12] The Court of Appeals repeatedly referred to the three categories in § 3730(e)(4)(A) as "clauses." See 528 F. 3d, at 300–305. Were they in fact clauses rather than prepositional phrases, reliance on *noscitur a sociis* might have been supported by one of our earliest cases using that term, *Watson* v. *Mercer*, 8 Pet. 88, 105 (1834) (Reporter's statement of the case), which suggested that "different clauses of the same sentence" should be presumed "to embrace the subject matter of the sentence." The Court of Appeals' mistaken reference to "clauses" is of course less significant than its failure to treat the public disclosure bar as an integrated whole. Cf. Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373, 1376 (1992) (emphasizing importance of reading provisions in their broader statutory context).

a *qui tam* action. In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943), we upheld the relator's recovery even though he had discovered the fraud by reading a federal criminal indictment—a quintessential "parasitic" suit. *Id.*, at 545–548; see *id.*, at 545 ("Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed"). Congress promptly reacted to that decision by amending the statute to preclude *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, 57 Stat. 609 (codified at 31 U. S. C. § 232(C) (1946 ed.)). This amendment erected what came to be known as a Government knowledge bar: "[O]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 949 (1997) (internal quotation marks omitted). In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled. "Seeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own," *United States ex rel. Springfield Terminal R. Co.* v. *Quinn*, 14 F. 3d 645, 649 (CADC 1994), Congress overhauled the statute once again in 1986 "to make the FCA a 'more useful tool against fraud in modern times,'" *Cook County* v. *United States ex rel. Chandler*, 538 U. S. 119, 133 (2003) (quoting S. Rep. No. 99–345, p. 2 (1986) (hereinafter S. Rep.)).

The present text of § 3730(e)(4) was enacted in 1986 as part of this larger reform. Congress apparently concluded that a total bar on *qui tam* actions based on information already in the Government's possession thwarted a significant number of potentially valuable claims. Rather than simply repeal the Government knowledge bar, however, Congress re-

placed it with the public disclosure bar in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in *Hess*. How exactly § 3730(e)(4) came to strike this balance in the way it did is a matter of considerable uncertainty. The House and Senate Judiciary Committees each reported bills that contained very different public disclosure bars from the one that emerged in the Statutes at Large; the Senate bill, for example, did not include the words "administrative," "audit," or "investigation" in its version of Category 2, nor did it contain an original source exception. See S. Rep., at 42–43 (text of proposed § 3730(e)(4)).[13]

In respondent and her *amici*'s view, this background counsels in favor of an exclusively federal interpretation of "administrative" for three separate reasons. First, the drafting history of the public disclosure bar suggests that Congress intended such a result. Second, a major aim of the 1986 amendments was to limit the scope of the Government knowledge bar, and "[c]onstruing [§ 3730(e)(4)(A)] as limited to disclosures in federal proceedings furthers Congress's purpose 'to encourage more private enforcement suits.'" Brief for United States 21 (quoting S. Rep., at 23–24). Third, whereas federal administrative proceedings can be presumed to provide the Attorney General with a fair opportunity to decide whether to bring an FCA action based on revelations made therein, the Attorney General is much less likely to learn of fraud disclosed in state proceedings. Respondent and her *amici* further maintain that it would be perverse to include nonfederal sources in Category 2, as local governments would then be able to shield themselves from *qui tam* liability by discretely disclosing evidence of fraud in "public" reports.[14]

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[13] See also H. R. Rep. No. 99–660, pp. 2–3 (1986) (text of proposed § 3730(b)(5)). The public disclosure bar that was enacted more closely resembles the version in the Senate bill.

[14] State governments are already shielded from *qui tam* liability under our precedent. *Stevens*, 529 U. S. 765.

These arguments are reasonable so far as they go, but they do not go very far. As many have observed, the drafting history of the public disclosure bar raises more questions than it answers.[15] Significant substantive changes—including the introduction of the term we are construing in this case—were inserted without floor debate, as "technical" amendments. That the original Senate bill mentioned only congressional and GAO sources in Category 2 is therefore of little moment. Neither the House nor the Senate Committee Report explained why a federal limitation would be appropriate, and the subsequent addition of "administrative" sources to this Category might be taken as a sign that such a limitation was rejected by the full Chambers.[16]

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[15] See, *e. g.*, *Dunleavy*, 123 F. 3d, at 745 ("Congress gave us little specific guidance to determine the scope of public disclosure sources"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P. A.* v. *Prudential Ins. Co.*, 944 F. 2d 1149, 1154 (CA3 1991) ("The bill that eventuated in the 1986 amendments underwent substantial revisions during its legislative path. This provides ample opportunity to search the legislative history and find some support somewhere for almost any construction of the many ambiguous terms in the final version"); *id.*, at 1163 (Scirica, J., dissenting) ("One difficulty in interpreting the 1986 amendments is that Congress was never completely clear about what kind of 'parasitic' suits it was attempting to avoid"); Boese § 4.02[A], at 4–46 ("The present Section 3730(e)(4) was enacted . . . without explanation by Congress"); *id.*, § 4.02[A], at 4–47 to 4–48 ("[A]pplicable legislative history explaining versions [of § 3730(e)(4)] not adopted is of little help in deciphering this provision. Because Section 3730(e)(4) was drafted subsequent to the completion of the House and Senate Committee reports on the proposed False Claims Act Amendments, those reports, which contained discussion of altogether different bars, cannot be used in interpreting it. And the sponsors' interpretations of the provision ultimately enacted . . . are spare, often incorrect, and wide-ranging enough to provide some support for almost any construction of its many ambiguities").

[16] JUSTICE SOTOMAYOR makes a valiant effort to unearth from the legislative history "the balance Congress evidently sought to achieve through the 1986 amendments." *Post*, at 312. But her reconstruction of the history assigns little weight to the side of this balance preserved by the public disclosure bar: the desire to minimize "the potential for parasitic

Respondent and her *amici* place particular emphasis on a remark made by the lead sponsor of the Senate bill, Senator Grassley. See Brief for Respondent 29; Brief for United States 20; Brief for American Center for Law and Justice as *Amicus Curiae* 13–14; Brief for Taxpayers Against Fraud Education Fund as *Amicus Curiae* 30–31. In a floor statement, Grassley said that "the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in [the public disclosure bar]; that is, Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations." 132 Cong. Rec. 20536 (1986). Yet even if a single sentence by a single legislator were entitled to any meaningful weight, Senator Grassley's remark merely begs the question before us. His formulation fails to indicate whether the "other governmental bodies" may be state or local bodies. It also turns on a term, "Government" with a capital "G," that does not appear in the codified version of the public disclosure bar, which Congress subsequently revised in numerous respects prior to passage.

There is, in fact, only one item in the legislative record that squarely corroborates respondent's reading of the statute: a letter sent by the primary sponsors of the 1986 amendments to the Attorney General in 1999. See 145 Cong. Rec. 16032 (1999) (reproducing text of letter in which Rep. Berman and Sen. Grassley state: "We did intend, and any fair reading of the statute will confirm, that the disclosure must

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lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud," *United States ex rel. Doe* v. *John Doe Corp.*, 960 F. 2d 318, 319 (CA2 1992). And her narrative contains no account of why Category 2 emerged in the form that it did. Any such account would necessarily be an exercise in speculation, as the record is silent on the matter. In our view, neither the general trajectory of 20th-century FCA reform nor the specific statements made during the 1986 legislative process clearly point one way or the other on the question before us.

be in a federal criminal, civil or administrative hearing. Disclosure in a state proceeding of any kind should not be a bar to a subsequent qui tam suit"). Needless to say, this letter does not qualify as legislative "history," given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes.[17]

We do not doubt that Congress passed the 1986 amendments to the FCA "to strengthen the Government's hand in fighting false claims," *Cook County*, 538 U. S., at 133–134, and "to encourage more private enforcement suits," S. Rep., at 23–24. It is equally beyond cavil, however, that Congress passed the public disclosure bar to *bar* a subset of those suits that it deemed unmeritorious or downright harmful. The question before us concerns the precise scope of that subset; and on this matter, the record is all but opaque. While "the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question," *United States* v. *Bornstein*, 423 U. S. 303, 310 (1976), there is no "evi-

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[17] See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 118 (1980); *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 580, n. 10 (2006); see also *Hafter*, 190 F. 3d, at 1161, n. 6 (refusing to credit the Berman-Grassley letter in interpreting the public disclosure bar). Respondent and her *amici* additionally contend that the enactment of the Program Fraud Civil Remedies Act of 1986 (PFCRA), 100 Stat. 1934 (codified at 31 U. S. C. § 3801 *et seq.*), shortly before the enactment of the FCA amendments supports their reading of the latter. See Brief for Respondent 30–33; Brief for United States 14–15; Brief for Taxpayers Against Fraud Education Fund as *Amicus Curiae* 28–29. Yet while "there is no question that the PFCRA was designed to operate in tandem with the FCA," *Stevens*, 529 U. S., at 786, n. 17, or that the PFCRA is addressed to federal administrative agencies, there is also no explicit evidence to suggest that Congress intended to limit Category 2's reference to "administrative" sources to the same set of agencies. The FCA's public disclosure bar serves a distinct function not replicated in the PFCRA; the text of the public disclosure bar contains no reference to the PFCRA; and no Member of Congress, so far as we are aware, articulated any such intent.

dent legislative purpose" to guide our resolution of the discrete issue that confronts us.

V

Respondent and her *amici* likewise fail to prove their case that petitioners' reading of the statute will lead to results that Congress could not have intended. Their argument rests on an empirical proposition: "While federal inquiries and their outcomes are readily available to Department of Justice [(DOJ)] attorneys, many state and local reports and investigations never come to the attention of federal authorities." Brief for United States 22; see also 528 F. 3d, at 306 ("Because the federal government is unlikely to learn about state and local investigations, a large number of fraudulent claims against the government would go unremedied without the financial incentives offered by the *qui tam* provisions of the FCA"). This proposition is not implausible, but it is sheer conjecture. Numerous federal investigations may be occurring at any given time, and DOJ attorneys may not reliably learn about their findings. DOJ attorneys may learn about quite a few state and local inquiries, especially when the inquiries are conducted pursuant to a joint federal-state program financed in part by federal dollars, such as the program at issue in this case.[18] Just how accessible to the Attorney General a typical state or local source will be, as compared to a federal source, is an open question. And it is

[18] In some instances, federal law dictates that state and local governments receiving federal funds perform an audit of their programs. See 31 U. S. C. § 7502(a)(1)(B) (requiring nonfederal entities that expend federal awards above a certain amount to "undergo a single audit" in accordance with specified conditions); Brief for State of Pennsylvania et al. as *Amici Curiae* 7–10 (discussing the Single Audit Act of 1984). It bears mention that, to the extent one is worried about Federal Government ignorance of state and local antifraud efforts, see *post,* at 312–313 (opinion of SOTOMAYOR, J.), today's ruling may induce federal authorities to pay closer attention to such efforts going forward.

not even the right question. The statutory touchstone, once again, is whether the allegations of fraud have been "public[ly] disclos[ed]," § 3730(e)(4)(A), not whether they have landed on the desk of a DOJ lawyer.

Respondent's argument also gives insufficient weight to Congress' decision to bar *qui tam* actions based on disclosures "from the news media." *Ibid.* Because there was no such bar prior to 1986, the addition of the news media as a jurisdiction-stripping category forecloses the suggestion that the 1986 amendments implemented a single-minded intent to increase the availability of *qui tam* litigation. And since the "news media" include a large number of local newspapers and radio stations, this category likely describes a multitude of sources that would seldom come to the attention of the Attorney General.

As for respondent and her *amici*'s concern that local governments will insulate themselves from *qui tam* liability "through careful, low key 'disclosures'" of potential fraud, Brief for American Center for Law and Justice as *Amicus Curiae* 17, this argument rests not just on speculation but indeed on rather strained speculation. Any such disclosure would not immunize the local government from FCA liability in an action brought by the United States, see *Rockwell Int'l Corp.* v. *United States*, 549 U. S. 457, 478 (2007)—and to the contrary it could tip off the Attorney General that such an action might be fruitful. It seems to us that petitioners have the more clear-eyed view when they assert that, "[g]iven the fact that the submission of a false claim to the United States subjects a defendant to criminal liability, fines, debarment, treble damages and attorneys' fees, no rational entity would prepare a report that self-discloses fraud with the sole purpose of cutting off *qui tam* actions." Reply Brief for Petitioners 19; see also *United States ex rel. Bly-Magee* v. *Premo*, 470 F. 3d 914, 919 (CA9 2006) ("The fear [of self-insulating disclosures] is unfounded in general because it is unlikely that an agency trying to cover up its fraud would

reveal the requisite 'allegations or transactions' underlying the fraud in a public document").[19]

Our conclusion is buttressed by the fact that Congress carefully preserved the rights of the most deserving *qui tam* plaintiffs: those whistle-blowers who qualify as original sources. Notwithstanding public disclosure of the allegations made by a *qui tam* plaintiff, her case may go forward if she is "an original source of the information." § 3730(e)(4)(A). It is therefore flat wrong to suggest that a finding for petitioners will " 'in effect return us to the unduly restrictive "government knowledge" standard' " that prevailed prior to 1986. Brief for United States 31 (quoting *Dunleavy*, 123 F. 3d, at 746); see Brief for Respondent 34 (asserting that "petitioners' construction would reimpose a form of the 'government knowledge' bar" (capitalization omitted)). Today's ruling merely confirms that disclosures made in one type of context—a state or local report, audit, or investigation—may trigger the public disclosure bar. It has no bearing on disclosures made in other contexts, and it leaves intact the ability of original sources to prosecute *qui tam* actions irrespective of the state of Government knowledge. Whether respondent can qualify as an "original source," as that term is defined in § 3730(e)(4), is one of many issues that remain open on remand.

VI

Respondent and the Solicitor General have given numerous reasons why they believe their reading of the FCA

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[19] Petitioners and their *amici* also counter with public policy arguments of their own. Under the Court of Appeals' reading of the statute, they allege, there is an increased likelihood that parasitic relators will beat more deserving relators to the courthouse, Brief for Petitioners 31, and that state and local governments will find their antifraud investigations impeded, or will decline to conduct such investigations in the first place, on account of "opportunistic potential relators trolling state records and reports, available to the public," in search of a *qui tam* claim, Brief for Commonwealth of Pennsylvania et al. as *Amici Curiae* 11.

moves it closer to the golden mean between an inadequate and an excessive scope for private enforcement. Congress may well have endorsed those views in its recent amendment to the public disclosure bar. See n. 1, *supra.* With respect to the version of § 3730(e)(4)(A) that is before us, however, we conclude that the term "administrative" in Category 2 is not limited to federal sources.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I join Parts I–III and V–VI of the Court's opinion. As for Part IV, I agree that the stray snippets of legislative history respondent, the Solicitor General, and the dissent have collected prove nothing at all about Congress's purpose in enacting 31 U. S. C. § 3730(e)(4)(A). *Ante*, at 295–299. But I do not share the Court's premise that if a "'legislative purpose'" were "'evident'" from such history it would make any difference. *Ante*, at 298 (quoting *United States* v. *Bornstein*, 423 U. S. 303, 310 (1976)). The Constitution gives legal effect to the "Laws" Congress enacts, Art. VI, cl. 2, not the objectives its Members aimed to achieve in voting for them. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79–80 (1998). If § 3730(e)(4)(A)'s text includes state and local administrative reports and audits, as the Court correctly concludes it does, then it is utterly irrelevant whether the Members of Congress intended otherwise. Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of "history" that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting.

The False Claims Act (FCA) divests federal courts of jurisdiction to hear *qui tam* lawsuits based on allegations or transactions publicly disclosed in a "congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation," unless the *qui tam* relator is an "original source" of the information. 31 U. S. C. § 3730(e)(4)(A) (footnote omitted). Today, the Court reads the phrase "administrative . . . report, hearing, audit, or investigation" to encompass not only federal, but also state and local, government sources. In my view, the Court misreads the statutory text and gives insufficient weight to contextual and historical evidence of Congress' purpose in enacting § 3730. I would affirm the judgment of the Court of Appeals and hold that "administrative" in the above-quoted provision refers only to Federal Government sources.[1]

I

Section 3730(e)(4)(A) sets forth three categories of "public disclosure[s]" that trigger the FCA's jurisdictional bar: "allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or [3] from the news media."[2] (Like the majority, I have inserted Arabic numerals and refer to the three phrases as "Categories.") "It is

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[1] As the Court notes, recent legislation amended the language of 31 U. S. C. § 3730(e)(4). See *ante*, at 283, n. 1 (citing Pub. L. 111–148, § 10104(j)(2), 124 Stat. 901). Like the Court, I use the present tense throughout this opinion in discussing the statute as it existed at the time this case was argued before this Court.

[2] As the Court observes, in enacting § 3730(e)(4)(A) Congress erroneously referred to the General Accounting Office—now renamed the Government Accountability Office—as the "Government Accounting Office." *Ante*, at 287, n. 6.

a '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.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989)). No party here disputes that "congressional" and "[GAO]" refer only to Federal Government sources. *Ante*, at 287, and nn. 5–6. As the Court acknowledges, *ante*, at 286–287, the word "administrative" is more capacious, potentially reaching not only federal, state, and local government sources but also disclosures by private entities. See, *e. g.*, Black's Law Dictionary 42 (5th ed. 1979) (defining "administrative" as "pertain[ing] to administration, especially management, . . . [of] the execution, application or conduct of persons or things").

Like the Court of Appeals, I view Congress' choice of two "clearly federal terms [to] bookend the not-so-clearly federal term" as a "very strong contextual cue about the meaning of 'administrative.'" 528 F. 3d 292, 302 (CA4 2008). "'The maxim *noscitur a sociis*, . . . while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.'" *Gutierrez* v. *Ada*, 528 U. S. 250, 255 (2000) (quoting *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)). Here, the immediate proximity of "congressional" and "[GAO]" suggests that "administrative" should be read, like its neighbors, as referring to Federal Government sources. If Congress had intended to include state or local government administrative materials, it could have said so, for instance by referring generically to "governmental" sources. See 528 F. 3d, at 304–305.

The Court applies the logic that underlies the *noscitur a sociis* canon in concluding that "administrative" does not refer to private entities because of the meaning suggested by the slightly more distant neighbors "report, hearing, audit, or investigation." See *ante*, at 286–287. I agree

with the majority that "administrative" in this context does not reach private entities. But in my view, "congressional" and "[GAO]" provide the better textual grounding for that conclusion. I see no reason why the "administrati[on]" of a private university, for instance, could not issue a "report," order an "audit" or "investigation," or conduct a "hearing." Nor, contrary to the majority's suggestion, are private entities—particularly those receiving federal funds or participating in federal programs—incapable of making "public disclosure[s]" of fraud on the Federal Government.

Despite its own implicit reliance on the canon, the Court nevertheless rejects the Court of Appeals' application of *noscitur a sociis* to interpret the three terms in Category 2, concluding that "[a] list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Ante*, at 288. The three terms in Category 2, the Court concludes, are "too few and too disparate" to justify invocation of *noscitur a sociis*. *Ante*, at 289. We have not previously constrained the canon in this way, and I would not do so here.

To take just one example, in *Jarecki* we construed the statutory term "'abnormal income,'" which the statute defined to include income resulting from "'exploration, discovery, or prospecting.'" 367 U. S., at 304–305 (quoting § 456(a) of the Internal Revenue Code of 1939). Recognizing that the word "'[d]iscovery'" is "usable in many contexts and with various shades of meaning," we observed that it "gathers meaning from the words around it" and concluded that "[t]he three words in conjunction . . . all describe income-producing activity in the oil and gas and mining industries." *Id.*, at 307. As a result, and in light of other contextual evidence supporting the same conclusion, we held that sales of newly invented drugs or camera equipment did not give rise to "abnormal income" even if such inventions might otherwise be understood as "discover[ies]." See *id.*, at 307–313. In my view, the three terms in Category 2 are no more "dis-

tinct" or "disparate," *ante*, at 288, 289, than the phrase at issue in *Jarecki*, particularly given the expansive plain meaning of "discovery." Cf. *ante*, at 289, n. 7. Here, application of the *noscitur a sociis* principle readily yields a common feature: The sources at issue are federal in nature, not related to state or local governments or private entities. See *Third Nat. Bank in Nashville* v. *Impac Limited, Inc.*, 432 U. S. 312, 322–323, 315 (1977) (applying principle that "words grouped in a list should be given related meaning" where term "'injunction'" was "sandwiched" between two other words in the statutory phrase "'attachment, injunction, or execution'").[3]

The Court draws additional support for its conclusion from reference to the provision's "larger scheme," *ante*, at 289—*i. e.*, the sources enumerated in Categories 1 and 3. Although the scope of Category 1 is not before us today (and although this Court has never addressed that question), the Court believes that reading Category 2 as limited to Federal Government sources would be inconsistent with decisions of lower

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[3] The Court relies on *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 338–339 (1979), for the proposition that we should not "'rob'" any of the three terms in Category 2 of 31 U. S. C. § 3730(e)(4)(A) of "'its independent and ordinary significance.'" *Ante*, at 288. But *Reiter* involved the statutory term "business or property." Those two words less readily suggest a shared limiting principle than do "congressional, administrative, or [GAO]." Moreover, our concern about "rob[bing]" the word "'property'" of its broader meaning rested on a desire not to "ignore the disjunctive 'or'" in the statutory pairing. 442 U. S., at 338–339; see also *id.*, at 339 ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings"). Because Congress did not employ a completely disjunctive list in § 3730(e)(4)(A)—*i. e.*, "congressional *or* administrative *or* [GAO]"—the *Reiter* principle applies with less force. Cf. *Garcia* v. *United States*, 469 U. S. 70, 73 (1984) (applying disjunctive principle in construing statutory prohibition on assault and robbery of any custodian of "'mail matter *or* of any money *or* other property of the United States,'" and observing that "[t]he three classes of property . . . are each separated by the conjunction 'or'" (quoting 18 U. S. C. § 2114; some emphasis deleted)).

courts that have interpreted "criminal, civil, or administrative hearing[s]" in Category 1 to include both state and federal proceedings. There is no conflict, however, if both categories are read, as respondent and the Solicitor General urge, as exclusively federal. See Brief for Respondent 23–24; Brief for United States as *Amicus Curiae* 25–26. Even reading Category 1 more broadly, however, does not change the exclusively federal nature of "congressional" and "[GAO]," which undermines whatever inference might be drawn from taking the statutory terms in strict succession. Treating the entirety of § 3730(e)(4)(A) as an undifferentiated list of items gives short shrift to the syntactical choices Congress made in offsetting each category with commas and prepositions, and in providing distinct classes of adjectives that modify different nouns.

Finally, the Court also views "news media" as "distinctly nonfederal in nature." *Ante*, at 290. But "news media" does not seem particularly illuminating in this context. As the Court of Appeals observed, although media sources may be national or local in scope, that distinction is not analogous to the difference between federal and state government sources. 528 F. 3d, at 304.

II

In my view, the statutory context and legislative history are also less "opaque," cf. *ante*, at 298, and more supportive of the reading adopted by the Court of Appeals, than the majority today acknowledges. While the legislative record is concededly incomplete, it does provide reason to exercise caution before giving the statutory text its broadest possible meaning—*i. e.*, to encompass not only federal, but also state and local, government sources.

Three points are particularly salient. First, prior to the 1986 amendments, the "Government knowledge" bar unquestionably referred only to information in the possession of the

Federal Government.[4] Even still, the bar was criticized as overly restrictive. A Senate Report on an initial version of the 1986 legislation, for instance, described the FCA's history and need for legislative reform, noting "several restrictive court interpretations of the act . . . which tend to thwart the effectiveness of the statute." S. Rep. No. 99–345, p. 4 (1986) (hereinafter S. Rep.). For instance, courts had applied the Government knowledge bar "even if the Government makes no effort to investigate or take action after . . . original allegations [a]re received." *Id.*, at 12 (citing *United States ex rel. Lapin* v. *International Business Machines Corp.*, 490 F. Supp. 244 (Haw. 1980)).[5]

Second, there is more support than the Court recognizes for the proposition that Congress sought in the 1986 amendments to broaden the availability of *qui tam* relief. The Senate Report characterized the reform effort as intended to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government" and dwelt at length on the "severe" and "growing" problem of "fraud in Federal programs." S. Rep., at 1–2; accord, H. R.

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[4] As originally enacted in 1943, the bar applied to suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." 57 Stat. 609. In 1982, Congress recodified the provision to apply to suits "based on evidence or information the Government had when the action was brought." 96 Stat. 979.

[5] The Senate Report also discussed *United States ex rel. Wisconsin (Dept. of Health and Social Servs.)* v. *Dean*, 729 F. 2d 1100 (CA7 1984), in which the court barred Wisconsin from bringing a *qui tam* suit for Medicaid fraud because the State had previously disclosed the information to the Federal Government, even when the State's own investigation had discovered the fraud. S. Rep., at 12–13. Lower courts have observed that the *Dean* decision was controversial and appears to have motivated the inclusion of the "original source" exception in the 1986 jurisdictional bar. See, *e. g.*, *Wang* v. *FMC Corp.*, 975 F. 2d 1412, 1419 (CA9 1992); see also S. Rep., at 13 (noting resolution by the National Association of Attorneys General criticizing *Dean* and urging Congress to address the problem).

Rep. No. 99–660, p. 18 (1986) ("Evidence of fraud in Government programs and procurement is on a steady rise"). The Senate Report also articulated a desire to "encourage any individual knowing of Government fraud to bring that information forward," and it identified as "perhaps the most serious problem plaguing effective enforcement [of antifraud laws] a lack of resources on the part of Federal enforcement agencies." S. Rep., at 2, 7.[6]

Consistent with these expressed views, the enacted legislation was replete with provisions encouraging *qui tam* actions. By replacing the Government knowledge bar with the current text of § 3730(e)(4)(A) and including an exception for "original source[s]," Congress "allowed private parties to sue even based on information already in the Government's possession." *Cook County* v. *United States ex rel. Chandler*, 538 U. S. 119, 133 (2003). The 1986 amendments also established the right of *qui tam* relators to continue as a party to a suit after the Government intervenes, 31 U. S. C. § 3730(c)(1) (1988 ed.); increased the percentage of recovery available as an incentive for private suits, § 3730(d)(1); and created a cause of action against employers who retaliate against *qui tam* relators, § 3730(h).[7]

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[6] In introducing a later and near-final version of the bill, Senator Grassley described the reform effort as stemming "from a realization that the Government needs help—lots of help—to adequately protect taxpayer funds from growing and increasingly sophisticated fraud." 132 Cong. Rec. 28580 (1986); see also *United States ex rel. Siller* v. *Becton Dickinson & Co., Microbiology Systems Div.*, 21 F. 3d 1339, 1347 (CA4 1994) ("By 1986, when section 3730(e)(4) was enacted, Congress had come to the conclusion that fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud" (internal quotation marks omitted)).

[7] See also 1 J. Boese, Civil False Claims and *Qui Tam* Actions § 1.04[G], p. 1–22 (Supp. 2007) ("[V]irtually all the changes introduced in th[e] section [of the 1986 amendments addressing *qui tam* actions] expanded the rights of *qui tam* relators"). The amendments also contained a number of provisions facilitating enforcement generally, *e. g.*, lowering the requisite show-

To be sure, Congress was also concerned in 1986, as in 1943, with guarding against purely opportunistic, "parasitic" *qui tam* relators. See S. Rep., at 10–11 (describing history of parasitic suits and the 1943 amendments); *ante*, at 293–295. Lower courts have viewed the 1986 amendments as striking a balance between the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *United States ex rel. Springfield Terminal R. Co.* v. *Quinn*, 14 F. 3d 645, 651 (CADC 1994). But evidence that Congress sought to balance two competing goals supports moderation in interpreting an arguably am-

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ing of intent by making clear that "knowing" violations require "no proof of specific intent to defraud," 31 U. S. C. § 3729(b)(1) (1988 ed.); lengthening the statute of limitations, § 3731(b); and authorizing treble damages, § 3729(a).

The Court fairly observes that the addition of "news media" to the jurisdictional bar undercuts attributing to Congress a "single-minded" intent to expand the availability of *qui tam* relief. *Ante*, at 300. But neither does that provision support reading Category 2 to its broadest possible extent. Moreover, barring suits based on "news media" disclosures may not have constituted a particularly significant expansion of existing law. Courts had applied the pre-1986 Government knowledge bar to dismiss actions based on information reported in the news media. In *United States ex rel. Thompson* v. *Hays*, 432 F. Supp. 253, 256, 255 (DC 1976), the court dismissed a suit based on evidence "gleaned from sources in the news media which received widespread public attention [alleging fraud by a Member of Congress]," when the Department of Justice "first obtained information regarding the claims . . . as a result of [a] *Washington Post* article." Similarly, the court in *United States* v. *Burmah Oil Co.*, 558 F. 2d 43, 46, n. 1 (CA2 1977) *(per curiam)* characterized the Government knowledge bar as "discourag[ing] the filing of actions by parties having no information of their own to contribute, but who merely plagiarized information in indictments returned in the courts, newspaper stories or congressional investigations." Congress could have reasonably assumed in 1986 that news media would report on the kinds of high-profile frauds that would naturally—perhaps as a result of the reporting—come to the Government's attention, and thus would already have been covered under existing law.

biguous statutory text, rather than woodenly reading the statutory language to its fullest possible extent.

Third, the legislative record "'contains no hint of any intention'" to bar suits based on disclosures from state or local government sources. Brief for United States as *Amicus Curiae* 20 (quoting *United States ex rel. Anti-Discrimination Center of Metro N. Y., Inc.* v. *Westchester Cty.*, 495 F. Supp. 2d 375, 383 (SDNY 2007)). Inclusion of state or local government sources would have constituted a significant departure from the Federal Government knowledge bar that had existed for four decades by 1986. But neither the initial bills reported by the Senate and House Committees nor statements by individual Members of Congress about subsequent versions of the legislation suggest any consideration or debate about expanding the pre-1986 bar to apply to state or local government sources.[8]

[8] In June 1986, the House Committee on the Judiciary reported a bill that would have barred *qui tam* actions based on information "which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding," "disclosed during the course of a congressional investigation," or "disseminated by any news media." H. R. Rep. No. 99–660, pp. 2, 3 (internal quotation marks omitted). The references to information disclosed by the Government itself (with a capital "G") and to "congressional investigation[s]" connote federal, not state or local, government sources. In July, the Senate Committee on the Judiciary reported its own version of the bill, barring actions "based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or [GAO] report or hearing, or from the news media." S. Rep., at 43. The reference to suits in which the Federal Government is a party and absence of the ambiguous term "administrative" in the bill's reference to "congressional or [GAO]" reports or hearings, similarly tend to exclude disclosures from state or local government reports. The enacted legislation did differ in several respects from the reported bills, but the subsequent legislative record contains no reference to the inclusion of state or local government sources. See, *e. g.*, 132 Cong. Rec. 20535–20537 (statement of Sen. Grassley); *id.*, at 29321–29322 (statements of Reps. Glickman and Berman).

Although these points do not definitively resolve the question presented today, to my mind they counsel against reading § 3730(e)(4)(A) (2006 ed.) so broadly as to disturb the balance Congress evidently sought to achieve through the 1986 amendments. Today's decision risks such a result. The Court imposes a jurisdictional bar that is by all appearances *more* restrictive of *qui tam* suits than the pre-1986 regime. Construing § 3730(e)(4)(A) to encompass the thousands of state and local government administrative reports produced each year effectively imputes to the Federal Government knowledge of such sources, whether or not the Government is aware of the information or in a position to act on it.[9] The Solicitor General specifically warns that while information in federal administrative audits or investigations is "readily available" to attorneys at the Department of Justice, "many state and local reports and investigations never come to the attention of federal authorities." Brief for United States as *Amicus Curiae* 22. The Court dismisses this concern as "sheer conjecture," postulating that Government lawyers "may" in fact learn about "quite a few" state or local reports and investigations, particularly in joint state-federal programs.[10] *Ante*, at 299. Perhaps so. But absent any con-

[9] Of course, 31 U. S. C. § 3730(e)(4)(A) (2006 ed.) speaks of "public disclosure," not notice to the Government. But the requirement of a "public" disclosure countenances notice, both to the public and otherwise. Indeed, a number of lower courts look to whether the Federal Government is "on notice" of alleged fraud before concluding that a particular source is a "public disclosure of allegations or transactions" under § 3730(e)(4)(A). See, *e. g.*, *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F. 3d 503, 512 (CA6 2009) ("[A] public disclosure reveals fraud if the information is sufficient to put the government on notice of the likelihood of related fraudulent activity" (internal quotation marks omitted)); *United States* v. *Alcan Elec. & Eng., Inc.*, 197 F. 3d 1014, 1020 (CA9 1999) (similar); *United States ex rel. Fine* v. *Sandia Corp.*, 70 F. 3d 568, 572 (CA10 1995) (similar).

[10] The Court observes that federal law requires some recipients of federal funds to conduct audits, *ante*, at 299, n. 18, and *amici* States point to the auditing and reporting requirements of the Single Audit Act of 1984, Brief for Commonwealth of Pennsylvania et al. as *Amici Curiae* 7–10

crete reason to believe otherwise, I would not so readily dismiss the formal representation of the Executive Branch entity with responsibility for, and practical experience in, litigating FCA claims on behalf of the United States.

In sum, the statute's plain text, evidence of Congress' intent to expand *qui tam* actions, and practical consequences of a more expansive interpretation together suggest Category 2 is most reasonably read to encompass federal, but not state or local, government sources.[11]

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For the reasons given above, I would affirm the judgment of the Court of Appeals, and respectfully dissent.

(hereinafter States Brief). But neither the Court nor the *amici* rebut the Solicitor General's pragmatic observation that "the vague and summary nature of many of those reports . . . does not . . . alert the federal government of fraud." Brief for United States as *Amicus Curiae* 31.

[11] The majority notes in passing several policy arguments advanced by petitioners and their *amici*. *Ante*, at 301, n. 19. None merits much weight. Petitioners are concerned about a race to the courthouse, in which parasitic relators will capitalize on information released in a state or local government report to the disadvantage of a slow-moving insider. Brief for Petitioners 31. But the FCA's first-to-file provision, 31 U. S. C. § 3730(b)(5), reflects Congress' explicit policy choice to encourage prompt filing and, in turn, prompt recovery of defrauded funds by the United States. *Amici* States are concerned that relators may interfere with ongoing state and local government investigations by "trolling state records and reports" for evidence of fraud. States Brief 11. But some state freedom-of-information laws exempt materials related to ongoing civil investigations. See, *e. g.*, Kan. Stat. Ann. § 45–221(a)(11) (2008 Cum. Supp.); Pa. Stat. Ann., Tit. 65, § 67.708(b)(17) (Purdon Supp. 2009). In any event, the FCA contains no provision giving state or local governments a privileged position as *qui tam* relators or, with respect to local governments, defendants.

Syllabus

BERGHUIS, WARDEN *v.* SMITH

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

No. 08–1402. Argued January 20, 2010—Decided March 30, 2010

Criminal defendants have a Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. See *Taylor* v. *Louisiana*, 419 U. S. 522. To establish a prima facie violation of the fair-cross-section requirement, a defendant must prove that: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. *Duren* v. *Missouri*, 439 U. S. 357, 364.

At *voir dire* in the Kent County Circuit Court trial of respondent Smith, an African-American, the venire panel included between 60 and 100 individuals, only 3 of whom, at most, were African-American. At that time, African-Americans constituted 7.28% of the County's jury-eligible population, and 6% of the pool from which potential jurors were drawn. The court rejected Smith's objection to the panel's racial composition, an all-white jury convicted him of second-degree murder and felony firearm possession, and the court sentenced him to life in prison with the possibility of parole.

On order of the Michigan Court of Appeals, the trial court conducted an evidentiary hearing on Smith's fair-cross-section claim. The evidence at the hearing showed, *inter alia*, that under the juror-assignment order in effect when Smith's jury was empaneled, the County assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the countywide Circuit Court, which heard felony cases like Smith's. Smith calls this procedure "siphoning." The month after Smith's *voir dire*, however, the County reversed course and adopted a Circuit-Court-first assignment order. It did so based on the belief that the district courts took most of the minority jurors, leaving the Circuit Court with a jury pool that did not represent the entire County. The trial court noted two means of measuring the underrepresentation of African-Americans on Circuit Court venires. First, the court described the "absolute disparity" test, under which the percentage of African-Americans in the jury pool (6%) is subtracted from the percentage of African-Americans in the local, jury-eligible population (7.28%). According to this measure, African-Americans were underrepresented by 1.28%. Next, the

court set out the "comparative disparity" test, under which the absolute disparity (1.28%) is divided by the percentage of African-Americans in the jury-eligible population (7.28%). The quotient (18%) indicated that, on average, African-Americans were 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list. In the 11 months after Kent County discontinued the district-court-first assignment policy, the comparative disparity, on average, dropped from 18% to 15.1%. The hearing convinced the trial court that African-Americans were underrepresented on Circuit Court venires. But Smith's evidence, the trial court held, was insufficient to prove that the juror-assignment order, or any other part of the jury-selection process, had systematically excluded African-Americans. The court therefore rejected Smith's fair-cross-section claim.

The state intermediate appellate court reversed and ordered a new trial with jurors selected under the Circuit-Court-first assignment order. Reversing in turn, the Michigan Supreme Court concluded that Smith had not established a prima facie Sixth Amendment violation. This Court, the state high court observed, has specified no preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable. The court noted that lower federal courts had applied three tests: the absolute and comparative disparity tests and a standard deviation test. Adopting a case-by-case approach allowing consideration of all three means of measuring underrepresentation, the court found that Smith had failed to establish a legally significant disparity under any measurement. Nevertheless giving Smith the benefit of the doubt on underrepresentation, the court determined that he had not shown systematic exclusion.

Smith then filed a federal habeas petition. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prohibits federal habeas relief unless the state court's 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," 28 U. S. C. § 2254(d)(1), or "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," § 2254(d)(2). Finding no infirmity in the Michigan Supreme Court's decision when assessed under AEDPA's standards, the District Court dismissed Smith's petition. The Sixth Circuit reversed. The Court of Appeals ruled, first, that courts should use the comparative disparity test to measure underrepresentation where, as here, the allegedly excluded group is small. The court then held that Smith's comparative disparity statistics demonstrated that African-Americans' representation in County Circuit Court venires was unfair and unreasonable. It next stated that Smith

had shown systematic exclusion. In accord with the Michigan intermediate appellate court, the Sixth Circuit believed that the district-court-first assignment order significantly reduced the number of African-Americans available for Circuit Court venires. Smith was entitled to relief, the Sixth Circuit concluded, because no important state interest supported the district-court-first allocation system.

Held: The Sixth Circuit erred in ruling that the Michigan Supreme Court's decision "involv[ed] an unreasonable application o[f] clearly established Federal law," § 2254(d)(1). *Duren* hardly establishes—no less "clearly" so—that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. Pp. 327–333.

(a) The *Duren* defendant readily met all three parts of the Court's prima facie test when he complained of the dearth of women in a county's jury pool. First, he showed that women in the county were both "numerous and distinct from men." 439 U. S., at 364. Second, to establish underrepresentation, he proved that women were 54% of the jury-eligible population, but accounted for only 26.7% of those summoned for jury service, and only 14.5% of those on the postsummons weekly venires from which jurors were drawn. *Id.*, at 364–366. Finally, to show the "systematic" cause of the underrepresentation, he pointed to Missouri's law permitting any woman to opt out of jury service and to the manner in which the county administered that law. This Court noted that "appropriately tailored" hardship exemptions would likely survive a fair-cross-section challenge if justified by an important state interest, *id.*, at 370, but concluded that no such interest could justify the exemption for each and every woman, *id.*, at 369–370. Pp. 327–328.

(b) Neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure underrepresentation. Each of the three methods employed or identified by the courts below—absolute disparity, comparative disparity, and standard deviation—is imperfect. Absolute disparity and comparative disparity measurements can be misleading where, as here, members of the distinctive group compose only a small percentage of the community's jury-eligible population. And it appears that no court has relied exclusively on a standard deviation analysis. Even absent AEDPA's constraint, this Court would have no cause to take sides here on the appropriate method or methods for measuring underrepresentation. Although the Michigan Supreme Court concluded that Smith's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests, the court nevertheless gave Smith the benefit of the

doubt on underrepresentation in order to reach the issue ultimately dispositive in *Duren*: To the extent underrepresentation existed, was it due to "systematic exclusion"? 463 Mich., at 205, 615 N. W. 2d, at 3; see *Duren*, 439 U. S., at 364. Pp. 329–330.

(c) Smith's evidence gave the Michigan Supreme Court little reason to conclude that the district-court-first assignment order had any significant effect on the representation of African-Americans on Circuit Court venires. Although the record established that some County officials *believed* that the assignment order created racial disparities, and the County reversed the order in response, the belief was not substantiated by Smith's evidence. He introduced no evidence that African-Americans were underrepresented on the Circuit Court's venires in significantly higher percentages than on the District Court for Grand Rapids, which had the County's largest African-American population. He did not address whether Grand Rapids had more need for jurors per capita than any other district in Kent County. And he did not compare the African-American representation levels on Circuit Court venires with those on the Federal District Court venires for the same region. See *Duren*, 439 U. S., at 367, n. 25. Smith's best evidence of systematic exclusion was the decline in comparative underrepresentation, from 18% to 15.1%, after Kent County reversed its assignment order. But that evidence indicated no large change and was, in any event, insufficient to prove that the original assignment order had a significantly adverse impact on the representation of African-Americans on Circuit Court venires. Pp. 330–331.

(d) In addition to renewing his "siphoning" argument, Smith urges that a laundry list of factors—*e. g.*, the County's practice of excusing prospective jurors without adequate proof of alleged hardship, and the refusal of County police to enforce orders for prospective jurors to appear—combined to reduce systematically the number of African-Americans appearing on jury lists. No "clearly established" precedent of this Court supports Smith's claim. Smith urges that one sentence in *Duren*, 439 U. S., at 368–369, places the burden of proving causation on the State. But Smith clipped that sentence from its context: The sentence does not concern the demonstration of a prima face case; instead, it speaks to what the State might show *to rebut* the defendant's prima facie case. The Michigan Supreme Court was therefore far from "unreasonable," § 2254(d)(1), in concluding that *Duren* first and foremost required Smith himself to show that the underrepresentation complained of was due to systematic exclusion. This Court, furthermore, has never "clearly established" that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim. Rather, the *Taylor* Court "recognized broad discretion in the States" to

Syllabus

"prescribe relevant qualifications for their jurors and to provide reasonable exemptions." 419 U. S., at 537–538. And in *Duren*, the Court understood that hardship exemptions resembling those Smith assails might well "survive a fair-cross-section challenge." 439 U. S., at 370. Pp. 332–333.

543 F. 3d 326, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 334.

B. Eric Restuccia, Solicitor General of Michigan, argued the cause for petitioner. With him on the briefs were *Michael A. Cox*, Attorney General, *Joel D. McGormley*, Division Chief, and *Timothy K. McMorrow*, Special Assistant Attorney General.

James Sterling Lawrence argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *Kevin T. Kane*, Chief State's Attorney of Connecticut, *Harry Weller*, Senior Assistant State's Attorney, and *Michael E. O'Hare*, Supervisory Assistant State's Attorney, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Lawrence G. Wasden* of Idaho, *Douglas F. Gansler* of Maryland, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, and *J. B. Van Hollen* of Wisconsin; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the Charles Hamilton Houston Institute for Race & Justice et al. by *Michael B. de Leeuw;* for the NAACP Legal Defense & Educational Fund, Inc., by *John Payton*, *Debo P. Adegbile*, *Christina Swarns*, *Johanna B. Steinberg*, *Jin Hee Lee*, *Vincent M. Southerland*, *Virginia A. Seitz*, *Gary Feinerman*, *Jeffrey T. Green*, *Rebecca K. Troth*, and *Sarah O'Rourke Schrup;* and for the National Association of Criminal Defense Lawyers et al. by *Clifford M. Sloan*, *Thomas M. Meyer*, *Joshua Dratel*, and *Steven R. Shapiro*.

Erik Levin, *David Kairys*, and *Jack C. Auspitz* filed a brief for Social Scientists et al. as *amici curiae*.

JUSTICE GINSBURG delivered the opinion of the Court.

The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community. See *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). The question presented in this case is whether that right was accorded to respondent Diapolis Smith, an African-American convicted of second-degree murder by an all-white jury in Kent County, Michigan, in 1993. At the time of Smith's trial, African-Americans constituted 7.28% of Kent County's jury-eligible population, and 6% of the pool from which potential jurors were drawn.

In *Duren* v. *Missouri*, 439 U. S. 357 (1979), this Court described three showings a criminal defendant must make to establish a prima facie violation of the Sixth Amendment's fair-cross-section requirement. He or she must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.*, at 364. The first showing is, in most cases, easily made; the second and third are more likely to generate controversy.

The defendant in *Duren* readily met all three measures. He complained of the dearth of women in the Jackson County, Missouri, jury pool. To establish underrepresentation, he proved that women were 54% of the jury-eligible population, but accounted for only 26.7% of the persons summoned for jury service, and only 14.5% of the persons on the postsummons weekly venires from which jurors were drawn. To show the "systematic" cause of the underrepresentation, Duren pointed to Missouri's law exempting women from jury service, and to the manner in which Jackson County administered the exemption. Concluding that no significant state interest could justify Missouri's explicitly gender-based ex-

emption, this Court held the law, as implemented in Jackson County, violative of the Sixth Amendment's fair-cross-section requirement.

We here review the decision of the United States Court of Appeals for the Sixth Circuit holding that Smith "satisf[ied] the prima facie test established by *Duren*," and granting him habeas corpus relief, *i. e.*, release from imprisonment absent a new trial commenced within 180 days of the Court of Appeals' order. 543 F. 3d 326, 336 (2008). Despite marked differences between Smith's case and Duren's, and a cogent Michigan Supreme Court decision holding that Smith "ha[d] not shown . . . systematic exclusion," *People* v. *Smith*, 463 Mich. 199, 205, 615 N. W. 2d 1, 3 (2000), the Sixth Circuit found the matter settled. Cognizant of the restrictions Congress placed on federal habeas review of state-court convictions, the Court of Appeals considered that a decision contrary to its own would "involv[e] an unreasonable application o[f] clearly established Federal law, as determined by the Supreme Court of the United States," 28 U. S. C. § 2254(d)(1). 543 F. 3d, at 335.

The Sixth Circuit erred in so ruling. No decision of this Court "clearly establishe[s]" Smith's entitlement to federal-court relief. According to the Sixth Circuit, Smith had demonstrated that a Kent County prospective-juror-assignment procedure, which Smith calls "siphoning," "systematic[ally] exclu[ded]" African-Americans. Under this procedure, Kent County assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the countywide Circuit Court, which heard felony cases like Smith's. The Michigan Supreme Court, however, had rejected Smith's "siphoning" plea for lack of proof that the assignment procedure caused underrepresentation. *Smith*, 463 Mich., at 205, 615 N. W. 2d, at 3. As that determination was not at all unreasonable, the Sixth Circuit had no warrant to disturb it. See § 2254(d)(2).

In addition to renewal of his "siphoning" argument, Smith here urges that a host of factors combined to reduce systematically the number of African-Americans appearing on Kent County jury lists, for example, the Kent County court's practice of excusing people without adequate proof of alleged hardship, and the refusal of Kent County police to enforce orders for prospective jurors to appear. Brief for Respondent 53–54. Our decisions do not address factors of the kind Smith urges. We have cautioned, however, that "[t]he fair-cross-section principle must have much leeway in application." *Taylor*, 419 U. S., at 537–538; see *id.*, at 537 (Court's holding that Sixth Amendment is violated by systematic exclusion of women from jury service "does not augur or authorize the fashioning of detailed jury-selection codes by federal courts.").

I

A

On November 7, 1991, Christopher Rumbley was shot and killed during a bar brawl in Grand Rapids, Michigan. The bar was crowded at the time of the brawl, with 200 to 300 people on the premises. All patrons of the bar were African-American. The State charged Smith with the murder in Kent County Circuit Court.

Voir dire for Smith's trial took place in September 1993. The venire panel included between 60 and 100 individuals. The parties agree that, at most, three venire members were African-American. Smith unsuccessfully objected to the composition of the venire panel.

Smith's case proceeded to trial before an all-white jury. The case for the prosecution turned on the identity of the man who shot Rumbley. Thirty-seven witnesses from the bar, including Smith, testified at the trial. Of those, two testified that Smith fired the gun. Five testified that the shooter was not Smith, and the remainder made no identifications of the shooter. The jury convicted Smith of second-

degree murder and possession of a firearm during a felony, and the court sentenced him to life imprisonment with the possibility of parole.

B

On first appeal, the Michigan Court of Appeals ordered the trial court to conduct an evidentiary hearing on Smith's fair-cross-section claim. The hearing occurred in early 1998. Smith's evidence showed that Grand Rapids, the largest city in Kent County, was home to roughly 37% of Kent County's population, and to 85% of its African-American residents. Felony charges in Kent County were tried in a sole Circuit Court. Misdemeanors were prosecuted in 12 district courts, each covering a discrete geographical area. To fill the courts' venires, Kent County sent questionnaires to prospective jurors. The Circuit Court Administrator testified that about 5% of the forms were returned as undeliverable, and another 15% to 20% were not answered. App. 13a. From the pool of prospective jurors who completed questionnaires, the County granted requests for hardship exemptions, *e. g.*, for lack of transportation or child care. *Id.*, at 21a. Kent County then assigned nonexempt prospective jurors to their local district courts' venires. After filling the district courts' needs, the County assigned the remaining prospective jurors to the Circuit Court's panels. *Id.*, at 20a, 22a.

The month after *voir dire* for Smith's trial, Kent County reversed the assignment order. It did so, according to the Circuit Court Administrator, based on "[t]he belief . . . that the respective districts essentially swallowed up most of the minority jurors," leaving the Circuit Court with a jury pool that "did not represent the entire county." *Id.*, at 22a. The Jury Minority Representation Committee, its co-chair testified, held the same view concerning the impact of choosing district court jurors first and not returning unused persons to the pool available for Circuit Court selections. *Id.*, at 64a–65a.

The trial court considered two means of measuring the extent of underrepresentation of African-Americans on Circuit Court venires: "absolute disparity" and "comparative disparity." "Absolute disparity" is determined by subtracting the percentage of African-Americans in the jury pool (here, 6% in the six months leading up to Smith's trial) from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African-Americans were underrepresented by 1.28%. "Comparative disparity" is determined by dividing the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%) showed that, in the six months prior to Smith's trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list. App. to Pet. for Cert. 215a.

Isolating the month Smith's jury was selected, Smith's statistics expert estimated that the comparative disparity was 34.8%. App. 181a. In the 11 months after Kent County discontinued the district-court-first assignment policy, the comparative disparity, on average, dropped from 18% to 15.1%. *Id.*, at 102a–103a, 113a.

Smith also introduced the testimony of an expert in demographics and economics, who tied the underrepresentation to social and economic factors. In Kent County, the expert explained, these forces made African-Americans less likely than whites to receive or return juror-eligibility questionnaires, and more likely to assert a hardship excuse. *Id.*, at 79a–80a.

The hearing convinced the trial court that African-Americans were underrepresented in Circuit Court venires. App. to Pet. for Cert. 210a. But Smith's evidence was insufficient, that court held, to prove that the juror-assignment order, or any other part of the jury-selection process, had systematically excluded African-Americans. *Id.*, at 210a–

212a. The court therefore rejected Smith's fair-cross-section claim.

C

The Michigan Court of Appeals concluded that the juror-allocation system in place at the relevant time did result in the underrepresentation of African-Americans. *Id.*, at 182a–183a. Reversing the trial court's judgment, the intermediate appellate court ordered a new trial, with jurors selected under the Circuit-Court-first assignment order installed shortly after the *voir dire* in Smith's case. *Ibid.*; see *supra*, at 322.

The Michigan Supreme Court, in turn, reversed the Court of Appeals' judgment, concluding that Smith "ha[d] not established a prima facie violation of the Sixth Amendment fair cross-section requirement." *Smith*, 463 Mich., at 207, 615 N. W. 2d, at 4. The Michigan high court observed, first, that this Court has specified "[no] preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable." *Id.*, at 203, 615 N. W. 2d, at 2. The court then noted that lower federal courts had applied three different methods to measure fair and reasonable representation: the absolute and comparative disparity tests, described *supra*, at 323, and "the standard deviation test."[1]

Recognizing that no single test was entirely satisfactory, the Michigan Supreme Court adopted a case-by-case approach allowing consideration of all three means of measuring underrepresentation. *Smith*, 463 Mich., at 204, 615 N. W. 2d, at 3. Smith's statistical evidence, the court found, "failed to establish a legally significant disparity under either the absolute or comparative disparity tests." *Id.*, at

[1] Standard deviation analysis seeks to determine the probability that the disparity between a group's jury-eligible population and the group's percentage in the qualified jury pool is attributable to random chance. See *People* v. *Smith*, 463 Mich. 199, 219–220, 615 N. W. 2d 1, 9–10 (2000) (Cavanagh, J., concurring).

204–205, 615 N. W. 2d, at 3. (The parties had presented no expert testimony regarding application of the standard deviation test. *Id.*, at 205, n. 1, 615 N. W. 2d, at 3, n. 1; *supra*, at 323.)

Nevertheless "grant[ing] [Smith] the benefit of the doubt on unfair and unreasonable underrepresentation," the Michigan Supreme Court ultimately determined that "he ha[d] not shown systematic exclusion." *Smith*, 463 Mich., at 203, 205, 615 N. W. 2d, at 2, 3. Smith's evidence, the court said, did not show "how the alleged siphoning of African-American jurors to district courts affected the circuit court jury pool." *Id.*, at 205, 615 N. W. 2d, at 3. In particular, the court observed, "[t]he record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool." *Ibid.* The court also ruled that "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion." *Id.*, at 206, 615 N. W. 2d, at 3.

D

In February 2003, Smith filed a habeas corpus petition in the United States District Court for the Western District of Michigan, reasserting his fair-cross-section claim. Because Smith is "in custody pursuant to the judgment of a State court," the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 2254, governed the District Court's review of his application for federal habeas corpus relief. Under the controlling provision of AEDPA, codified in § 2254(d), a state prisoner's application may not be granted as to "any claim . . . adjudicated . . . in State court" unless the state court's adjudication

> "(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."

Applying these standards, the District Court dismissed Smith's habeas petition. App. to Pet. for Cert. 40a–42a.

The Court of Appeals reversed. Where, as here, the allegedly excluded group is small, the Sixth Circuit ruled, courts should use the comparative disparity test to measure underrepresentation. 543 F. 3d, at 338. In that court's view, Smith's comparative disparity statistics sufficed "to demonstrate that the representation of African American veniremen in Kent County . . . was unfair and unreasonable." *Ibid.* As to systematic exclusion, the Sixth Circuit, in accord with the Michigan intermediate appellate court, believed that the juror-assignment order in effect when Smith's jury was empaneled significantly reduced the number of African-Americans available for Circuit Court venires. *Id.*, at 342. Smith was entitled to relief, the court concluded, because no important state interest supported that allocation system. *Id.*, at 345.[2]

The State petitioned for certiorari, attacking the Sixth Circuit's decision on two principal grounds: First, the State charged that the federal appellate court erred in adopting the comparative disparity test to determine whether a distinctive group was underrepresented in the jury pool. Pet. for Cert. ii. Second, the State urged that, in any event,

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[2] The Sixth Circuit also found that the Michigan Supreme Court had unreasonably applied *Duren* v. *Missouri*, 439 U. S. 357 (1979), when it declared that social and economic factors could not establish systematic exclusion. 543 F. 3d, at 341–342. Because such factors disproportionately affect African-Americans, the Sixth Circuit said, Kent County's routine grants of certain hardship exemptions "produced systematic exclusion within the meaning of *Duren*." *Ibid.* The Sixth Circuit held, however, that the hardship exemptions could not establish a fair-cross-section claim because the State "has a significant interest [in] avoiding undue burdens on individuals" by allowing such excuses. *Id.*, at 345.

"there was no . . . systematic exclusion of African Americans from juries in Kent County, Michigan," *id.*, at 25, and no warrant for the Sixth Circuit's contrary determination.[3] We granted review, 557 U. S. 965 (2009), and now reverse the Sixth Circuit's judgment.

According to the Sixth Circuit, the Michigan Supreme Court's rejection of Smith's Sixth Amendment plea "involved an unreasonable application o[f] clearly established Federal law, as determined by [this Court in *Duren*]." § 2254(d)(1); see 543 F. 3d, at 345. We disagree. As explained below, our *Duren* decision hardly establishes—no less "clearly" so—that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community.

II

To establish a prima facie violation of the fair-cross-section requirement, this Court's pathmarking decision in *Duren* instructs, a defendant must prove that: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. 439 U. S., at 364; see *supra*, at 319.

The defendant in *Duren* successfully challenged Jackson County's administration of a Missouri exemption permitting any woman to opt out of jury service. 439 U. S., at 360. The Court explained why it was plain that defendant Duren had established a prima facie case. First, women in Jackson

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[3] Although the question presented by the State homes in on the proper measure for underrepresentation, it initially and more comprehensively inquires whether Smith was denied his right to a jury drawn from a fair cross section of the community. See Pet. for Cert. ii (asking "[w]hether the U. S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply 'clearly established' Supreme Court precedent under 28 U. S. C. § 2254 on the issue of the fair cross-section requirement under *Duren* . . . "). We therefore address that overarching issue.

County were both "numerous and distinct from men." *Id.*, at 364 (quoting *Taylor*, 419 U. S., at 531). Second, Duren's "statistical presentation" showed gross underrepresentation: Women were over half the jury-eligible population; in stark contrast, they accounted for less than 15% of jury venires. 439 U. S., at 364–366.

Duren also demonstrated systematic exclusion with particularity. He proved that women's underrepresentation was persistent—occurring in every weekly venire for almost a year—and he identified the two stages of the jury-selection process "when . . . the systematic exclusion took place." *Id.*, at 366. First, questionnaires for prospective jurors stated conspicuously that women could opt out of jury service. Less than 30% of those summoned were female, suggesting that women in large numbers claimed the exemption at the questionnaire stage. *Ibid.* "Moreover, at the summons stage women were . . . given another opportunity to [opt out]." *Id.*, at 366–367. And if a woman ignored the summons, she was deemed to have opted out; no further inquiry was made. *Id.*, at 367. At this "final, venire, stage," women's representation plummeted to 14.5%. *Ibid.* In the Federal District Court serving the same territory, the Court noted, despite a women-only childcare exemption, women accounted for nearly 40% of those actually serving on juries. See *ibid.*, n. 25.

The "disproportionate and consistent exclusion of women from the [Jackson County] jury wheel and at the venire stage," the Court concluded, "was quite obviously due to the *system* by which juries were selected." *Id.*, at 367. "[A]ppropriately tailored" hardship exemptions, the Court added, would likely survive a fair-cross-section challenge if justified by an important state interest. *Id.*, at 370. But no such interest, the Court held, could justify Missouri's exemption for each and every woman—the altogether evident explanation for the underrepresentation. *Id.*, at 369–370.

III

A

As the Michigan Supreme Court correctly observed, see *supra*, at 324, neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools. The courts below and the parties noted three methods employed or identified in lower federal court decisions: absolute disparity, comparative disparity, and standard deviation. See *Smith*, 463 Mich., at 204–205, 615 N. W. 2d, at 2–3; Brief for Petitioner 3; Brief for Respondent 26; *supra*, at 324.

Each test is imperfect. Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as here, "members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service." *Smith*, 463 Mich., at 203–204, 615 N. W. 2d, at 2–3. And to our knowledge, "[n]o court . . . has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." *United States* v. *Rioux*, 97 F. 3d 648, 655 (CA2 1996).

On direct review, as earlier stated, the Michigan Supreme Court chose no single method "to measur[e] whether representation was fair and reasonable." *Smith*, 463 Mich., at 204, 615 N. W. 2d, at 3; see *supra*, at 324. Instead, it "adopt[ed] a case-by-case approach." *Smith*, 463 Mich., at 204, 615 N. W. 2d, at 3. "Provided that the parties proffer sufficient evidence," that court said, "the results of all the tests [should be considered]." *Ibid.* In contrast, the Sixth Circuit declared that "[w]here the distinctive group alleged to have been underrepresented is small, as is the case here, the comparative disparity test is the more appropriate measure of underrepresentation." 543 F. 3d, at 338.

Even in the absence of AEDPA's constraint, see *supra*, at 325–326, we would have no cause to take sides today on the

method or methods by which underrepresentation is appropriately measured.[4] Although the Michigan Supreme Court concluded that "[Smith's] statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests," *Smith*, 463 Mich., at 204–205, 615 N. W. 2d, at 3,[5] that court nevertheless gave Smith "the benefit of the doubt on underrepresentation," *id.*, at 205, 615 N. W. 2d, at 3. It did so in order to reach the issue ultimately dispositive in *Duren*: To the extent underrepresentation existed, was it due to "systematic exclusion"? 463 Mich., at 205, 615 N. W. 2d, at 3; see *Duren*, 439 U. S., at 364.

B

Addressing the ground on which the Sixth Circuit rested its decision, Smith submits that the district-court-first assignment order systematically excluded African-Americans from Kent County Circuit Court venires. Brief for Respondent 46–48. But as the Michigan Supreme Court not at all unreasonably concluded, *Smith*, 463 Mich., at 205, 615 N. W. 2d, at 3, Smith's evidence scarcely shows that the assignment order he targets caused underrepresentation. Al-

[4] The State asks us to "adopt the absolute-disparity standard for measuring fair and reasonable representation" and to "requir[e] proof that the absolute disparity exceeds 10%" to make out a prima facie fair-cross-section violation. Brief for Petitioner 45–46. Under the rule the State proposes, "the Sixth Amendment offers no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold." Brief for Respondent 35. We need not reach that issue.

[5] For similar conclusions, see, for example, *United States* v. *Orange*, 447 F. 3d 792, 798–799, and n. 7 (CA10 2006) (absolute disparity of 3.57%; comparative disparities "rang[ing] from 38.17% to 51.22%"); *United States* v. *Royal*, 174 F. 3d 1, 10 (CA1 1999) (2.97% absolute disparity; 61.1% comparative disparity); *United States* v. *Rioux*, 97 F. 3d 648, 657–658 (CA2 1996) (2.08% absolute disparity; 29% comparative disparity); *State* v. *Gibbs*, 254 Conn. 578, 591–593, 758 A. 2d 327, 337–338 (2000) (2.49% absolute disparity; 37% comparative disparity).

though the record established that some officials and others in Kent County *believed* that the assignment order created racial disparities, and the County reversed the order in response, *supra*, at 322, the belief was not substantiated by Smith's evidence.

Evidence that African-Americans were underrepresented on the Circuit Court's venires in significantly higher percentages than on the Grand Rapids District Court's could have indicated that the assignment order made a critical difference. But, as the Michigan Supreme Court noted, Smith adduced no evidence to that effect. See *Smith*, 463 Mich., at 205, 615 N. W. 2d, at 3. Nor did Smith address whether Grand Rapids, which had the County's largest African-American population, "ha[d] more need for jurors per capita than [any other district in Kent County]." Tr. of Oral Arg. 26; *id.*, at 18, 37. Furthermore, Smith did not endeavor to compare the African-American representation levels in Circuit Court venires with those in the Federal District Court venires for the same region. See *id.*, at 46–47; *Duren*, 439 U. S., at 367, n. 25.

Smith's best evidence of systematic exclusion was offered by his statistics expert, who reported a decline in comparative underrepresentation, from 18% to 15.1%, after Kent County reversed the assignment order. See *supra*, at 323. This evidence—particularly in view of AEDPA's instruction, § 2254(d)(2)—is insufficient to support Smith's claim that the assignment order caused the underrepresentation. As Smith's counsel recognized at oral argument, this decrease could not fairly be described as "a big change." Tr. of Oral Arg. 51; see *ibid.* (the drop was "a step in the right direction"). In short, Smith's evidence gave the Michigan Supreme Court little reason to conclude that the district-court-first assignment order had a significantly adverse impact on the representation of African-Americans on Circuit Court venires.

C

To establish systematic exclusion, Smith contends, the defendant must show only that the underrepresentation is persistent and "produced by the method or 'system' used to select [jurors]," rather than by chance. Brief for Respondent 38, 40. In this regard, Smith catalogs a laundry list of factors in addition to the alleged "siphoning" that, he urges, rank as "systematic" causes of underrepresentation of African-Americans in Kent County's jury pool. *Id.*, at 53–54. Smith's list includes the County's practice of excusing people who merely alleged hardship or simply failed to show up for jury service, its reliance on mail notices, its failure to follow up on nonresponses, its use of residential addresses at least 15 months old, and the refusal of Kent County police to enforce court orders for the appearance of prospective jurors. *Ibid.*

No "clearly established" precedent of this Court supports Smith's claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation. Smith recites a sentence in our *Duren* opinion that, he says, placed the burden of proving causation on the State. See Tr. of Oral Arg. 33, 35. The sentence reads: "Assuming, *arguendo*, that the exemptions mentioned by the court below [those for persons over 65, teachers, and government workers] would justify failure to achieve a fair community cross section on jury venires, the State must demonstrate that these exemptions [rather than the women's exemption] caused the underrepresentation complained of." 439 U. S., at 368–369. That sentence appears after the Court had already assigned to Duren—and found he had carried—the burden of proving that the underrepresentation "was due to [women's] systematic exclusion in the jury-selection process." *Id.*, at 366. The Court's comment, which Smith clipped from its context, does not concern the demonstration

of a prima face case. Instead, it addresses what the State might show *to rebut* the defendant's prima facie case. The Michigan Supreme Court was therefore far from "unreasonable," § 2254(d)(1), in concluding that *Duren* first and foremost required Smith himself to show that the underrepresentation complained of was "due to systematic exclusion." *Id.*, at 364; see *Smith*, 463 Mich., at 205, 615 N. W. 2d, at 3.

This Court, furthermore, has never "clearly established" that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim. In *Taylor*, we "recognized broad discretion in the States" to "prescribe relevant qualifications for their jurors and to provide reasonable exemptions." 419 U. S., at 537–538. And in *Duren*, the Court understood that hardship exemptions resembling those Smith assails might well "survive a fair-cross-section challenge," 439 U. S., at 370.[6] In sum, the Michigan Supreme Court's decision rejecting Smith's fair-cross-section claim is consistent with *Duren* and "involved [no] unreasonable application o[f] clearly established Federal law," § 2254(d)(1).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[6] We have also never "clearly" decided, and have no need to consider here, whether the impact of social and economic factors can support a fair-cross-section claim. Compare *Smith*, 463 Mich., at 206, 615 N. W. 2d, at 3 ("[T]he influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of [a distinctive group]."), with 543 F. 3d 326, 341 (CA6 2008) (case below) ("[T]he Sixth Amendment is concerned with social or economic factors when the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel.").

JUSTICE THOMAS, concurring.

The text of the Sixth Amendment guarantees the right to a trial by "an impartial jury." Historically, juries did not include a sampling of persons from all levels of society or even from both sexes. See, *e. g.*, Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877 (1994) (In 1791, "[e]very state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists"); *Taylor* v. *Louisiana*, 419 U. S. 522, 533, n. 13 (1975) ("In this country women were disqualified by state law to sit as jurors until the end of the 19th century"). The Court has nonetheless concluded that the Sixth Amendment guarantees a defendant the right to a jury that represents "a fair cross section" of the community. *Ante*, at 319 (citing *Taylor, supra*).

In my view, that conclusion rests less on the Sixth Amendment than on an "amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment," *Duren* v. *Missouri*, 439 U. S. 357, 372 (1979) (Rehnquist, J., dissenting), and seems difficult to square with the Sixth Amendment's text and history. Accordingly, in an appropriate case I would be willing to reconsider our precedents articulating the "fair cross section" requirement. But neither party asks us to do so here, and the only question before us is whether the state court's disposition was contrary to, or an unreasonable application of, our precedents. See *ante*, at 320, 325–327; 28 U. S. C. § 2254(d). I concur in the Court's answer to that question.

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JONES ET AL. *v.* HARRIS ASSOCIATES L. P.

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

No. 08–586. Argued November 2, 2009—Decided March 30, 2010

Petitioners, shareholders in mutual funds managed by respondent investment adviser, filed this suit alleging that respondent violated § 36(b)(1) of the Investment Company Act of 1940, which imposes a "fiduciary duty [on investment advisers] with respect to the receipt of compensation for services," 15 U. S. C. § 80a–35(b). Granting respondent summary judgment, the District Court concluded that petitioners had not raised a triable issue of fact under the applicable standard set forth in *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 694 F. 2d 923, 928 (CA2): "[T]he test is essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in the light of all of the surrounding circumstances. . . . To be guilty of a violation of § 36(b), . . . the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." Rejecting the *Gartenberg* standard, the Seventh Circuit panel affirmed based on different reasoning.

Held: Based on § 36(b)'s terms and the role that a shareholder action for breach of the investment adviser's fiduciary duty plays in the Act's overall structure, *Gartenberg* applied the correct standard. Pp. 343–353.

(a) A consensus has developed regarding the standard *Gartenberg* set forth over 25 years ago: The standard has been adopted by other federal courts, and the Securities and Exchange Commission's regulations have recognized, and formalized, *Gartenberg*-like factors. Both petitioners and respondent generally endorse the *Gartenberg* approach but disagree in some respects about its meaning. Pp. 343–345.

(b) Section 36(b)'s "fiduciary duty" phrase finds its meaning in *Pepper* v. *Litton*, 308 U. S. 295, 306–307, where the Court discussed the concept in the analogous bankruptcy context: "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." *Gartenberg*'s approach fully incorporates this understanding, insisting that all relevant circumstances be taken into account and using the range of fees that might result from arm's-length bargaining as the benchmark for reviewing challenged fees. Pp. 345–347.

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(c) *Gartenberg*'s approach also reflects § 36(b)'s place in the statutory scheme and, in particular, its relationship to the other protections the Act affords investors. Under the Act, scrutiny of investment-adviser compensation by a fully informed mutual fund board, see *Burks* v. *Lasker*, 441 U. S. 471, 482, and shareholder suits under § 36(b) are mutually reinforcing but independent mechanisms for controlling adviser conflicts of interest, see *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523, 541. In recognition of the disinterested directors' role, the Act instructs courts to give board approval of an adviser's compensation "such consideration . . . as is deemed appropriate under all the circumstances." § 80a–35(b)(2). It may be inferred from this formulation that (1) a measure of deference to a board's judgment may be appropriate in some instances, and (2) the appropriate measure of deference varies depending on the circumstances. *Gartenberg* heeds these precepts. See 694 F. 2d, at 930. Pp. 348–349.

(d) The Court resolves the parties' disagreements on several important questions. First, since the Act requires consideration of all relevant factors, § 80a–35(b)(2), courts must give comparisons between the fees an investment adviser charges a captive mutual fund and the fees it charges its independent clients the weight they merit in light of the similarities and differences between the services the clients in question require. In doing so, the Court must be wary of inapt comparisons based on significant differences between those services and must be mindful that the Act does not necessarily ensure fee parity between the two types of clients. However, courts should not rely too heavily on comparisons with fees charged mutual funds by other advisers, which may not result from arm's-length negotiations. Finally, a court's evaluation of an investment adviser's fiduciary duty must take into account both procedure and substance. Where disinterested directors consider all of the relevant factors, their decision to approve a particular fee agreement is entitled to considerable weight, even if the court might weigh the factors differently. Cf. *Burks*, 441 U. S., at 486. In contrast, where the board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome. *Id.*, at 484. *Gartenberg*'s "so disproportionately large" standard, 694 F. 2d, at 928, reflects Congress' choice to "rely largely upon [independent] 'watchdogs' to protect shareholders interests," *Burks*, *supra*, at 485. Pp. 349–353.

(e) The Seventh Circuit erred in focusing on disclosure by investment advisers rather than the *Gartenberg* standard, which the panel rejected. That standard may lack sharp analytical clarity, but it accurately reflects the compromise embodied in § 36(b) as to the appropriate method of

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testing investment-adviser compensation, and it has provided a workable standard for nearly three decades. P. 353.

527 F. 3d 627, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 353.

David C. Frederick argued the cause for petitioners. With him on the briefs were *Brendan J. Crimmins*, *Daniel G. Bird*, *Ernest A. Young*, *Michael J. Brickman*, *James C. Bradley*, *Nina H. Fields*, *Guy M. Burns*, and *John M. Greabe*.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* supporting petitioners. With him on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Stewart*, *David M. Becker*, *Mark D. Cahn*, *Jacob H. Stillman*, and *Mark Pennington*.

John D. Donovan, Jr., argued the cause for respondent. With him on the brief were *Robert A. Skinner*, *Benjamin S. Halasz*, *Brian R. Blais*, *Jeffrey A. Lamken*, and *Aaron M. Streett*.*

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Jay E. Sushelsky* and *Michael Schuster;* for Law Professors by *William A. Birdthistle*, *pro se;* for the National Association of Shareholder and Consumer Attorneys by *Jerome M. Congress*, *Anna C. Dover*, and *Kevin P. Roddy;* for the North American Securities Administrators Association, Inc., by *Alfred E. T. Rusch;* for John C. Bogle by *James A. Feldman*, *Michael Woerner*, and *Lynn Lincoln Sarko;* and for Deborah A. DeMott et al. by *Ms. DeMott*, *pro se*, and *Jerome A. Broadhurst*.

Briefs of *amici curiae* urging affirmance were filed for the Cato Institute by *Ilya Shapiro* and *Timothy Sandefur;* for the Chamber of Commerce of the United States of America by *Richard D. Bernstein*, *Barry P. Barbash*, *Mary Eaton*, *Robin S. Conrad*, and *Amar D. Sarwal;* for Fidelity Management & Research Co. by *Stephen M. Shapiro*, *Andrew J. Pincus*, *Timothy S. Bishop*, *James N. Benedict*, and *Sean M. Murphy;* for the Independent Directors Council by *Theodore B. Olson* and *Mark A. Perry;* for the Investment Company Institute by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Rebecca G. Deutsch*, *Lori A. Martin*, *Paul Schott Stevens*, and *Karrie McMillan;* for Law and Finance Professors and Scholars by *Fran-*

JUSTICE ALITO delivered the opinion of the Court.

We consider in this case what a mutual fund shareholder must prove in order to show that a mutual fund investment adviser breached the "fiduciary duty with respect to the receipt of compensation for services" that is imposed by § 36(b) of the Investment Company Act of 1940, 15 U. S. C. § 80a–35(b) (hereinafter § 36(b)).

I

A

The Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. § 80a–1 *et seq.*, regulates investment companies, including mutual funds. "A mutual fund is a pool of assets, consisting primarily of [a] portfolio [of] securities, and belonging to the individual investors holding shares in the fund." *Burks* v. *Lasker*, 441 U. S. 471, 480 (1979). The following arrangements are typical. A separate entity called an investment adviser creates the mutual fund, which may have no employees of its own. See *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 93 (1991); *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523, 536 (1984); *Burks*, 441 U. S., at 480–481. The adviser selects the fund's directors, manages the fund's investments, and provides other services. See *id.*, at 481. Because of the relationship between a mutual fund and its investment adviser, the fund often "'cannot, as a practical matter sever its relationship with the adviser. Therefore, the forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.'" *Ibid.* (quoting S. Rep. No. 91–184, p. 5 (1969) (hereinafter S. Rep.)).

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ces S. Cohen, W. Hardy Callcott, T. Peter R. Pound, and *Jennifer L. Holden;* for the Mutual Fund Directors Forum by *G. Eric Brunstad, Jr., Ruth S. Epstein,* and *Susan Ferris Wyderko;* and for the Securities Industry and Financial Markets Association by *Carter G. Phillips, Jonathan F. Cohn, Robert Pietrzak,* and *Kevin M. Carroll.*

Stephen M. Tillery filed a brief for Robert Litan et al. as *amici curiae.*

"Congress adopted the [Investment Company Act of 1940] because of its concern with the potential for abuse inherent in the structure of investment companies." *Daily Income Fund*, 464 U. S., at 536 (internal quotation marks omitted). Recognizing that the relationship between a fund and its investment adviser was "fraught with potential conflicts of interest," the Act created protections for mutual fund shareholders. *Id.*, at 536–538 (internal quotation marks omitted); *Burks*, *supra*, at 482–483. Among other things, the Act required that no more than 60 percent of a fund's directors could be affiliated with the adviser and that fees for investment advisers be approved by the directors and the shareholders of the fund. See §§ 10, 15(c), 54 Stat. 806, 813.

The growth of mutual funds in the 1950's and 1960's prompted studies of the 1940 Act's effectiveness in protecting investors. See *Daily Income Fund*, 464 U. S., at 537–538. Studies commissioned or authored by the Securities and Exchange Commission (SEC or Commission) identified problems relating to the independence of investment company boards and the compensation received by investment advisers. See *ibid.* In response to such concerns, Congress amended the Act in 1970 and bolstered shareholder protection in two primary ways.

First, the amendments strengthened the "cornerstone" of the Act's efforts to check conflicts of interest, the independence of mutual fund boards of directors, which negotiate and scrutinize adviser compensation. *Burks*, *supra*, at 482. The amendments required that no more than 60 percent of a fund's directors be "persons who are interested persons," *e. g.*, that they have no interest in or affiliation with the investment adviser.[1] 15 U. S. C. § 80a–10(a);

[1] An "affiliated person" includes (1) a person who owns, controls, or holds the power to vote 5 percent or more of the securities of the investment adviser; (2) an entity which the investment adviser owns, controls, or in which it holds the power to vote more than 5 percent of the securities; (3) any person directly or indirectly controlling, controlled by, or under

§ 80a–2(a)(19); see also *Daily Income Fund*, *supra*, at 538. These board members are given "a host of special responsibilities." *Burks*, 441 U. S., at 482–483. In particular, they must "review and approve the contracts of the investment adviser" annually, *id.*, at 483, and a majority of these directors must approve an adviser's compensation, 15 U. S. C. § 80a–15(c). Second, § 36(b), 84 Stat. 1429, of the Act imposed upon investment advisers a "fiduciary duty" with respect to compensation received from a mutual fund, 15 U. S. C. § 80a–35(b), and granted individual investors a private right of action for breach of that duty, *ibid.*

The "fiduciary duty" standard contained in § 36(b) represented a delicate compromise. Prior to the adoption of the 1970 amendments, shareholders challenging investment adviser fees under state law were required to meet "common-law standards of corporate waste, under which an unreasonable or unfair fee might be approved unless the court deemed it 'unconscionable' or 'shocking,' " and "security holders challenging adviser fees under the [Investment Company Act] itself had been required to prove gross abuse of trust." *Daily Income Fund*, 464 U. S., at 540, n. 12. Aiming to give shareholders a stronger remedy, the SEC proposed a provision that would have empowered the Commission to bring actions to challenge a fee that was not "reasonable" and to intervene in any similar action brought by or on behalf of an investment company. *Id.*, at 538. This approach was included in a bill that passed the House. H. R. 9510, 90th Cong., 1st Sess., § 8(d) (1967); see also S. 1659, 90th Cong.,

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common control with the investment adviser; (4) an officer, director, partner, copartner, or employee of the investment adviser; (5) an investment adviser or a member of the investment adviser's board of directors; or (6) the depositor of an unincorporated investment adviser. See § 80a–2(a)(3). The Act defines "interested person" to include not only all affiliated persons but also a wider swath of people such as the immediate family of affiliated persons, interested persons of an underwriter or investment adviser, legal counsel for the company, and interested broker-dealers. § 80a–2(a)(19).

1st Sess., § 8(d) (as introduced May 1, 1967). Industry representatives, however, objected to this proposal, fearing that it "might in essence provide the Commission with ratemaking authority." *Daily Income Fund*, 464 U. S., at 538.

The provision that was ultimately enacted adopted "a different method of testing management compensation," *id.*, at 539 (quoting S. Rep., at 5; internal quotation marks omitted), that was more favorable to shareholders than the previously available remedies but that did not permit a compensation agreement to be reviewed in court for "reasonableness." This is the fiduciary duty standard in § 36(b).

B

Petitioners are shareholders in three different mutual funds managed by respondent Harris Associates L. P., an investment adviser. Petitioners filed this action in the Northern District of Illinois pursuant to § 36(b) seeking damages, an injunction, and rescission of advisory agreements between Harris Associates and the mutual funds. The complaint alleged that Harris Associates had violated § 36(b) by charging fees that were "disproportionate to the services rendered" and "not within the range of what would have been negotiated at arm's length in light of all the surrounding circumstances." App. 52.

The District Court granted summary judgment for Harris Associates. Applying the standard adopted in *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 694 F. 2d 923 (CA2 1982), the court concluded that petitioners had failed to raise a triable issue of fact as to "whether the fees charged . . . were so disproportionately large that they could not have been the result of arm's-length bargaining." App. to Pet. for Cert. 29a. The District Court assumed that it was relevant to compare the challenged fees with those that Harris Associates charged its other clients. *Id.*, at 30a. But in light of those comparisons as well as comparisons with fees charged by other investment advisers to similar mu-

tual funds, the court held that it could not reasonably be found that the challenged fees were outside the range that could have been the product of arm's-length bargaining. *Id.*, at 29a–32a.

A panel of the Seventh Circuit affirmed based on different reasoning, explicitly "disapprov[ing] the *Gartenberg* approach." 527 F. 3d 627, 632 (2008). Looking to trust law, the panel noted that, while a trustee "owes an obligation of candor in negotiation," a trustee, at the time of the creation of a trust, "may negotiate in his own interest and accept what the settlor or governance institution agrees to pay." *Ibid.* (citing Restatement (Second) of Trusts § 242, and Comment *f*). The panel thus reasoned that "[a] fiduciary duty differs from rate regulation. A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation." 527 F. 3d, at 632. In the panel's view, the amount of an adviser's compensation would be relevant only if the compensation were "so unusual" as to give rise to an inference "that deceit must have occurred, or that the persons responsible for decision have abdicated." *Ibid.*

The panel argued that this understanding of § 36(b) is consistent with the forces operating in the contemporary mutual fund market. Noting that "[t]oday thousands of mutual funds compete," the panel concluded that "sophisticated investors" shop for the funds that produce the best overall results, "mov[e] their money elsewhere" when fees are "excessive in relation to the results," and thus "create a competitive pressure" that generally keeps fees low. *Id.*, at 633–634. The panel faulted *Gartenberg* on the ground that it "relies too little on markets." 527 F. 3d, at 632. And the panel firmly rejected a comparison between the fees that Harris Associates charged to the funds and the fees that Harris Associates charged other types of clients, observing that "[d]ifferent clients call for different commitments of time" and that costs, such as research, that may benefit several categories of clients "make it hard to draw inferences from fee levels." *Id.*, at 634.

The Seventh Circuit denied rehearing en banc by an equally divided vote. 537 F. 3d 728 (2008) *(per curiam)*. The dissent from the denial of rehearing argued that the panel's rejection of *Gartenberg* was based "mainly on an economic analysis that is ripe for reexamination." 537 F. 3d, at 730 (opinion of Posner, J.). Among other things, the dissent expressed concern that Harris Associates charged "its captive funds more than twice what it charges independent funds," and the dissent questioned whether high adviser fees actually drive investors away. *Id.*, at 731.

We granted certiorari to resolve a split among the Courts of Appeals over the proper standard under § 36(b).[2] 556 U. S. 1104 (2009).

II

A

Since Congress amended the Investment Company Act in 1970, the mutual fund industry has experienced exponential growth. Assets under management increased from $38.2 billion in 1966 to over $9.6 trillion in 2008. The number of mutual fund investors grew from 3.5 million in 1965 to 92 million in 2008, and there are now more than 9,000 open- and closed-end funds.[3]

During this time, the standard for an investment adviser's fiduciary duty has remained an open question in our Court, but, until the Seventh Circuit's decision below, something of a consensus had developed regarding the standard set forth

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[2] See 527 F. 3d 627 (CA7 2008) (case below); *Migdal* v. *Rowe Price-Fleming Int'l, Inc.*, 248 F. 3d 321 (CA4 2001); *Krantz* v. *Prudential Invs. Fund Management LLC*, 305 F. 3d 140 (CA3 2002) *(per curiam)*. After we granted certiorari in this case, another Court of Appeals adopted the standard of *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 694 F. 2d 923 (CA2 1982). See *Gallus* v. *Ameriprise Financial, Inc.*, 561 F. 3d 816 (CA8 2009).

[3] Compare H. R. Rep. No. 2337, 89th Cong., 2d Sess., p. vii (1966), with Investment Company Institute, 2009 Fact Book 15, 20, 72 (49th ed.), online at http://www.icifactbook.org/pdf/2009_factbook.pdf (as visited Mar. 9, 2010, and available in Clerk of Court's case file).

over 25 years ago in *Gartenberg*, 694 F. 2d 923. The *Gartenberg* standard has been adopted by other federal courts,[4] and "[t]he SEC's regulations have recognized, and formalized, *Gartenberg*-like factors." Brief for United States as *Amicus Curiae* 23. See 17 CFR § 240.14a–101, Sched. 14A, Item 22, par. (c)(11)(i) (2009); 69 Fed. Reg. 39801, n. 31, 39807–39809 (2004). In the present case, both petitioners and respondent generally endorse the *Gartenberg* approach, although they disagree in some respects about its meaning.

In *Gartenberg*, the Second Circuit noted that Congress had not defined what it meant by a "fiduciary duty" with respect to compensation but concluded that "the test is essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in the light of all of the surrounding circumstances." 694 F. 2d, at 928. The Second Circuit elaborated that, "[t]o be guilty of a violation of § 36(b), . . . the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." *Ibid.* "To make this determination," the court stated, "all pertinent facts must be weighed," *id.*, at 929, and the court specifically mentioned "the adviser-manager's cost in providing the service, . . . the extent to which the adviser-manager realizes economies of scale as the fund grows larger, and the volume of orders which must be processed by the manager," *id.*, at 930.[5] Observing that competition among advisers for

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[4] See, *e. g.*, *Gallus*, *supra*, at 822–823; *Krantz*, *supra*; *In re Franklin Mut. Funds Fee Litigation*, 478 F. Supp. 2d 677, 683, 686 (NJ 2007); *Yameen* v. *Eaton Vance Distributors, Inc.*, 394 F. Supp. 2d 350, 355 (Mass. 2005); *Hunt* v. *Invesco Funds Group, Inc.*, No. H–04–2555, 2006 WL 1581846, *2 (SD Tex., June 5, 2006); *Siemers* v. *Wells Fargo & Co.*, No. C 05–4518 WHA, 2006 WL 2355411, *15–*16 (ND Cal., Aug. 14, 2006); see also *Amron* v. *Morgan Stanley Inv. Advisors Inc.*, 464 F. 3d 338, 340–341 (CA2 2006).

[5] Other factors cited by the *Gartenberg* court include (1) the nature and quality of the services provided to the fund and shareholders; (2) the profitability of the fund to the adviser; (3) any "fall-out financial benefits,"

the business of managing a fund may be "virtually nonexistent," the court rejected the suggestion that "the principal factor to be considered in evaluating a fee's fairness is the price charged by other similar advisers to funds managed by them," although the court did not suggest that this factor could not be "taken into account." *Id.*, at 929. The court likewise rejected the "argument that the lower fees charged by investment advisers to large pension funds should be used as a criterion for determining fair advisory fees for money market funds," since a "pension fund does not face the myriad of daily purchases and redemptions throughout the nation which must be handled by [a money market fund]." *Id.*, at 930, n. 3.[6]

B

The meaning of § 36(b)'s reference to "a fiduciary duty with respect to the receipt of compensation for services"[7] is hardly pellucid, but based on the terms of that provision and the role that a shareholder action for breach of that duty plays in the overall structure of the Act, we conclude that

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those collateral benefits that accrue to the adviser because of its relationship with the mutual fund; (4) comparative fee structure (meaning a comparison of the fees with those paid by similar funds); and (5) the independence, expertise, care, and conscientiousness of the board in evaluating adviser compensation. 694 F. 2d, at 929–932 (internal quotation marks omitted).

[6] A money market fund differs from a mutual fund in both the types of investments and the frequency of redemptions. A money market fund often invests in short-term money market securities, such as short-term securities of the United States Government or its agencies, bank certificates of deposit, and commercial paper. Investors can invest in such a fund for as little as a day, so, from the investor's perspective, the fund resembles an investment "more like a bank account than [a] traditional investment in securities." *Id.*, at 925.

[7] Section 36(b) provides as follows:

"[T]he investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser." 84 Stat. 1429 (codified at 15 U. S. C. § 80a–35(b)).

Gartenberg was correct in its basic formulation of what § 36(b) requires: To face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining.

1

We begin with the language of § 36(b). As noted, the Seventh Circuit panel thought that the phrase "fiduciary duty" incorporates a standard taken from the law of trusts. Petitioners agree but maintain that the panel identified the wrong trust-law standard. Instead of the standard that applies when a trustee and a settlor negotiate the trustee's fee at the time of the creation of a trust, petitioners invoke the standard that applies when a trustee seeks compensation after the trust is created. Brief for Petitioners 20–23, 35–37. A compensation agreement reached at that time, they point out, "'will not bind the beneficiary' if either 'the trustee failed to make a full disclosure of all circumstances affecting the agreement'" which he knew or should have known or if the agreement is unfair to the beneficiary. *Id.*, at 23 (quoting Restatement (Second) of Trusts § 242, Comment *i*). Respondent, on the other hand, contends that the term "fiduciary" is not exclusive to the law of trusts, that the phrase means different things in different contexts, and that there is no reason to believe that § 36(b) incorporates the specific meaning of the term in the law of trusts. Brief for Respondent 34–36.

We find it unnecessary to take sides in this dispute. In *Pepper* v. *Litton*, 308 U. S. 295 (1939), we discussed the meaning of the concept of fiduciary duty in a context that is analogous to that presented here, and we also looked to trust law. At issue in *Pepper* was whether a bankruptcy court could disallow a dominant or controlling shareholder's claim for compensation against a bankrupt corporation. Domi-

nant or controlling shareholders, we held, are "fiduciar[ies]" whose "powers are powers [held] in trust." *Id.*, at 306. We then explained:

> "Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. . . . *The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.* If it does not, equity will set it aside." *Id.*, at 306–307 (emphasis added; footnote omitted); see also *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599 (1921) (standard of fiduciary duty for interested directors).

We believe that this formulation expresses the meaning of the phrase "fiduciary duty" in § 36(b), 84 Stat. 1429. The Investment Company Act modifies this duty in a significant way: It shifts the burden of proof from the fiduciary to the party claiming breach, 15 U. S. C. § 80a–35(b)(1), to show that the fee is outside the range that arm's-length bargaining would produce.

The *Gartenberg* approach fully incorporates this understanding of the fiduciary duty as set out in *Pepper* and reflects § 36(b)(1)'s imposition of the burden on the plaintiff. As noted, *Gartenberg* insists that all relevant circumstances be taken into account, see 694 F. 2d, at 929, as does § 36(b)(2), 84 Stat. 1429 ("[A]pproval by the board of directors . . . shall be given such consideration by the court as is deemed appropriate under *all the circumstances*" (emphasis added)). And *Gartenberg* uses the range of fees that might result from arm's-length bargaining as the benchmark for reviewing challenged fees.

Gartenberg's approach also reflects § 36(b)'s place in the statutory scheme and, in particular, its relationship to the other protections that the Act affords investors.

Under the Act, scrutiny of investment-adviser compensation by a fully informed mutual fund board is the "cornerstone of the . . . effort to control conflicts of interest within mutual funds." *Burks*, 441 U. S., at 482. The Act interposes disinterested directors as "independent watchdogs" of the relationship between a mutual fund and its adviser. *Id.*, at 484 (internal quotation marks omitted). To provide these directors with the information needed to judge whether an adviser's compensation is excessive, the Act requires advisers to furnish all information "reasonably . . . necessary to evaluate the terms" of the adviser's contract, 15 U. S. C. § 80a–15(c), and gives the SEC the authority to enforce that requirement. See § 80a–41. Board scrutiny of adviser compensation and shareholder suits under § 36(b), 84 Stat. 1429, are mutually reinforcing but independent mechanisms for controlling conflicts. See *Daily Income Fund*, 464 U. S., at 541 (Congress intended for § 36(b) suits and directorial approval of adviser contracts to act as "independent checks on excessive fees"); *Kamen*, 500 U. S., at 108 ("Congress added § 36(b) to the [Act] in 1970 because it concluded that the shareholders should not have to rely solely on the fund's directors to assure reasonable adviser fees, notwithstanding the increased disinterestedness of the board" (internal quotation marks omitted)).

In recognition of the role of the disinterested directors, the Act instructs courts to give board approval of an adviser's compensation "such consideration . . . as is deemed appropriate under all the circumstances." § 80a–35(b)(2). Cf. *Burks*, *supra*, at 485 ("[I]t would have been paradoxical for Congress to have been willing to rely largely upon [boards of directors as] 'watchdogs' to protect shareholder

interests and yet, where the 'watchdogs' have done precisely that, require that they be totally muzzled").

From this formulation, two inferences may be drawn. First, a measure of deference to a board's judgment may be appropriate in some instances. Second, the appropriate measure of deference varies depending on the circumstances.

Gartenberg heeds these precepts. *Gartenberg* advises that "the expertise of the independent trustees of a fund, whether they are fully informed about all facts bearing on the [investment adviser's] service and fee, and the extent of care and conscientiousness with which they perform their duties are important factors to be considered in deciding whether they and the [investment adviser] are guilty of a breach of fiduciary duty in violation of § 36(b)." 694 F. 2d, at 930.

III

While both parties in this case endorse the basic *Gartenberg* approach, they disagree on several important questions that warrant discussion.

The first concerns comparisons between the fees that an adviser charges a captive mutual fund and the fees that it charges its independent clients. As noted, the *Gartenberg* court rejected a comparison between the fees that the adviser in that case charged a money market fund and the fees that it charged a pension fund. 694 F. 2d, at 930, n. 3 (noting that "[t]he nature and extent of the services required by each type of fund differ sharply"). Petitioners contend that such a comparison is appropriate, Brief for Petitioners 30–31, but respondent disagrees, Brief for Respondent 38–44. Since the Act requires consideration of all relevant factors, 15 U. S. C. § 80a–35(b)(2); see also § 80a–15(c), we do not think that there can be any categorical rule regarding the comparisons of the fees charged different types of clients. See *Daily Income Fund*, *supra*, at 537 (discussing concern with investment advisers' practice of charging higher fees to mutual funds than to their other clients). Instead, courts may

give such comparisons the weight that they merit in light of the similarities and differences between the services that the clients in question require, but courts must be wary of inapt comparisons. As the panel below noted, there may be significant differences between the services provided by an investment adviser to a mutual fund and those it provides to a pension fund which are attributable to the greater frequency of shareholder redemptions in a mutual fund, the higher turnover of mutual fund assets, the more burdensome regulatory and legal obligations, and higher marketing costs. 527 F. 3d, at 634 ("Different clients call for different commitments of time"). If the services rendered are sufficiently different that a comparison is not probative, then courts must reject such a comparison. Even if the services provided and fees charged to an independent fund are relevant, courts should be mindful that the Act does not necessarily ensure fee parity between mutual funds and institutional clients, contrary to petitioners' contentions. See *id.*, at 631 ("Plaintiffs maintain that a fiduciary may charge its controlled clients no more than its independent clients").[8]

By the same token, courts should not rely too heavily on comparisons with fees charged to mutual funds by other advisers. These comparisons are problematic because these

[8] Comparisons with fees charged to institutional clients, therefore, will not "doo[m] [a]ny [f]und to [t]rial." Brief for Respondent 49; see also *Strougo* v. *BEA Assocs.*, 188 F. Supp. 2d 373, 384 (SDNY 2002) (suggesting that fee comparisons, where permitted, might produce a triable issue). First, plaintiffs bear the burden in showing that fees are beyond the range of arm's-length bargaining. § 80a–35(b)(1). Second, a showing of relevance requires courts to assess any disparity in fees in light of the different markets for advisory services. Only where plaintiffs have shown a large disparity in fees that cannot be explained by the different services in addition to other evidence that the fee is outside the arm's-length range will trial be appropriate. Cf. App. to Pet. for Cert. 30a; see also *In re AllianceBernstein Mut. Fund Excessive Fee Litigation*, No. 04 Civ. 4885 (SWK), 2006 WL 1520222, *2 (SDNY, May 31, 2006) (citing report finding that fee differential resulted from different services and different liabilities assumed).

fees, like those challenged, may not be the product of negotiations conducted at arm's length. See 537 F. 3d, at 731–732 (opinion dissenting from denial of rehearing en banc); *Gartenberg*, *supra*, at 929 ("Competition between money market funds for shareholder business does not support an inference that competition must therefore also exist between [investment advisers] for fund business. The former may be vigorous even though the latter is virtually non-existent").

Finally, a court's evaluation of an investment adviser's fiduciary duty must take into account both procedure and substance. See 15 U. S. C. § 80a–35(b)(2) (requiring deference to board's consideration "as is deemed appropriate under all the circumstances"); cf. *Daily Income Fund*, 464 U. S., at 541 ("Congress intended security holder and SEC actions under § 36(b), on the one hand, and directorial approval of adviser contracts, on the other, to act as independent checks on excessive fees"). Where a board's process for negotiating and reviewing investment-adviser compensation is robust, a reviewing court should afford commensurate deference to the outcome of the bargaining process. See *Burks*, 441 U. S., at 484 (unaffiliated directors serve as "independent watchdogs" (internal quotation marks omitted)). Thus, if the disinterested directors considered the relevant factors, their decision to approve a particular fee agreement is entitled to considerable weight, even if a court might weigh the factors differently. Cf. *id.*, at 485. This is not to deny that a fee may be excessive even if it was negotiated by a board in possession of all relevant information, but such a determination must be based on evidence that the fee "is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." *Gartenberg*, 694 F. 2d, at 928.

In contrast, where the board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome. When an investment adviser fails to disclose material information to the

board, greater scrutiny is justified because the withheld information might have hampered the board's ability to function as "an independent check on management." *Burks*, *supra*, at 484 (internal quotation marks omitted). "Section 36(b) is sharply focused on the question of whether the fees themselves were excessive." *Migdal* v. *Rowe Price-Fleming Int'l, Inc.*, 248 F. 3d 321, 328 (CA4 2001); see also 15 U. S. C. § 80a–35(b) (imposing a "fiduciary duty with respect to the *receipt of compensation* for services, or of payments of a material nature" (emphasis added)). But an adviser's compliance or noncompliance with its disclosure obligations is a factor that must be considered in calibrating the degree of deference that is due a board's decision to approve an adviser's fees.

It is also important to note that the standard for fiduciary breach under § 36(b) does not call for judicial second-guessing of informed board decisions. See *Daily Income Fund*, *supra*, at 538; see also *Burks*, 441 U. S., at 483 ("Congress consciously chose to address the conflict-of-interest problem through the Act's independent-directors section, rather than through more drastic remedies"). "[P]otential conflicts [of interests] may justify some restraints upon the unfettered discretion of even disinterested mutual fund directors, particularly in their transactions with the investment adviser," but they do not suggest that a court may supplant the judgment of disinterested directors apprised of all relevant information, without additional evidence that the fee exceeds the arm's-length range. *Id.*, at 481. In reviewing compensation under § 36(b), the Act does not require courts to engage in a precise calculation of fees representative of arm's-length bargaining. See 527 F. 3d, at 633 ("Judicial price-setting does not accompany fiduciary duties"). As recounted above, Congress rejected a "reasonableness" requirement that was criticized as charging the courts with rate-setting responsibilities. See *Daily Income Fund*, *supra*, at 538–540. Congress' approach recognizes that

courts are not well suited to make such precise calculations. Cf. *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 308 (1997) ("[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them"); *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 539 (2002); see also *Concord* v. *Boston Edison Co.*, 915 F. 2d 17, 25 (CA1 1990) (opinion for the court by Breyer, C. J.) ("[H]ow is a judge or jury to determine a 'fair price' "). *Gartenberg*'s "so disproportionately large" standard, 694 F. 2d, at 928, reflects this congressional choice to "rely largely upon [independent director] 'watchdogs' to protect shareholder interests." *Burks*, *supra*, at 485.

By focusing almost entirely on the element of disclosure, the Seventh Circuit panel erred. See 527 F. 3d, at 632 (An investment adviser "must make full disclosure and play no tricks but is not subject to a cap on compensation"). The *Gartenberg* standard, which the panel rejected, may lack sharp analytical clarity, but we believe that it accurately reflects the compromise that is embodied in § 36(b), and it has provided a workable standard for nearly three decades. The debate between the Seventh Circuit panel and the dissent from the denial of rehearing regarding today's mutual fund market is a matter for Congress, not the courts.

IV

For the foregoing reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Court rightly affirms the careful approach to § 36(b) cases, see 15 U. S. C. § 80a–35(b), that courts have applied since (and in certain respects in spite of) *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 694 F. 2d 923, 928–930

(CA2 1982). I write separately because I would not shortchange the Court's effort by describing it as affirmation of the "*Gartenberg* standard." *Ante*, at 344, 353.

The District Court and Court of Appeals in *Gartenberg* created that standard, which emphasizes fee "fairness" and proportionality, 694 F. 2d, at 929, in a manner that could be read to permit the equivalent of the judicial rate regulation the *Gartenberg* opinions disclaim, based on the Investment Company Act of 1940's "tortuous" legislative history and a handful of extrastatutory policy and market considerations, *id.*, at 928; see also *id.*, at 926–927, 929–931; *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 528 F. Supp. 1038, 1046–1050, 1055–1057 (SDNY 1981). Although virtually all subsequent § 36(b) cases cite *Gartenberg*, most courts have correctly declined its invitation to stray beyond statutory bounds. Instead, they have followed an approach (principally in deciding which cases may proceed past summary judgment) that defers to the informed conclusions of disinterested boards and holds plaintiffs to their heavy burden of proof in the manner the Act, and now the Court's opinion, requires. See, *e. g.*, *ante*, at 347 (underscoring that the Act "modifies" the governing fiduciary duty standard "in a significant way: It shifts the burden of proof from the fiduciary to the party claiming breach, 15 U. S. C. § 80a–35(b)(1), to show that the fee is outside the range that arm's-length bargaining would produce"); *ante*, at 352 (citing the "degree of deference that is due a board's decision to approve an adviser's fees" and admonishing that "the standard for fiduciary breach under § 36(b) does not call for judicial second-guessing of informed board decisions").

I concur in the Court's decision to affirm this approach based upon the Investment Company Act's text and our longstanding fiduciary duty precedents. But I would not say that in doing so we endorse the "*Gartenberg* standard." Whatever else might be said about today's decision, it does not countenance the free-ranging judicial "fairness" review

of fees that *Gartenberg* could be read to authorize, see 694 F. 2d, at 929–930, and that virtually all courts deciding § 36(b) cases since *Gartenberg* (including the Court of Appeals in this case) have wisely eschewed in the post-*Gartenberg* precedents we approve.

Syllabus

PADILLA *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 08–651. Argued October 13, 2009—Decided March 31, 2010

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment's effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. Pp. 360–375.

(a) Changes to immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. 360–364.

(b) *Strickland* v. *Washington*, 466 U. S. 668, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assist-

ance" required under *Strickland*, 466 U. S., at 689. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Pp. 364–366.

(c) To satisfy *Strickland*'s two-prong inquiry, counsel's representation must fall "below an objective standard of reasonableness," *id.*, at 688, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id.*, at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of "'[p]reserving the . . . right to remain in the United States'" and "preserving the possibility of" discretionary relief from deportation. *INS* v. *St. Cyr*, 533 U. S. 289, 322, 323. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland*'s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 366–369.

(d) The Solicitor General's proposed rule—that *Strickland* should be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice—is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not

Syllabus

open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill* v. *Lockhart*, 474 U. S. 52, 58. Pp. 369–374.

253 S. W. 3d 482, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined, *post*, p. 375. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 388.

Stephen B. Kinnaird argued the cause for petitioner. With him on the briefs were *Richard E. Neal*, *Timothy G. Arnold*, and *Stephanos Bibas*.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Ginger D. Anders*, and *William C. Brown*.

Wm. Robert Long, Jr., Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *Jack Conway*, Attorney General, and *Matthew R. Krygiel*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *H. Thomas Wells, Jr.*, *Gabriel J. Chin*, *Daniel J. Leffell*, *Margaret Colgate Love*, and *Peter S. Margulies;* for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans;* for Legal Ethics, Criminal Procedure, and Criminal Law Professors by *Miguel A. Estrada* and *Richard A. Bierschbach;* and for the National Association of Criminal Defense Lawyers et al. by *Joshua L. Dratel*, *Manuel D. Vargas*, *Iris E. Bennett*, and *Matthew Hersh*.

A brief of *amici curiae* urging affirmance was filed for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, *Kyle Duncan*, Appellate Chief, *Gene C. Schaerr*, and *Linda T. Coberly*, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Steve Six* of Kansas, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Jon Bruning* of Nebraska, *Catherine*

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.[1]

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "'did not have to worry about immigration status since he had been in the country so long.'" 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" con-

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Cortez Masto of Nevada, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *John R. Kroger* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming.

Paul R. Q. Wolfson, Adam Raviv, Karen K. Narasaki, Vincent A. Eng, Nina Perales, and *Elise Sandra Shore* filed a brief for the Asian American Justice Center et al. as *amici curiae.*

[1] Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U. S. C. § 1227(a)(2)(B)(i).

sequence of his conviction. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U. S. 1169 (2009), to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.2a, p. 5 (1959). An early effort to empower the President to order the deportation of those immigrants he "judge[d] dangerous to the peace and safety of the United States," Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon § 1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon § 1.2b, at 6. In 1891, Congress added to the list of excludable persons those "who have been convicted of a felony or other infamous

crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.[2]

The Immigration Act of 1917 (1917 Act) brought "radical changes" to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . ." 39 Stat. 889. And § 19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term "moral turpitude."

While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." *Id.*, at 890.[3] This procedure, known as a judicial recommen-

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[2] In 1907, Congress expanded the class of excluded persons to include individuals who "admit" to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 899.

[3] As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889–890.

This provision was codified in 8 U. S. C. § 1251(b) (1994 ed.) (transferred to § 1227 (2006 ed.)). The judge's nondeportation recommendation was bind-

dation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier* v. *United States*, 793 F. 2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses—such as the offense at issue in this case—provided a distinct basis for deportation as early as 1922,[4] the JRAD procedure was generally available to avoid deportation in narcotics convictions. See *United States* v. *O'Rourke*, 213 F. 2d 759, 762 (CA8 1954). Except for "technical, inadvertent and insignificant violations of the laws relating to narcotics," *ibid.*, it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act's broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics

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ing on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier* v. *United States*, 793 F. 2d 449, 452 (CA2 1986).

[4] Congress first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin* v. *Moy Fat*, 8 F. 2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special," *Chung Que Fong* v. *Nagle*, 15 F. 2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi* v. *Ebey*, 12 F. 2d 922, 923 (CA7 1926); *Todaro* v. *Munster*, 62 F. 2d 963, 964 (CA10 1933).

case "was effective to prevent deportation" (citing *Dang Nam* v. *Bryan*, 74 F. 2d 379, 380–381 (CA9 1934))).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland* v. *Washington*, 466 U. S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F. 2d 449. See also *United States* v. *Castro*, 26 F. 3d 557 (CA5 1994). In its view, seeking a JRAD was "part of the sentencing" process, *Janvier*, 793 F. 2d, at 452, even if deportation itself is a civil action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),[5] and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS* v. *St. Cyr*, 533 U. S. 289, 296 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amend-

[5] The INA separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U. S. C. § 1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204, 206. The JRAD procedure, codified in 8 U. S. C. § 1251(b) (1994 ed.), applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States* v. *O'Rourke*, 213 F. 2d 759, 762 (CA8 1954) (recognizing that, under the 1952 INA, narcotics offenses were no longer eligible for JRADs).

ments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.[6] See 8 U. S. C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See § 1101(a)(43)(B); § 1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part[7]—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970); *Strickland*, 466 U. S., at 686. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i. e.*, those matters not within the sentencing authority of the state trial court.[8] 253 S. W. 3d,

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[6] The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term "removal" rather than "deportation." See *Calcano-Martinez* v. *INS*, 533 U. S. 348, 350, n. 1 (2001).

[7] See Brief for Asian American Justice Center et al. as *Amici Curiae* 12–27 (providing real-world examples).

[8] There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bear-

at 483–484 (citing *Commonwealth* v. *Fuartado*, 170 S. W. 3d 384 (2005)). In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.[9]

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U. S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe "penalty," *Fong Yue Ting* v. *United States*, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and

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ing on the disposition of this case because, as even JUSTICE ALITO agrees, counsel must, at the very least, advise a noncitizen "defendant that a criminal conviction may have adverse immigration consequences," *post*, at 375 (opinion concurring in judgment). See also *post*, at 387 ("I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation"). In his concurring opinion, JUSTICE ALITO has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post*, at 375–376.

[9] See, *e. g.*, *United States* v. *Gonzalez*, 202 F. 3d 20 (CA1 2000); *United States* v. *Del Rosario*, 902 F. 2d 55 (CADC 1990); *United States* v. *Yearwood*, 863 F. 2d 6 (CA4 1988); *Santos-Sanchez* v. *United States*, 548 F. 3d 327 (CA5 2008); *Broomes* v. *Ashcroft*, 358 F. 3d 1251 (CA10 2004); *United States* v. *Campbell*, 778 F. 2d 764 (CA11 1985); *Oyekoya* v. *State*, 558 So. 2d 990 (Ala. Crim. App. 1989); *State* v. *Rosas*, 183 Ariz. 421, 904 P. 2d 1245 (App. 1995); *State* v. *Montalban*, 2000–2739 (La. 2/26/02), 810 So. 2d 1106; *Commonwealth* v. *Frometa*, 520 Pa. 552, 555 A. 2d 92 (1989).

the penalty of deportation for nearly a century, see Part I, *supra*, at 360–364. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States* v. *Russell*, 686 F. 2d 35, 38 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U. S., at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions").

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

III

Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U. S., at 688. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Ibid.;*

Bobby v. *Van Hook*, 558 U. S. 4, 7 (2009) *(per curiam)*; *Florida* v. *Nixon*, 543 U. S. 175, 191, and n. 6 (2004); *Wiggins* v. *Smith*, 539 U. S. 510, 524 (2003); *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000). Although they are "only guides," *Strickland*, 466 U. S., at 688, and not "inexorable commands," *Bobby*, 558 U. S., at 8, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Defense Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20–21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713–718 (2002); A. Campbell, Law of Sentencing § 13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed. 1999). "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution §§ 6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Non-

citizen in a Criminal Case, 31 The Champion 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed. 2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (West 2009)).

We too have previously recognized that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *St. Cyr*, 533 U. S., at 322 (quoting 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U. S., at 323. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U. S. C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency:

The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[10] But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ," though counsel is required to provide accurate advice if she

[10] As JUSTICE ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor General's proposed rule unpersuasive, although it has support among the lower courts. See, *e. g., United States* v. *Couto*, 311 F. 3d 179, 188 (CA2 2002); *United States* v. *Kwan*, 407 F. 3d 1005 (CA9 2005); *Sparks* v. *Sowders*, 852 F. 2d 882 (CA6 1988); *United States* v. *Russell*, 686 F. 2d 35 (CADC 1982); *State* v. *Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . . [, and] completely lacking in legal or rational bases." Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.*, at 30; *Strickland*, 466 U. S., at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State* v. *Paredez*, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti* v. *United States*, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.[11] Second, it would deny a

[11] As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attor-

class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation, and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Hill* v. *Lockhart*, 474 U. S. 52, 62 (1985) (White, J., concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*, see *id.*, at 58, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.[12]

A flood did not follow in that decision's wake. Surmounting *Strickland*'s high bar is never an easy task. See, *e. g.*, 466 U. S., at 689 ("Judicial scrutiny of counsel's performance must be highly deferential"); *id.*, at 693 (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a

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ney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37–38. We think the same result should follow when the stakes are not life and death but merely "banishment or exile," *Delgadillo* v. *Carmichael*, 332 U. S. 388, 390–391 (1947).

[12] However, we concluded that, even though *Strickland* applied to petitioner's claim, he had not sufficiently alleged prejudice to satisfy *Strickland*'s second prong. *Hill*, 474 U. S., at 59–60. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong.

Justice Alito believes that the Court misreads *Hill*, *post*, at 383–384. In *Hill*, the Court recognized—for the first time—that *Strickland* applies to advice respecting a guilty plea. 474 U. S., at 58 ("We hold, therefore, that the two-part *Strickland* v. *Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel"). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla's claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.

particular case as they are to be prejudicial"). Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe* v. *Flores-Ortega*, 528 U. S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See *supra*, at 368–371. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland*, 466 U. S., at 689.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.[13] But they account for only approximately 30% of the habeas petitions filed.[14] The nature of relief secured by a successful collat-

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[13] See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

[14] See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

eral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U. S., at 57; see also *Richardson*, 397 U. S., at 770–771. The severity of deportation—"the equivalent of banishment or exile," *Delgadillo* v. *Carmichael*, 332 U. S. 388, 390–391 (1947)—only underscores how critical it is for coun-

sel to inform her noncitizen client that he faces a risk of deportation.[15]

V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." *Richardson*, 397 U. S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.

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[15] To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC–491 (rev. Feb. 2003), http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, *e. g.*, Alaska Rule Crim. Proc. 11(c)(3)(C) (2009–2010); Cal. Penal Code Ann. § 1016.5 (West 2008); Conn. Gen. Stat. § 54–1j (2009); D. C. Code § 16–713 (2001); Fla. Rule Crim. Proc. 3.172(c)(8) (Supp. 2010); Ga. Code Ann. § 17–7–93(c) (1997); Haw. Rev. Stat. Ann. § 802E–2 (2007); Iowa Rule Crim. Proc. 2.8(2)*(b)*(3) (Supp. 2009); Md. Rule 4–242 (Lexis 2009); Mass. Gen. Laws, ch. 278, § 29D (West 2009); Minn. Rule Crim. Proc. 15.01 (2009); Mont. Code Ann. § 46–12–210 (West 2009); N. M. Rule Crim. Form 9–406 (2009); N. Y. Crim. Proc. Law Ann. § 220.50(7) (West Supp. 2009); N. C. Gen. Stat. Ann. § 15A–1022 (Lexis 2007); Ohio Rev. Code Ann. § 2943.031 (West 2006); Ore. Rev. Stat. § 135.385 (2007); R. I. Gen. Laws § 12–12–22 (Lexis Supp. 2008); Tex. Code Crim. Proc. Ann., Art. 26.13(a)(4) (Vernon Supp. 2009); Vt. Stat. Ann., Tit. 13, § 6565(c)(1) (Supp. 2009); Wash. Rev. Code § 10.40.200 (2008); Wis. Stat. § 971.08 (2005–2006).

See *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 530 (2002).

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland* v. *Washington*, 466 U. S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it." *Ante*, at 369. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"—but not, perhaps, in other situations. *Ibid.* This vague, halfway test will lead to much confusion and needless litigation.

I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. 466 U. S., at 688. Until today, the longstanding and unanimous position of the federal

courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, *e. g., United States* v. *Gonzalez,* 202 F. 3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States* v. *Banda,* 1 F. 3d 354, 355 (CA5 1993) (holding that "an attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 699 (2002) (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"—including "eleven federal circuits, more than thirty states, and the District of Columbia"—"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante,* at 364, n. 8, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. Chin & Holmes 705–706. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s]," see *ante,* at 374, but this Court has

never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante*, at 367 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. *E. g.*, *Roe* v. *Flores-Ortega*, 528 U. S. 470, 477 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. See *Strickland*, *supra*, at 688 (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante*, at 369, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel, in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at 368–369.

The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not

specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer's Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) ("Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject"); *id.*, § 5.2, at 146 (stating that the aggravated felony list at 8 U. S. C. § 1101(a)(43) is not clear with respect to several of the listed categories, that "the term 'aggravated felonies' can include misdemeanors," and that the determination of whether a crime is an "aggravated felony" is made "even more difficult" because "several agencies and courts interpret the statute," including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and District Courts considering immigration-law and criminal-law issues); ABA Guidebook § 4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, § 4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").

Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit*." *Id.*, § 5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth

Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U. S. C. § 1101(a)(43)." *Id.*, § 5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "*attempted* possession," *id.*, § 5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while "[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony," *id.*, § 5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." *Id.*, § 5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMT" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably* not a CIMT" (emphasis added)); *id.*, at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may* not be a CIMT" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may

be hard, in some cases, for defense counsel even to determine whether a client is an alien,[1] or whether a particular state disposition will result in a "conviction" for purposes of federal immigration law.[2] The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes § 2:1, at 2–2 to 2–3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "noth-

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[1] Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook § 4.20, at 113 (explaining that U. S. citizenship conferred by blood is "'derivative,'" and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").

[2] "A disposition that is not a 'conviction' under state law may still be a 'conviction' for immigration purposes." *Id.*, § 4.32, at 117 (citing *Matter of Salazar-Regino*, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook § 4.37; accord, D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes § 2:1, p. 2–2 (2009) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").

ing is ever simple with immigration law"—including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook § 4.65, at 130; Immigration Law and Crimes § 2:1. I therefore cannot agree with the Court's apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante*, at 368. But "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ante*, at 369. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration-law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes § 2:1, at 2–2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal

conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook § 4.14, at 111 ("Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, "28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas." Brief for State of Louisiana et al. 25; accord, Chin & Holmes 708 ("A growing number of states require advice about deportation by statute or court rule"). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the

advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States* v. *Russell*, 686 F. 2d 35, 39–40 (CADC 1982) (explaining that a district court's discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, "the possible existence of prejudice to the government's case as a result of the defendant's untimely request to stand trial" and "the strength of the defendant's reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge").

Fourth, the Court's decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel. As noted above, the Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far. See, *e. g.*, *Gonzalez*, 202 F. 3d, at 28; *Banda*, 1 F. 3d, at 355; Chin & Holmes 697, 699. The majority appropriately acknowledges that the lower courts are "now quite experienced with applying *Strickland*," *ante*, at 372, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment by claiming that this Court in *Hill* v. *Lockhart*, 474 U. S. 52 (1985), similarly "applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." *Ante*, at 371. That

characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant's Sixth Amendment right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of 'prejudice.'" 474 U. S., at 60. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court's strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel's performance objectively unreasonable. After all, the Court still would have "applied *Strickland*" to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attor-

neys *in criminal cases.*'" *Strickland*, 466 U. S., at 687 (quoting *McMann* v. *Richardson*, 397 U. S. 759, 770, 771 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys *in criminal cases.*" See *ante*, at 369 ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it"). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'" 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland*, 466 U. S., at 686 ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional

rights. See *ibid.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.[3] And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences

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[3] See *United States* v. *Kwan*, 407 F. 3d 1005, 1015–1017 (CA9 2005); *United States* v. *Couto*, 311 F. 3d 179, 188 (CA2 2002); *Downs-Morgan* v. *United States*, 765 F. 2d 1534, 1540–1541 (CA11 1985) (limiting holding to the facts of the case); see also *Santos-Sanchez* v. *United State*s, 548 F. 3d 327, 333–334 (CA5 2008) (concluding that counsel's advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

might be deemed "collateral."[4] By contrast, it appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short, the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that the Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty

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[4] See *Hill* v. *Lockhart*, 894 F. 2d 1009, 1010 (CA8 1990) (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*"); *Sparks* v. *Sowders*, 852 F. 2d 882, 885 (CA6 1988) ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel"); *id.*, at 886 (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); *Strader* v. *Garrison*, 611 F. 2d 61, 65 (CA4 1979) ("[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel").

that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer "for his defence" against a "criminal prosecutio[n]"—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of JUSTICE ALITO's concurrence, I dissent from the Court's conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney's

assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

* * *

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See *United States* v. *Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, Right to Counsel in American Courts 21, 28–29 (1955). We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963), and that the right to "the assistance of counsel" includes the right to *effective* assistance, *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery* v. *Gillespie County*, 554 U. S. 191, 216 (2008) (ALITO, J., concurring) (summarizing cases). We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah* v. *United States*, 377 U. S. 201, 205–206 (1964); *United States* v. *Wade*, 388 U. S. 218, 236–238 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran* v. *Burbine*, 475 U. S.

412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas* v. *Cobb*, 532 U. S. 162, 164 (2001).

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within "the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970). See *id.*, at 769–770 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Cf. *Cobb*, *supra*, at 171, n. 2; *Moran*, *supra*, at 430. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point. As the concurrence observes:

> "[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are 'seriou[s]'. . . ." *Ante*, at 376 (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, see *ante*, at 387—what would come to be known as the "*Padilla* warning"—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U. S. C. § 924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante*, at 385–386. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969); *Brady* v. *United States*, 397 U. S. 742, 748 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.[1]

[1] I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See *Brady*, 397 U. S., at 755 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due process requirements for a valid plea, see *Libretti* v. *United States*, 516 U. S. 29, 49–50 (1995), does not mention collateral consequences. Whatever the outcome, however, the effect of misadvice

But we should not smuggle the claim into the Sixth Amendment.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.[2] Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

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regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

[2] As the Court's opinion notes, *ante,* at 374, n. 15, many States—including Kentucky—already require that criminal defendants be warned of potential removal consequences.

Syllabus

SHADY GROVE ORTHOPEDIC ASSOCIATES, P. A. *v.* ALLSTATE INSURANCE CO.

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

No. 08–1008. Argued November 2, 2009—Decided March 31, 2010

After respondent Allstate refused to remit the interest due under New York law on petitioner Shady Grove's insurance claim, Shady Grove filed this class action in diversity to recover interest Allstate owed it and others. Despite the class-action provisions set forth in Federal Rule of Civil Procedure 23, the District Court held itself deprived of jurisdiction by N. Y. Civ. Prac. Law Ann. § 901(b), which precludes a class action to recover a "penalty" such as statutory interest. Affirming, the Second Circuit acknowledged that a Federal Rule adopted in compliance with the Rules Enabling Act, 28 U. S. C. § 2072, would control if it conflicted with § 901(b), but held there was no conflict because § 901(b) and Rule 23 address different issues—eligibility of the particular type of claim for class treatment and certifiability of a given class, respectively. Finding no Federal Rule on point, the Court of Appeals held that § 901(b) must be applied by federal courts sitting in diversity because it is "substantive" within the meaning of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

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

549 F. 3d 137, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I and II–A, concluding that § 901(b) does not preclude a federal district court sitting in diversity from entertaining a class action under Rule 23. Pp. 398–406.

(a) If Rule 23 answers the question in dispute, it governs here unless it exceeds its statutory authorization or Congress's rulemaking power. *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5. P. 398.

(b) Rule 23(b) answers the question in dispute—whether Shady Grove's suit may proceed as a class action—when it states that "[a] class action may be maintained" if certain conditions are met. Since § 901(b) attempts to answer the same question, stating that Shady Grove's suit "may not be maintained as a class action" because of the relief it seeks, that provision cannot apply in diversity suits unless Rule 23 is ultra vires. The Second Circuit's view that § 901(b) and Rule 23 address different issues is rejected. The line between eligibility and certifiability

is entirely artificial and, in any event, Rule 23 explicitly empowers a federal court to certify a class in every case meeting its criteria. Allstate's arguments based on the exclusion of some federal claims from Rule 23's reach pursuant to federal statutes and on § 901's structure are unpersuasive. Pp. 398–401.

(c) The dissent's claim that § 901(b) can coexist with Rule 23 because it addresses only the remedy available to class plaintiffs is foreclosed by § 901(b)'s text, notwithstanding its perceived purpose. The principle that courts should read ambiguous Federal Rules to avoid overstepping the authorizing statute, 28 U. S. C. § 2072(b), does not apply because Rule 23 is clear. The dissent's approach does not avoid a conflict between § 901(b) and Rule 23 but instead would render Rule 23 partially invalid. Pp. 401–406.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE SOTOMAYOR, concluded in Parts II–B and II–D:

(a) The Rules Enabling Act, 28 U. S. C. § 2072, not *Erie*, controls the validity of a Federal Rule of Procedure. Section 2072(b)'s requirement that federal procedural rules "not abridge, enlarge or modify any substantive right" means that a Rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14. Though a Rule may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. Rule 23 satisfies that criterion, at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants. Allstate's arguments asserting § 901(b)'s substantive impact are unavailing: It is not the substantive or procedural nature of the affected state law that matters, but that of the Federal Rule. See, *e. g.*, *id.*, at 14. Pp. 406–410.

(b) Opening federal courts to class actions that cannot proceed in state court will produce forum shopping, but that is the inevitable result of the uniform system of federal procedure that Congress created. Pp. 415–416.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded in Part II–C that the concurrence's analysis—under which a Federal Rule may displace a state procedural rule that is not "bound up" or "sufficiently intertwined" with substantive rights and remedies under state law—squarely conflicts with *Sibbach*'s single criterion that the Federal Rule "really regulat[e] procedure," 312 U. S., at 13–14. Pp. 410–415.

JUSTICE STEVENS agreed that Federal Rule of Civil Procedure 23 must apply because it governs whether a class must be certified, and it does not violate the Rules Enabling Act in this case. Pp. 416–436.

(a) When the application of a federal rule would "abridge, enlarge or modify any substantive right," 28 U. S. C. § 2072(b), the federal rule cannot govern. In rare cases, a federal rule that dictates an answer to a traditionally procedural question could, if applied, displace an unusual state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. Examples may include state laws that make it significantly more difficult to bring or to prove a claim or that function as limits on the amount of recovery. An application of a federal rule that directly collides with such a state law violates the Rules Enabling Act. Pp. 416–428.

(b) New York Civ. Prac. Law Ann. § 901(b), however, is not such a state law. It is a procedural rule that is not part of New York's substantive law. Pp. 432–436.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, in which ROBERTS, C. J., and STEVENS, THOMAS, and SOTOMAYOR, JJ., joined, an opinion with respect to Parts II–B and II–D, in which ROBERTS, C. J., and THOMAS and SOTOMAYOR, JJ., joined, and an opinion with respect to Part II–C, in which ROBERTS, C. J., and THOMAS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 416. GINSBURG, J., filed a dissenting opinion, in which KENNEDY, BREYER, and ALITO, JJ., joined, *post,* p. 436.

Scott L. Nelson argued the cause for petitioner. With him on the briefs were *Brian Wolfman* and *John S. Spadaro.*

Christopher Landau argued the cause for respondent. With him on the brief was *Andrew T. Hahn, Sr.**

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, an opinion with respect to Parts II–B and II–D, in

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**Amanda Frost, Leslie A. Brueckner,* and *Arthur H. Bryant* filed a brief for Public Justice, P. C., as *amicus curiae* urging reversal.

Douglas W. Dunham, Ellen P. Quackenbos, Allan J. Stein, Robin S. Conrad, and *Amar D. Sarwal* filed a brief for the Partnership for New York City, Inc., et al. as *amici curiae* urging affirmance.

which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE SOTOMAYOR join, and an opinion with respect to Part II–C, in which THE CHIEF JUSTICE and JUSTICE THOMAS join.

New York law prohibits class actions in suits seeking penalties or statutory minimum damages.[1] We consider whether this precludes a federal district court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23.[2]

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[1] New York Civ. Prac. Law Ann. § 901 (West 2006) provides:

"(a) One or more members of a class may sue or be sued as representative parties on behalf of all if:

"1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

"2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

"3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

"4. the representative parties will fairly and adequately protect the interests of the class; and

"5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

"(b) Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

[2] Rule 23(a) provides:

"(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

"(1) the class is so numerous that joinder of all members is impracticable;

"(2) there are questions of law or fact common to the class;

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

"(4) the representative parties will fairly and adequately protect the interests of the class."

Subsection (b) says that "[a] class action may be maintained if Rule 23(a) is satisfied and if" the suit falls into one of three described categories (irrelevant for present purposes).

I

The petitioner's complaint alleged the following: Shady Grove Orthopedic Associates, P. A., provided medical care to Sonia E. Galvez for injuries she suffered in an automobile accident. As partial payment for that care, Galvez assigned to Shady Grove her rights to insurance benefits under a policy issued in New York by Allstate Insurance Co. Shady Grove tendered a claim for the assigned benefits to Allstate, which under New York law had 30 days to pay the claim or deny it. See N. Y. Ins. Law Ann. § 5106(a) (West 2009). Allstate apparently paid, but not on time, and it refused to pay the statutory interest that accrued on the overdue benefits (at two percent per month), see *ibid.*

Shady Grove filed this diversity suit in the Eastern District of New York to recover the unpaid statutory interest. Alleging that Allstate routinely refuses to pay interest on overdue benefits, Shady Grove sought relief on behalf of itself and a class of all others to whom Allstate owes interest. The District Court dismissed the suit for lack of jurisdiction. 466 F. Supp. 2d 467 (2006). It reasoned that N. Y. Civ. Prac. Law Ann. § 901(b), which precludes a suit to recover a "penalty" from proceeding as a class action, applies in diversity suits in federal court, despite Federal Rule of Civil Procedure 23. Concluding that statutory interest is a "penalty" under New York law, it held that § 901(b) prohibited the proposed class action. And, since Shady Grove conceded that its individual claim (worth roughly $500) fell far short of the amount-in-controversy requirement for individual suits under 28 U. S. C. § 1332(a), the suit did not belong in federal court.[3]

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[3] Shady Grove had asserted jurisdiction under 28 U. S. C. § 1332(d)(2), which relaxes, for class actions seeking at least $5 million, the rule against aggregating separate claims for calculation of the amount in controversy. See *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 571 (2005).

The Second Circuit affirmed. 549 F. 3d 137 (2008). The court did not dispute that a Federal Rule adopted in compliance with the Rules Enabling Act, 28 U. S. C. § 2072, would control if it conflicted with § 901(b). But there was no conflict because (as we will describe in more detail below) the Second Circuit concluded that Rule 23 and § 901(b) address different issues. Finding no Federal Rule on point, the Court of Appeals held that § 901(b) is "substantive" within the meaning of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and thus must be applied by federal courts sitting in diversity.

We granted certiorari. 556 U. S. 1220 (2009).

II

The framework for our decision is familiar. We must first determine whether Rule 23 answers the question in dispute. *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987). If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. *Id.*, at 5; see *Hanna* v. *Plumer*, 380 U. S. 460, 463–464 (1965). We do not wade into *Erie*'s murky waters unless the Federal Rule is inapplicable or invalid. See 380 U. S., at 469–471.

A

The question in dispute is whether Shady Grove's suit may proceed as a class action. Rule 23 provides an answer. It states that "[a] class action may be maintained" if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i. e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. Rule Civ. Proc. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. (The Federal Rules regularly use "may" to confer categorical permission, see, *e. g.*, Fed. Rules Civ. Proc. 8(d)(2)–(3), 14(a)(1), 18(a)–(b), 20(a)(1)–(2), 27(a)(1), 30(a)(1), as do federal statutes that es-

tablish procedural entitlements, see, *e. g.*, 29 U. S. C. § 626(c)(1); 42 U. S. C. § 2000e–5(f)(1).) Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question—*i. e.*, it states that Shady Grove's suit "may *not* be maintained as a class action" (emphasis added) because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra vires.

The Second Circuit believed that § 901(b) and Rule 23 do not conflict because they address different issues. Rule 23, it said, concerns only the criteria for determining whether a given class can and should be certified; § 901(b), on the other hand, addresses an antecedent question: whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent. See 549 F. 3d, at 143–144. Allstate embraces this analysis. Brief for Respondent 12–13.

We disagree. To begin with, the line between eligibility and certifiability is entirely artificial. Both are preconditions for maintaining a class action. Allstate suggests that eligibility must depend on the "particular cause of action" asserted, instead of some other attribute of the suit, *id.*, at 12. But that is not so. Congress could, for example, provide that only claims involving more than a certain number of plaintiffs are "eligible" for class treatment in federal court. In other words, relabeling Rule 23(a)'s prerequisites "eligibility criteria" would obviate Allstate's objection—a sure sign that its eligibility-certifiability distinction is made-to-order.

There is no reason, in any event, to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. *Id.*, at 13–14. But that is *exactly* what Rule 23 does: It says that if the

prescribed preconditions are satisfied "[a] class action *may be maintained*" (emphasis added)—not "*a class action may be permitted.*" Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts," Fed. Rule Civ. Proc. 1. See *Califano* v. *Yamasaki*, 442 U. S. 682, 699–700 (1979).

Allstate points out that Congress has carved out some federal claims from Rule 23's reach, see, *e. g.*, 8 U. S. C. § 1252(e)(1)(B)—which shows, Allstate contends, that Rule 23 does not authorize class actions for all claims, but rather leaves room for laws like § 901(b). But Congress, unlike New York, has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances. Cf. *Henderson* v. *United States*, 517 U. S. 654, 668 (1996). The fact that Congress has created specific exceptions to Rule 23 hardly proves that the Rule does not apply generally. In fact, it proves the opposite. If Rule 23 did *not* authorize class actions across the board, the statutory exceptions would be unnecessary.

Allstate next suggests that the structure of § 901 shows that Rule 23 addresses only certifiability. Section 901(*a*), it notes, establishes class-certification criteria roughly analogous to those in Rule 23 (wherefore it agrees *that* subsection is pre-empted). But § 901(b)'s rule barring class actions for certain claims is set off as its own subsection, and where it applies, § 901(a) does not. This shows, according to Allstate, that § 901(b) concerns a separate subject. Perhaps it does concern a subject separate from the subject of § 901(a). But the question before us is whether it concerns a subject separate from the subject of *Rule 23*—and for purposes of an-

swering *that* question the way New York has structured its statute is immaterial. Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements. Both of § 901's subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit. Cf. *Burlington*, 480 U. S., at 7–8.

The dissent argues that § 901(b) has nothing to do with whether Shady Grove may maintain its suit as a class action, but affects only the *remedy* it may obtain if it wins. See *post*, at 443–451 (opinion of GINSBURG, J.). Whereas "Rule 23 governs procedural aspects of class litigation" by "prescrib[ing] the considerations relevant to class certification and postcertification proceedings," § 901(b) addresses only "the size of a monetary award a class plaintiff may pursue." *Post*, at 446–447. Accordingly, the dissent says, Rule 23 and New York's law may coexist in peace.

We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23; that is not what § 901(b) does. By its terms, the provision precludes a plaintiff from "maintain[ing]" a class action seeking statutory penalties. Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all.[4] Conse-

[4] Contrary to the dissent's implication, *post*, at 448, we express no view as to whether state laws that set a ceiling on damages recoverable in a single suit, see App. A to Brief for Respondent, are pre-empted. Whether or not those laws conflict with Rule 23, § 901(b) does conflict because it addresses not the remedy, but the procedural right to maintain a class action. As Allstate and the dissent note, several federal statutes also limit the recovery available in class actions. See, *e. g.*, 12 U. S. C. § 2605(f)(2)(B); 15 U. S. C. § 1640(a)(2)(B); 29 U. S. C. § 1854(c)(1). But Congress has plenary power to override the Federal Rules, so its enactments, unlike those of the States, prevail even in case of a conflict.

quently, a court bound by § 901(b) could not certify a class action seeking both statutory penalties and other remedies even if it announces in advance that it will refuse to award the penalties in the event the plaintiffs prevail; to do so would violate the statute's clear prohibition on "maintain-[ing]" such suits as class actions.

The dissent asserts that a plaintiff can avoid § 901(b)'s barrier by omitting from his complaint (or removing) a request for statutory penalties. See *post*, at 449–450. Even assuming all statutory penalties are waivable,[5] the fact that a complaint omitting them could be brought as a class action would not at all prove that § 901(b) is addressed only to remedies. If the state law instead banned class actions for fraud claims, a would-be class-action plaintiff could drop the fraud counts from his complaint and proceed with the remainder in a class action. Yet that would not mean the law provides no remedy for fraud; the ban would affect only the procedural means by which the remedy may be pursued. In short, although the dissent correctly abandons Allstate's eligibility-certifiability distinction, the alternative it offers fares no better.

The dissent all but admits that the literal terms of § 901(b) address the same subject as Rule 23—*i. e.*, whether a class action may be maintained—but insists the provision's *purpose* is to restrict only remedies. See *post*, at 447–448; *post*, at 450 ("[W]hile phrased as responsive to the question whether certain class actions may begin, § 901(b) is unmistakably aimed at controlling how those actions must end"). Unlike Rule 23, designed to further procedural fairness and efficiency, § 901(b) (we are told) "responds to an entirely different concern": the fear that allowing statutory damages to be awarded on a classwide basis would "produce overkill." *Post*, at 447, 444 (internal quotation marks omitted). The

[5] But see, *e. g.*, *Asher* v. *Abbott Labs.*, 290 App. Div. 2d 208, 737 N. Y. S. 2d 4 (2002) (treble damages under N. Y. Gen. Bus. Law Ann. § 340(5) are nonwaivable, wherefore class actions under that law are barred).

dissent reaches this conclusion on the basis of (1) constituent concern recorded in the law's bill jacket; (2) a commentary suggesting that the legislature "apparently fear[ed]" that combining class actions and statutory penalties "could result in annihilating punishment of the defendant," V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006) (internal quotation marks omitted); (3) a remark by the Governor in his signing statement that § 901(b) "'provides a controlled remedy,'" *post,* at 444 (quoting Memorandum on Approving L. 1975, Ch. 207, reprinted in 1975 N. Y. Laws, p. 1748; emphasis deleted); and (4) a state court's statement that the final text of § 901(b) "'was the result of a compromise among competing interests,'" *post,* at 444 (quoting *Sperry* v. *Crompton Corp.*, 8 N. Y. 3d 204, 211, 863 N. E. 2d 1012, 1015 (2007)).

This evidence of the New York Legislature's purpose is pretty sparse. But even accepting the dissent's account of the legislature's objective at face value, it cannot override the statute's clear text. Even if its aim is to restrict the remedy a plaintiff can obtain, § 901(b) achieves that end by limiting a plaintiff's power to maintain a class action. The manner in which the law "could have been written," *post,* at 457, has no bearing; what matters is the law the legislature *did* enact. We cannot rewrite that to reflect our perception of legislative purpose, see *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79–80 (1998).[6] The dissent's con-

[6] Our decision in *Walker* v. *Armco Steel Corp.*, 446 U. S. 740 (1980), discussed by the dissent, *post,* at 441, 448, n. 8, is not to the contrary. There we held that Rule 3 (which provides that a federal civil action is "'commenced'" by filing a complaint in federal court) did not displace a state law providing that "'[a]n action shall be deemed commenced, *within the meaning of this article [the statute of limitations]*, as to each defendant, at the date of the summons which is served on him . . . .'" 446 U. S., at 743, n. 4 (quoting Okla. Stat., Tit. 12, § 97 (1971); alteration in original; emphasis added). Rule 3, we explained, "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations" or tolling rules, which it did not

cern for state prerogatives is frustrated rather than furthered by revising state laws when a potential conflict with a Federal Rule arises; the state-friendly approach would be to accept the law as written and test the validity of the Federal Rule.

The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce "confusion worse confounded," *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14 (1941). It would mean, to begin with, that one State's statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations. It would also mean that district courts would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law. That task will often prove arduous. Many laws further more than one aim, and the aim of others may be impossible to discern. Moreover, to the extent the dissent's purpose-driven approach depends on its characterization of § 901(b)'s aims as substantive, it would apply to many state rules ostensibly addressed to procedure. Pleading standards, for example, often embody policy preferences about the types of claims that should succeed—as do rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence. Hard cases will abound. It is not even clear that a state supreme court's pronouncement of the law's purpose would settle the issue, since existence of the factual predi-

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"purpor[t] to displace." 446 U. S., at 751, 750. The texts were therefore not in conflict. While our opinion observed that the State's actual-service rule was (in the State's judgment) an "integral part of the several policies served by the statute of limitations," *id.*, at 751, nothing in our decision suggested that a federal court may resolve an obvious conflict between the texts of state and federal rules by resorting to the state law's ostensible objectives.

cate for avoiding federal pre-emption is ultimately a federal question. Predictably, federal judges would be condemned to poring through state legislative history—which may be less easily obtained, less thorough, and less familiar than its federal counterpart, see R. Mersky & D. Dunn, Fundamentals of Legal Research 233 (8th ed. 2002); Torres & Windsor, State Legislative Histories: A Select, Annotated Bibliography, 85 L. Lib. J. 545, 547 (1993).

But while the dissent does indeed artificially narrow the scope of § 901(b) by finding that it pursues only substantive policies, that is not the central difficulty of the dissent's position. The central difficulty is that even artificial narrowing cannot render § 901(b) compatible with Rule 23. *Whatever* the policies they pursue, they flatly contradict each other. Allstate asserts (and the dissent implies, see *post*, at 438, 446) that we can (and must) *interpret* Rule 23 in a manner that avoids overstepping its authorizing statute.[7] If the Rule were susceptible of two meanings—one that would vio-

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[7] The dissent also suggests that we should read the Federal Rules "'with sensitivity to important state interests'" and "'to avoid conflict with important state regulatory policies.'" *Post*, at 442 (quoting *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 427, n. 7, 438, n. 22 (1996)). The search for state interests and policies that are "important" is just as standardless as the "important or substantial" criterion we rejected in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 13–14 (1941), to define the state-created rights a Federal Rule may not abridge.

If all the dissent means is that we should read an ambiguous Federal Rule to avoid "substantial variations [in outcomes] between state and federal litigation," *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 504 (2001) (internal quotation marks omitted), we entirely agree. We should do so not to avoid doubt as to the Rule's validity—since a Federal Rule that fails *Erie*'s forum-shopping test is not *ipso facto* invalid, see *Hanna* v. *Plumer*, 380 U. S. 460, 469–472 (1965)—but because it is reasonable to assume that "Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims," *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22, 37–38 (1988) (Scalia, J., dissenting). The assumption is irrelevant here, however, because there is only one reasonable reading of Rule 23.

late § 2072(b) and another that would not—we would agree. See *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 842, 845 (1999); cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 503–504 (2001). But it is not. Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met. We cannot contort its text, even to avert a collision with state law that might render it invalid. See *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 750, n. 9 (1980).[8] What the dissent's approach achieves is not the avoiding of a "conflict between Rule 23 and § 901(b)," *post*, at 452, but rather the invalidation of Rule 23 (pursuant to § 2072(b) of the Rules Enabling Act) to the extent that it conflicts with the substantive policies of § 901. There is no other way to reach the dissent's destination. We must therefore confront head-on whether Rule 23 falls within the statutory authorization.

B

Erie involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it "significantly affect[s] the result of a litigation." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945). That is not the test for either the constitutionality or the statutory validity of a Federal Rule of Procedure. Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters "rationally capable of classification" as procedure. *Hanna*, 380 U. S., at 472. In the Rules En-

[8] The cases chronicled by the dissent, see *post*, at 439–443, each involved a Federal Rule that we concluded could fairly be read not to "control the issue" addressed by the pertinent state law, thus avoiding a "direct collision" between federal and state law, *Walker*, *supra*, at 749 (internal quotation marks omitted). But here, as in *Hanna*, *supra*, at 470, a collision is "unavoidable."

abling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U. S. C. § 2072(a), but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," § 2072(b).

We have long held that this limitation means that the Rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," *Sibbach*, 312 U. S., at 14; see *Hanna*, *supra*, at 464; *Burlington*, 480 U. S., at 8. The test is not whether the Rule affects a litigant's substantive rights; most procedural rules do. *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 445 (1946). What matters is what the Rule itself *regulates:* If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not. *Id.*, at 446 (internal quotation marks omitted).

Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us. We have found to be in compliance with § 2072(b) Rules prescribing methods for serving process, see *id.*, at 445–446 (Fed. Rule Civ. Proc. 4(f)); *Hanna*, *supra*, at 463–465 (Fed. Rule Civ. Proc. 4(d)(1)), and requiring litigants whose mental or physical condition is in dispute to submit to examinations, see *Sibbach*, *supra*, at 14–16 (Fed. Rule Civ. Proc. 35); *Schlagenhauf* v. *Holder*, 379 U. S. 104, 113–114 (1964) (same). Likewise, we have upheld Rules authorizing imposition of sanctions upon those who file frivolous appeals, see *Burlington*, *supra*, at 8 (Fed. Rule App. Proc. 38), or who sign court papers without a reasonable inquiry into the facts asserted, see *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 498 U. S. 533, 551–554 (1991) (Fed. Rule Civ. Proc. 11). Each of these Rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights

themselves, the available remedies, or the rules of decision by which the court adjudicated either.

Applying that criterion, we think it obvious that Rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. See, *e. g.*, Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such Rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Allstate contends that the authorization of class actions is not substantively neutral: Allowing Shady Grove to sue on behalf of a class "transform[s] [the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty." Brief for Respondent 1. Allstate's aggregate liability, however, does not depend on whether the suit proceeds as a class action. Each of the 1,000-plus members of the putative class could (as Allstate acknowledges) bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on Allstate's or the plaintiffs' legal rights. The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of "incidental effec[t]" we have long held does not violate § 2072(b), *Mississippi Publishing*, *supra*, at 445.

Allstate argues that Rule 23 violates § 2072(b) because the state law it displaces, § 901(b), creates a right that the Fed-

eral Rule abridges—namely, a "substantive right . . . not to be subjected to aggregated class-action liability" in a single suit. Brief for Respondent 31. To begin with, we doubt that that is so. Nothing in the text of § 901(b) (which is to be found in New York's procedural code) confines it to claims under New York law; and of course New York has no power to alter substantive rights and duties created by other sovereigns. As we have said, the *consequence* of excluding certain class actions may be to cap the damages a defendant can face in a single suit, but the law itself alters only procedure. In that respect, § 901(b) is no different from a state law forbidding simple joinder. As a fallback argument, Allstate argues that even if § 901(b) is a procedural provision, it was enacted "for *substantive reasons*," *id.*, at 24 (emphasis added). Its end was not to improve "the conduct of the litigation process itself" but to alter "the outcome of that process." *Id.*, at 26.

The fundamental difficulty with both these arguments is that the substantive nature of New York's law, or its substantive purpose, *makes no difference.* A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). That could not be clearer in *Sibbach:*

> "The petitioner says the phrase ['substantive rights' in the Rules Enabling Act] connotes more; that by its use Congress intended that in regulating procedure this Court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination. In a number such an order is authorized by statute or rule. . . .
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> "The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules

> of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. . . . If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure . . . ." 312 U. S., at 13–14 (footnote omitted).

Hanna unmistakably expressed the same understanding that compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications:

> "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." 380 U. S., at 471.

In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. See *Sibbach*, *supra*, at 14; *Hanna*, *supra*, at 464; *Burlington*, 480 U. S., at 8. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.

C

A few words in response to the concurrence. We understand it to accept the framework we apply—which requires first, determining whether the federal and state rules can be reconciled (because they answer different questions), and second, if they cannot, determining whether the Federal Rule runs afoul of § 2072(b). *Post*, at 421–422 (STEVENS, J.,

concurring in part and concurring in judgment). The concurrence agrees with us that Rule 23 and § 901(b) conflict, *post*, at 429–431, and departs from us only with respect to the second part of the test, *i. e.*, whether application of the Federal Rule violates § 2072(b), *post*, at 422–428. Like us, it answers no, but for a reason different from ours. *Post*, at 431–436.

The concurrence would decide this case on the basis, not that Rule 23 is procedural, but that the state law it displaces is procedural, in the sense that it does not "function as a part of the State's definition of substantive rights and remedies." *Post*, at 416–417. A state procedural rule is not pre-empted, according to the concurrence, so long as it is "so bound up with," or "sufficiently intertwined with," a substantive state-law right or remedy "that it defines the scope of that substantive right or remedy," *post*, at 420, 428.

This analysis squarely conflicts with *Sibbach*, which established the rule we apply. The concurrence contends that *Sibbach* did not rule out its approach, but that is not so. Recognizing the impracticability of a test that turns on the idiosyncrasies of state law, *Sibbach* adopted and applied a rule with a single criterion: whether the Federal Rule "really regulates procedure." 312 U. S., at 14.[9] That the

[9] The concurrence claims that in *Sibbach* "[t]he Court . . . had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act." *Post*, at 427. Had *Sibbach* been applying the concurrence's theory, that is quite true—which demonstrates how inconsistent that theory is with *Sibbach*. For conformity with the Rules Enabling Act was the *very issue Sibbach* decided: The petitioner's position was that Rules 35 and 37 exceeded the Enabling Act's authorization, 312 U. S., at 9, 13; the Court faced and rejected that argument, *id.*, at 13–16, and proceeded to reverse the lower court for failing to apply Rule 37 correctly, *id.*, at 16. There could not be a clearer rejection of the theory that the concurrence now advocates.

The concurrence responds that "the specific question of 'the obligation of federal courts to apply the substantive law of a state'" was not before the Court, *post*, at 427 (quoting *Sibbach*, *supra*, at 9). It is clear from the context, however, that this passage referred to the *Erie* prohibition of court-created rules that displace state law. See *Erie R. Co.* v. *Tompkins*,

concurrence's approach would have yielded the same result in *Sibbach* proves nothing; what matters is the rule we *did* apply, and that rule leaves no room for special exemptions based on the function or purpose of a particular state rule.[10] We have rejected an attempt to read into *Sibbach* an exception with no basis in the opinion, see *Schlagenhauf*, 379 U. S., at 113–114, and we see no reason to find such an implied limitation today.

In reality, the concurrence seeks not to apply *Sibbach*, but to overrule it (or, what is the same, to rewrite it). Its approach, the concurrence insists, gives short shrift to the statutory text prohibiting the Federal Rules from "abridg[ing], enlarg[ing], or modify[ing] any substantive right," § 2072(b). See *post*, at 424–425. There is something to that. It is possible to understand how it can be determined whether a Federal Rule "enlarges" substantive rights without consulting state law: If the Rule creates a substantive right, even one that duplicates some state-created rights, it establishes a new *federal* right. But it is hard to understand how it can be determined whether a Federal Rule "abridges" or "modifies" substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. *Sib-*

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304 U. S. 64 (1938). The opinion unquestionably dealt with the Federal Rules' compliance with § 2072(b), and it adopted the standard we apply here to resolve the question, which does not depend on whether individual applications of the Rule abridge or modify state-law rights. See 312 U. S., at 13–14. To the extent *Sibbach* did not address the Federal Rules' validity vis-à-vis contrary state law, *Hanna* surely did, see 380 U. S., at 472, and it made clear that *Sibbach*'s test still controls, see 380 U. S., at 464–465, 470–471.

[10] The concurrence insists that we have misread *Sibbach*, since surely a Federal Rule that "in most cases" regulates procedure does not do so when it displaces one of those "rare" state substantive laws that are disguised as rules of procedure. *Post*, at 428, n. 13. This mistakes what the Federal Rule *regulates* for its incidental *effects*. As we have explained, *supra*, at 406–408, most Rules have some effect on litigants' substantive rights or their ability to obtain a remedy, but that does not mean the Rule itself regulates those rights or remedies.

bach's exclusive focus on the challenged Federal Rule—driven by the very real concern that Federal Rules which vary from State to State would be chaos, see 312 U. S., at 13–14—is hard to square with § 2072(b)'s terms.[11]

Sibbach has been settled law, however, for nearly seven decades.[12] Setting aside any precedent requires a "special justification" beyond a bare belief that it was wrong. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989) (internal quotation marks omitted). And a party seeking to

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[11] The concurrence's approach, however, is itself unfaithful to the statute's terms. Section 2072(b) bans abridgment or modification only of "substantive rights," but the concurrence would prohibit pre-emption of "procedural rules that are intimately bound up in the scope of a substantive right or remedy," *post*, at 433. This would allow States to force a wide array of parochial procedures on federal courts so long as they are "sufficiently intertwined with a state right or remedy." *Post*, at 428.

[12] The concurrence implies that *Sibbach* has slipped into desuetude, apparently for lack of sufficient citations. See *post*, at 428–429, n. 14. We are unaware of any rule to the effect that a holding of ours expires if the case setting it forth is not periodically revalidated. In any event, the concurrence's account of our shunning of *Sibbach* is greatly exaggerated. *Hanna* did not merely cite the case, but recognized it as establishing the governing rule. 380 U. S., at 464–465, 470–471. *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 445–446 (1946), likewise cited *Sibbach* and applied the same test, examining the Federal Rule, not the state law it displaced. True, *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1 (1987), and for that matter *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 498 U. S. 533 (1991), did not cite *Sibbach.* But both cited and followed *Hanna*—which as noted held out *Sibbach* as setting forth the governing rule. See *Burlington Northern*, *supra*, at 5–6, 8; *Business Guides*, *supra*, at 552–554. Thus, while *Sibbach* itself may appear infrequently in the U. S. Reports, its rule—and in particular its focus on the Federal Rule as the proper unit of analysis—is alive and well.

In contrast, *Hanna*'s obscure *obiter dictum* that a court "need not wholly blind itself" to a Federal Rule's effect on a case's outcome, 380 U. S., at 473—which the concurrence invokes twice, *post*, at 423, 428–429, n. 14—has never resurfaced in our opinions in the 45 years since its first unfortunate utterance. Nor does it cast doubt on *Sibbach*'s straightforward test: As the concurrence notes, *Hanna* cited *Sibbach* for that statement, 380 U. S., at 473, showing it saw no inconsistency between the two.

overturn a *statutory* precedent bears an even greater burden, since Congress remains free to correct us, *ibid.*, and adhering to our precedent enables it do so, see, *e. g.*, *Finley* v. *United States*, 490 U. S. 545, 556 (1989); 28 U. S. C. § 1367; *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 558 (2005). We do Congress no service by presenting it a moving target. In all events, Allstate has not even asked us to overrule *Sibbach*, let alone carried its burden of persuading us to do so. Cf. *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 32 (2005). Why we should cast aside our decades-old decision escapes us, especially since (as the concurrence explains) that would not affect the result.[13]

The concurrence also contends that applying *Sibbach* and assessing whether a Federal Rule regulates substance or procedure is not always easy. See *post*, at 426, n. 10. Undoubtedly some hard cases will arise (though we have managed to muddle through well enough in the 69 years since

[13] The concurrence is correct, *post*, at 425, n. 9, that under our disposition any rule that "really regulates procedure," *Sibbach*, 312 U. S., at 14, will pre-empt a conflicting state rule, however "bound up" the latter is with substantive law. The concurrence is wrong, however, that that result proves our interpretation of § 2072(b) implausible, *post*, at 425–426, n. 9. The result is troubling only if one stretches the term "substantive rights" in § 2072(b) to mean not only state-law rights themselves, but also any state-law procedures closely connected to them. Neither the text nor our precedent supports that expansive interpretation. The examples the concurrence offers—statutes of limitations, burdens of proof, and standards for appellate review of damages awards—do not make its broad definition of substantive rights more persuasive. They merely illustrate that in rare cases it may be difficult to determine whether a rule "really regulates" procedure or substance. If one concludes the latter, there is no pre-emption of the state rule; the Federal Rule itself is invalid.

The concurrence's concern would make more sense if many Federal Rules that effectively alter state-law rights "bound up with procedures" would survive under *Sibbach*. But as the concurrence concedes, *post*, at 426, n. 10, very few would do so. The possible existence of a few outlier instances does not prove *Sibbach*'s interpretation is absurd. Congress may well have accepted such anomalies as the price of a uniform system of federal procedure.

Sibbach was decided). But as the concurrence acknowledges, *post*, at 426, the basic difficulty is unavoidable: The statute itself refers to "substantive right[s]," § 2072(b), so there is no escaping the substance-procedure distinction. What is more, the concurrence's approach does nothing to diminish the difficulty, but rather magnifies it many times over. Instead of a single hard question whether a Federal Rule regulates substance or procedure, that approach will present hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule.[14] And it still does not sidestep the problem it seeks to avoid. At the end of the day, one must come face to face with the decision whether or not the state policy (with which a putatively procedural state rule may be "bound up") pertains to a "substantive right or remedy," *post*, at 433—that is, whether it is substance or procedure.[15] The more one explores the alternatives to *Sibbach*'s rule, the more its wisdom becomes apparent.

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We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unac-

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[14] The concurrence argues that its approach is no more "taxing" than ours because few if any Federal Rules that are "facially valid" under the Enabling Act will fail the concurrence's test. *Post*, at 426, and n. 10. But that conclusion will be reached only after federal courts have considered hundreds of state rules applying the concurrence's inscrutable standard.

[15] The concurrence insists that the task will be easier if courts can "conside[r] the nature and functions of the state law," *post*, at 426, n. 10, regardless of the law's "form," *post*, at 419 (emphasis deleted), *i. e.*, what the law actually says. We think that amorphous inquiry into the "nature and functions" of a state law will tend to increase, rather than decrease, the difficulty of classifying Federal Rules as substantive or procedural. Walking through the concurrence's application of its test to § 901(b), *post*, at 431–436, gives little reason to hope that its approach will lighten the burden for lower courts.

ceptable when it comes as the consequence of judge-made rules created to fill supposed "gaps" in positive federal law. See *Hanna*, 380 U. S., at 471–472. For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, "state law must govern because there can be no other law." *Ibid.;* see Clark, *Erie's* Constitutional Source, 95 Cal. L. Rev. 1289, 1302, 1311 (2007). But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court. Cf. *Hanna*, 380 U. S., at 472–473. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to "disembowel either the Constitution's grant of power over federal procedure" or Congress's exercise of it. *Id.*, at 473–474.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

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

The New York law at issue, N. Y. Civ. Prac. Law Ann. (CPLR) § 901(b) (West 2006), is a procedural rule that is not part of New York's substantive law. Accordingly, I agree with JUSTICE SCALIA that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II–A of the Court's opinion. But I also agree with JUSTICE GINSBURG that there are some state procedural rules that federal courts must apply in diversity cases because they function

as a part of the State's definition of substantive rights and remedies.

I

It is a long-recognized principle that federal courts sitting in diversity "apply state substantive law and federal procedural law." *Hanna* v. *Plumer*, 380 U. S. 460, 465 (1965).[1] This principle is governed by a statutory framework, and the way that it is administered varies depending upon whether there is a federal rule addressed to the matter. See *id.*, at 469–472. If no federal rule applies, a federal court must follow the Rules of Decision Act, 28 U. S. C. § 1652, and make the "relatively unguided *Erie* choice,"[2] *Hanna*, 380 U. S., at 471, to determine whether the state law is the "rule of decision." But when a situation is covered by a federal rule, the Rules of Decision Act inquiry by its own terms does not apply. See § 1652; *Hanna*, 380 U. S., at 471. Instead, the Rules Enabling Act (Enabling Act) controls. See 28 U. S. C. § 2072.

That does not mean, however, that the federal rule always governs. Congress has provided for a system of uniform federal rules, see *ibid.*, under which federal courts sitting in diversity operate as "an independent system for administering justice to litigants who properly invoke its jurisdiction," *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 537 (1958), and not as state-court clones that assume all aspects of state tribunals but are managed by Article III judges. See *Hanna*, 380 U. S., at 473–474. But while Con-

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[1] See also *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 427 (1996); E. Chemerinsky, Federal Jurisdiction § 5.3, p. 327 (5th ed. 2007) (hereinafter Chemerinsky); 17A J. Moore et al., Moore's Federal Practice § 124.01[1] (3d ed. 2009) (hereinafter Moore).

[2] The choice in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), requires that the court consider "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U. S. 460, 468 (1965); see also *Gasperini*, 518 U. S., at 427–428 (describing *Erie* inquiry).

gress may have the constitutional power to prescribe procedural rules that interfere with state substantive law in any number of respects, that is not what Congress has done. Instead, it has provided in the Enabling Act that although "[t]he Supreme Court" may "prescribe general rules of practice and procedure," § 2072(a), those rules "shall not abridge, enlarge or modify any substantive right," § 2072(b). Therefore, "[w]hen a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule" unless doing so would violate the Act or the Constitution. *Id.*, at 471.

Although the Enabling Act and the Rules of Decision Act "say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law," the inquiries are not the same. *Ibid.;* see also *id.*, at 469–470. The Enabling Act does not invite federal courts to engage in the "relatively unguided *Erie* choice," *id.*, at 471, but instead instructs only that federal rules cannot "abridge, enlarge or modify any substantive right," § 2072(b). The Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 13–14 (1941) (reasoning that "the phrase 'substantive rights' " embraces only those state rights that are sought to be enforced in the judicial proceedings).

Congress has thus struck a balance: "[H]ousekeeping rules for federal courts" will generally apply in diversity cases, notwithstanding that some federal rules "will inevitably differ" from state rules. *Hanna*, 380 U. S., at 473. But not every federal "rul[e] of practice or procedure," § 2072(a), will displace state law. To the contrary, federal rules must be interpreted with some degree of "sensitivity to important state interests and regulatory policies," *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 427, n. 7 (1996), and applied to diversity cases against the background of Congress'

command that such rules not alter substantive rights and with consideration of "the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts," *Hanna*, 380 U. S., at 473. This can be a tricky balance to implement.[3]

It is important to observe that the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule. And in my view, the application of that balance does not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies. See §2072(b); cf. *Hanna*, 380 U. S., at 471 ("The line between 'substance' and 'procedure' shifts as the legal context changes"); *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945) (noting that the words "'substance'" and "'procedure'" "[e]ach impl[y] different variables depending upon the particular problem for which [they] are used").

Applying this balance, therefore, requires careful interpretation of the state and federal provisions at issue. "The line between procedural and substantive law is hazy," *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 92 (1938) (Reed, J., concurring in result), and matters of procedure and matters of substance are not "mutually exclusive categories with easily ascertainable contents," *Sibbach*, 312 U. S., at 17 (Frankfurter, J., dissenting). Rather, "[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555 (1949), and in some situations, "procedure and substance are so interwoven that rational separation becomes well-nigh impossible," *id.*, at 559 (Rutledge, J., dissenting). A "state procedural rule, though undeniably 'procedural' in the ordinary

[3] See Chemerinsky §5.3.5, at 321 (observing that courts "have struggled to develop an approach that permits uniform procedural rules to be applied in federal court while still allowing state substantive law to govern").

sense of the term," may exist "to influence substantive outcomes," *S. A. Healy Co.* v. *Milwaukee Metropolitan Sewerage Dist.*, 60 F. 3d 305, 310 (CA7 1995) (Posner, J.), and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim. See, *e. g.*, *Cohen*, 337 U. S., at 555 (state "procedure" that required plaintiffs to post bond before suing); *Guaranty Trust Co.*, 326 U. S. 99 (state statute of limitations).[4] Such "procedural rules" may also define the amount of recovery. See, *e. g.*, *Gasperini*, 518 U. S., at 427 (state procedure for examining jury verdicts as means of capping the available remedy); Moore § 124.07[3][a] (listing examples of federal courts' applying state laws that affect the amount of a judgment).

In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies. When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice. Cf. *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 533 (1949) ("Since th[e] cause of action is cre-

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[4] Cf. *Milam* v. *State Farm Mut. Auto. Ins. Co.*, 972 F. 2d 166, 170 (CA7 1992) (Posner, J.) (holding that "where a state in furtherance of its substantive policy makes it more difficult to prove a particular type of state-law claim, the rule by which it does this, even if denominated a rule of evidence or cast in evidentiary terms, will be given effect in a diversity suit as an expression of state substantive policy"); Moore § 124.09[2] (listing examples of federal courts that apply state evidentiary rules to diversity suits). Other examples include state-imposed burdens of proof.

ated by local law, the measure of it is to be found only in local law. . . . Where local law qualifies or abridges it, the federal court must follow suit").

II

When both a federal rule and a state law appear to govern a question before a federal court sitting in diversity, our precedents have set out a two-step framework for federal courts to negotiate this thorny area. At both steps of the inquiry, there is a critical question about what the state law and the federal rule mean.

The court must first determine whether the scope of the federal rule is "'sufficiently broad'" to "'control the issue'" before the court, "thereby leaving no room for the operation" of seemingly conflicting state law. See *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987); *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 749–750, and n. 9 (1980). If the federal rule does not apply or can operate alongside the state rule, then there is no "Ac[t] of Congress" governing that particular question, 28 U. S. C. § 1652, and the court must engage in the traditional Rules of Decision Act inquiry under *Erie* and its progeny. In some instances, the "plain meaning" of a federal rule will not come into "'direct collision'" with the state law, and both can operate. *Walker*, 446 U. S., at 750, n. 9, 749. In other instances, the rule "when fairly construed," *Burlington Northern R. Co.*, 480 U. S., at 4, with "sensitivity to important state interests and regulatory policies," *Gasperini*, 518 U. S., at 427, n. 7, will not collide with the state law.[5]

[5] I thus agree with JUSTICE GINSBURG, *post*, at 438–442 (dissenting opinion), that a federal rule, like any federal law, must be interpreted in light of many different considerations, including "sensitivity to important state interests," *post*, at 442 (internal quotation marks omitted), and "regulatory policies," *post*, at 437. See *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22, 37–38 (1988) (SCALIA, J., dissenting) ("We should assume . . . when it is fair to do so, that Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicat-

If, on the other hand, the federal rule is "sufficiently broad to control the issue before the Court," such that there is a "direct collision," *Walker*, 446 U. S., at 749–750, the court must decide whether application of the federal rule "represents a valid exercise" of the "rulemaking authority . . . bestowed on this Court by the Rules Enabling Act," *Burlington Northern R. Co.*, 480 U. S., at 5; see also *Gasperini*, 518 U. S., at 427, n. 7; *Hanna*, 380 U. S., at 471–474. The Enabling Act requires, *inter alia*, that federal rules "not abridge, enlarge or modify *any* substantive right." 28 U. S. C. § 2072(b) (emphasis added). Unlike JUSTICE SCALIA, I believe that an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates this command. Congress may have the constitutional power "to supplant state law" with rules that are "rationally capable of classification as procedure," *ante*, at 406 (internal quotation marks omitted), but we should generally presume that it has not done so. Cf. *Wyeth* v. *Levine*, 555 U. S. 555, 565 (2009) (observing that "we start with the assumption" that a federal statute does not displace a State's law "unless that was the clear and manifest purpose of Congress" (internal quotation marks omitted)). Indeed, the mandate that federal rules "shall not abridge, enlarge or modify any substantive right" evinces the opposite intent, as does Congress' decision to delegate the creation of rules to this Court rather than to a political branch, see 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4509, p. 265 (2d ed. 1996) (hereinafter Wright).

Thus, the second step of the inquiry may well bleed back into the first. When a federal rule appears to abridge, en-

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ing claims. . . . Thus, in deciding whether a federal . . . Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits"). I disagree with JUSTICE GINSBURG, however, about the degree to which the meaning of federal rules may be contorted, absent congressional authorization to do so, to accommodate state policy goals.

large, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. See, *e. g.*, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 503 (2001) (avoiding an interpretation of Federal Rule of Civil Procedure 41(b) that "would arguably violate the jurisdictional limitation of the Rules Enabling Act" contained in § 2072(b)).[6] And when such a "saving" construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule. See 28 U. S. C. § 2072(b) (mandating that federal rules "shall not" alter "*any* substantive right" (emphasis added)); *Hanna*, 380 U. S., at 473 ("[A] court, in measuring a Federal Rule against the standards contained in the Enabling Act . . . , need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts"); see also *Semtek Int'l Inc.*, 531 U. S., at 503–504 (noting that if state law granted a particular right, "the federal court's extinguishment of that right . . . would seem to violate [§ 2072(b)]"); cf. Statement of Justices Black and Douglas, 374 U. S. 865, 870 (1963) (observing that federal rules "as applied in given situations might have to be declared invalid"). A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. And absent a governing federal rule, a federal court must engage in the traditional Rules of Decision Act inquiry, under the *Erie* line

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[6] See also *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 842, 845 (1999) (adopting "limiting construction" of Federal Rule of Civil Procedure 23 that, *inter alia*, "minimizes potential conflict with the Rules Enabling Act"); *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 612–613 (1997) (observing that federal rules "must be interpreted in keeping with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right' ").

of cases. This application of the Enabling Act shows "sensitivity to important state interests," *post*, at 442 (internal quotation marks omitted), and "regulatory policies," *post*, at 437, but it does so as Congress authorized, by ensuring that federal rules that ordinarily "prescribe general rules of practice and procedure," § 2072(a), do "not abridge, enlarge or modify any substantive right," § 2072(b).

JUSTICE SCALIA believes that the sole Enabling Act question is whether the federal rule "really regulates procedure," *ante*, at 407, 410, 411, 414, n. 13 (plurality opinion) (internal quotation marks omitted), which means, apparently, whether it regulates "the manner and the means by which the litigants' rights are enforced," *ante*, at 407 (internal quotation marks omitted). I respectfully disagree.[7] This interpretation of the Enabling Act is consonant with the Act's first limitation to "general rules of practice and procedure," § 2072(a). But it ignores the second limitation that such rules also "not abridge, enlarge or modify *any* substantive right," § 2072(b) (emphasis added),[8] and in so doing ignores the balance that

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[7] This understanding of the Enabling Act has been the subject of substantial academic criticism, and rightfully so. See, *e. g.*, Wright § 4509, at 264, 269–270, 272; Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 719 (1974) (hereinafter Ely); see also R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 593, n. 6 (6th ed. 2009) (discussing Ely).

[8] JUSTICE SCALIA concedes as much, see *ante*, at 412–413, but argues that insofar as I allow for the possibility that a federal rule might violate the Enabling Act when it displaces a seemingly procedural state rule, my approach is itself "unfaithful to the statute's terms," which cover "substantive rights" but not "procedural rules," *ante*, at 413, n. 11 (internal quotation marks omitted). This is not an objection to my interpretation of the Enabling Act—that courts must look to whether a federal rule alters substantive rights in a given case—but simply to the way I would apply it, allowing for the possibility that a state rule that regulates something traditionally considered to be procedural might actually define a substantive right. JUSTICE SCALIA's objection, moreover, misses the key point: In some instances, a state rule that appears procedural really is not. A rule about how damages are reviewed on appeal may really be a damages cap. See *Gasperini*, 518 U. S., at 427. A rule that a plaintiff can bring a claim

Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies. It also ignores the separation-of-powers presumption, see Wright § 4509, at 265, and federalism presumption, see *Wyeth*, 555 U. S., at 565, that counsel against judicially created rules displacing state substantive law.[9]

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for only three years may really be a limit on the existence of the right to seek redress. A rule that a claim must be proved beyond a reasonable doubt may really be a definition of the scope of the claim. These are the sorts of rules that one might describe as "procedural," but they nonetheless define substantive rights. Thus, if a federal rule displaced such a state rule, the federal rule would have altered the State's "substantive rights."

[9] The plurality's interpretation of the Enabling Act appears to mean that no matter how bound up a state provision is with the State's own rights or remedies, any contrary federal rule that happens to regulate "the manner and the means by which the litigants' rights are enforced," *ante*, at 407 (internal quotation marks omitted), must govern. There are many ways in which seemingly procedural rules may displace a State's formulation of its substantive law. For example, statutes of limitations, although in some sense procedural rules, can also be understood as a temporal limitation on legally created rights; if this Court were to promulgate a federal limitations period, federal courts would still, in some instances, be required to apply state limitations periods. Similarly, if the federal rules altered the burden of proof in a case, this could eviscerate a critical aspect—albeit one that deals with *how* a right is enforced—of a State's framework of rights and remedies. Or if a federal rule about appellate review displaced a state rule about how damages are reviewed on appeal, the federal rule might be pre-empting a state damages cap. Cf. *Gasperini*, 518 U. S., at 427.

JUSTICE SCALIA responds that some of these federal rules might be invalid under his view of the Enabling Act because they may not "really regulat[e] procedure." *Ante*, at 414, n. 13 (internal quotation marks omitted). This response, of course, highlights how empty the plurality's test really is. See n. 10, *infra*. The response is also limited to those rules that can be described as "regulat[ing]" substance, *ante*, at 407; it does not address those federal rules that alter the right at issue in the litigation, see *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 13–14 (1941), only when they displace particular state laws. JUSTICE SCALIA speculates that "Congress may well have accepted" the occasional alteration of substantive rights "as the price of a uniform system of federal procedure." *Ante*, at 414, n. 13. Were we forced to speculate about the balance that Con-

Although the plurality appears to agree with much of my interpretation of § 2072, see *ante*, at 412–413, it nonetheless rejects that approach for two reasons, both of which are mistaken. First, JUSTICE SCALIA worries that if federal courts inquire into the effect of federal rules on state law, it will enmesh federal courts in difficult determinations about whether application of a given rule would displace a state determination about substantive rights. See *ante*, at 409, 414–415, and nn. 14, 15. I do not see why an Enabling Act inquiry that looks to state law necessarily is more taxing than JUSTICE SCALIA's.[10] But in any event, that inquiry is what the Enabling Act requires: While it may not be easy to decide what is actually a "substantive right," "the designations substantive and procedural become important, for the Enabling Act has made them so." Ely 723; see also Wright § 4509, at 266. The question, therefore, is not what rule *we* think would be easiest on federal courts. The question is what rule Congress established. Although JUSTICE SCALIA may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Enabling Act. Courts cannot ignore text and context in the service of simplicity.

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gress struck, I might very well agree. But no speculation is necessary because Congress explicitly told us that federal rules "shall not" alter "any" substantive right. § 2072(b).

[10] It will be rare that a federal rule that is facially valid under 28 U. S. C. § 2072 will displace a State's definition of its own substantive rights. See Wright § 4509, at 272 (observing that "unusual cases occasionally might arise in which . . . because of an unorthodox state rule of law, application of a Civil Rule . . . would intrude upon state substantive rights"). JUSTICE SCALIA's interpretation, moreover, is not much more determinate than mine. Although it avoids courts' having to evaluate state law, it tasks them with figuring out whether a federal rule is really "procedural." It is hard to know the answer to that question and especially hard to resolve it without considering the nature and functions of the state law that the federal rule will displace. The plurality's "'test' is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural." *Id.*, at 264.

Second, the plurality argues that its interpretation of the Enabling Act is dictated by this Court's decision in *Sibbach*, which applied a Federal Rule about when parties must submit to medical examinations. But the plurality misreads that opinion. As Justice Harlan observed in *Hanna*, "shorthand formulations which have appeared in earlier opinions are prone to carry untoward results that frequently arise from oversimplification." 380 U. S., at 475 (concurring opinion). To understand *Sibbach*, it is first necessary to understand the issue that was before the Court. The petitioner raised only the facial question whether "Rules 35 and 37 [of the Federal Rules of Civil Procedure] are . . . within the mandate of Congress to this court" and not the specific question of "the obligation of federal courts to apply the substantive law of a state."[11] 312 U. S., at 9. The Court, therefore, had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act.[12]

[11] The petitioner in *Sibbach* argued only that federal rules could not validly address subjects involving "important questions of policy," Supp. Brief for Petitioner, O. T. 1940, No. 28, p. 7; see also Reply to Brief for Respondent, O. T. 1940, No. 28, p. 2 (summarizing that the petitioner argued only that "[t]he right not to be compelled to submit to a physical examination" is "a 'substantive' right forbidden by Congress" to be addressed by the Federal Rules of Civil Procedure, "even though in theory the right is not of the character determinative of litigation"). In the petitioner's own words, "[t]his contention . . . [did] not in itself involve the [applicable] law of Illinois," *ibid.*, and the petitioner in her briefing referenced the otherwise applicable state law only "to show that [she] was in a position to make the contention," *ibid.*, that is, to show that the federal court was applying a federal rule and not, under the Rules of Decision Act, applying state law, see *id.*, at 3.

[12] The plurality defends its view by including a long quote from two paragraphs of *Sibbach*. *Ante*, at 409–410. But the quoted passage of *Sibbach* describes only a facial inquiry into whether federal rules may "deal with" particular subject matter. 312 U. S., at 13. The plurality's block quote, moreover, omits half of one of the quoted paragraphs, in which the Court explained that the term "substantive rights" in the Enabling Act "certainly embraces such rights" as "rights conferred by law to be protected and enforced," such as "the right not to be injured in one's per-

Nor, in *Sibbach*, was any further analysis necessary to the resolution of the case because the matter at issue, requiring medical exams for litigants, did not pertain to "substantive rights" under the Enabling Act. Although most state rules bearing on the litigation process are adopted for some policy reason, few seemingly "procedural" rules define the scope of a substantive right or remedy. The matter at issue in *Sibbach* reflected competing federal and state judgments about privacy interests. Those privacy concerns may have been weighty and in some sense substantive; but they did not pertain to the scope of any state right or remedy at issue in the litigation. Thus, in response to the petitioner's argument in *Sibbach* that "substantive rights" include not only "rights sought to be adjudicated by the litigants" but also "general principle[s]" or "question[s] of public policy that the legislature is able to pass upon," *id.*, at 2–3, we held that "the phrase 'substantive rights' " embraces only state rights, such as the tort law in that case, that are sought to be enforced in the judicial proceedings, *id.*, at 13–14. If the Federal Rule had in fact displaced a state rule that was sufficiently intertwined with a state right or remedy, then perhaps the Enabling Act analysis would have been different.[13] Our subsequent cases are not to the contrary.[14]

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son by another's negligence" and "to redress [such] infraction." *Ibid.* But whether a federal rule, for example, enlarges the right "to redress [an] infraction" will depend on the state law that it displaces.

[13] Put another way, even if a federal rule in most cases "really regulates procedure," *Sibbach*, 312 U. S., at 14, it does not "really regulat[e] procedure" when it displaces those rare state rules that, although "procedural" in the ordinary sense of the term, operate to define the rights and remedies available in a case. This is so because what is procedural in one context may be substantive in another. See *Hanna*, 380 U. S., at 471; *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945).

[14] Although this Court's decision in *Hanna* cited *Sibbach*, that is of little significance. *Hanna* did not hold that any seemingly procedural federal rule will always govern, even when it alters a substantive state right; nor, as in *Sibbach*, was the argument that I now make before the Court. Indeed, in *Hanna* we cited *Sibbach*'s statement that the Enabling Act pro-

III

JUSTICE GINSBURG views the basic issue in this case as whether and how to apply a federal rule that dictates an answer to a traditionally procedural question (whether to join plaintiffs together as a class), when a state law that "defines the dimensions" of a state-created claim dictates the opposite answer. *Post*, at 447. As explained above, I readily acknowledge that if a federal rule displaces a state rule that is "'procedural' in the ordinary sense of the term," *S. A. Healy Co.*, 60 F. 3d, at 310, but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way. In my view, however, this is not such a case.

Rule 23 Controls Class Certification

When the District Court in the case before us was asked to certify a class action, Federal Rule of Civil Procedure 23 squarely governed the determination whether the court

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hibits federal rules that alter the rights to be adjudicated by the litigants, 312 U. S., at 13–14, for the proposition that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act . . . need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts," 380 U. S., at 473. And most of our subsequent decisions that have squarely addressed the framework for applying federal rules in diversity cases have not mentioned *Sibbach* at all but cited only *Hanna*. See, *e. g.*, *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 5 (1987).

JUSTICE SCALIA notes that in *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1946), we used language that supported his view. See *ante*, at 407. But in that case, we contemplated only that the Federal Rule in question might have "incidental effects . . . upon the rights of litigants," explaining that "[t]he fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi" rather than southern Mississippi "will undoubtedly affect those rights." 326 U. S., at 445–446. There was no suggestion that by affecting the method of enforcing the rights in that case, the federal rules could plausibly abridge, enlarge, or modify the rights themselves.

should do so. That is the explicit function of Rule 23. Rule 23, therefore, must apply unless its application would abridge, enlarge, or modify New York rights or remedies.

Notwithstanding the plain language of Rule 23, I understand the dissent to find that Rule 23 does *not* govern the question of class certification in this matter because New York has made a substantive judgment that such a class should not be certified, as a means of proscribing damages. Although, as discussed *infra,* at 432–435, I do not accept the dissent's view of § 901(b), I also do not see how the dissent's interpretation of Rule 23 follows from that view.[15] I agree with JUSTICE GINSBURG that courts should "avoi[d] immoderate interpretations of the Federal Rules that would trench on state prerogatives," *post,* at 439, and should in some instances "interpre[t] the federal rules to avoid conflict with important state regulatory policies," *post,* at 441 (internal quotation marks omitted). But that is not what the dissent

[15] Nor do I see how it follows from the dissent's premises that a class cannot be certified. The dissent contends that § 901(b) is a damages "limitation," *post,* at 443, and n. 2, 444, 447, 459, or "proscription," *post,* at 447, n. 6, 456, whereas Rule 23 "does not command that a particular remedy be available when a party sues in a representative capacity," *post,* at 446, and that consequently both provisions can apply. Yet even if the dissent's premises were correct, Rule 23 would still control the question whether petitioner may certify a class, and § 901(b) would be relevant only to determine whether petitioner, at the conclusion of a class-action lawsuit, may collect statutory damages.

It may be that if the dissent's interpretation of § 901(b) were correct, this class could not (or has not) alleged sufficient damages for the federal court to have jurisdiction, see 28 U. S. C. § 1332(d)(6). But that issue was not raised in respondent's motion to dismiss (from which the case comes to this Court), and it was not squarely presented to the Court. In any event, although the lead plaintiff has "acknowledged that its individual claim" is for less than the required amount in controversy, see 549 F. 3d 137, 140 (CA2 2008), we do not know what actual damages the entire class can allege. Thus, even if the Court were to adopt all of the dissent's premises, I believe the correct disposition would be to vacate and remand for further consideration of whether the required amount in controversy has or can be met.

has done. Simply because a rule should be read in light of federalism concerns, it does not follow that courts may rewrite the rule.

At bottom, the dissent's interpretation of Rule 23 seems to be that Rule 23 covers only those cases in which its application would create no *Erie* problem. The dissent would apply the Rules of Decision Act inquiry under *Erie* even to cases in which there is a governing federal rule, and thus the Act, by its own terms, does not apply. But "[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice." *Hanna*, 380 U. S., at 471. The question is only whether the Enabling Act is satisfied. Although it reflects a laudable concern to protect "state regulatory policies," *post*, at 441 (internal quotation marks omitted), JUSTICE GINSBURG's approach would, in my view, work an end run around Congress' system of uniform federal rules, see 28 U. S. C. § 2072, and our decision in *Hanna*. Federal courts can and should interpret federal rules with sensitivity to "state prerogatives," *post*, at 439; but even when "state interests . . . warrant our respectful consideration," *post*, at 443, federal courts cannot rewrite the rules. If my dissenting colleagues feel strongly that § 901(b) is substantive and that class certification should be denied, then they should argue within the Enabling Act's framework. Otherwise, "the Federal Rule applies regardless of contrary state law." *Gasperini*, 518 U. S., at 427, n. 7; accord, *Hanna*, 380 U. S., at 471.

Applying Rule 23 Does Not Violate the Enabling Act

As I have explained, in considering whether to certify a class action such as this one, a federal court must inquire whether doing so would abridge, enlarge, or modify New York's rights or remedies, and thereby violate the Enabling Act. This inquiry is not always a simple one because "[i]t is difficult to conceive of any rule of procedure that cannot have

a significant effect on the outcome of a case," Wright § 4508, at 232–233, and almost "any rule can be said to have . . . 'substantive effects,' affecting society's distribution of risks and rewards," Ely 724, n. 170. Faced with a federal rule that dictates an answer to a traditionally procedural question and that displaces a state rule, one can often argue that the state rule was *really* some part of the State's definition of its rights or remedies.

In my view, however, the bar for finding an Enabling Act problem is a high one. The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies. And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.

The text of CPLR § 901(b) expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State. And there is no interpretation from New York courts to the contrary. It is therefore hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies. This is all the more apparent because lawsuits under New York law could be joined in federal class actions well before New York passed § 901(b) in 1975, and New York had done nothing to prevent that. It is true, as the dissent points out, that there is a limited amount of legislative history that can be read to suggest that the New York officials who supported § 901(b) wished to create a "limitation" on New York's "statutory damages." *Post,* at 443. But, as JUSTICE SCALIA

notes, that is not the law that New York adopted.[16] See *ante*, at 402–403 (opinion of the Court).

The legislative history, moreover, does not clearly describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages. In evaluating that legislative history, it is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy. Although almost every rule is adopted for some reason and has some effect on the outcome of litigation, not every state rule "defines the di-

[16] In its *Erie* analysis, the dissent observes that when sovereigns create laws, the enacting legislatures sometimes assume those laws will apply only within their territory. See *post*, at 453–454. That is a true fact, but it does not do very much work for the dissent's position. For one thing, as the dissent observes, this *Erie* analysis is relevant only if there is no conflict between Rule 23 and § 901(b), and the court can thus apply both. *Post*, at 451. But because, in my view, Rule 23 applies, the only question is whether it would violate the Enabling Act. See *Hanna*, 380 U. S., at 471. And that inquiry is different from the Rules of Decision Act, or *Erie*, inquiry. See 380 U. S., at 469–471.

The dissent's citations, moreover, highlight simply that when interpreting statutes, context matters. Thus, we sometimes presume that laws cover only domestic conduct and sometimes do not, depending upon, *inter alia*, whether it makes sense in a given situation to assume that "the character of an act as lawful or unlawful must be determined wholly by the law of the [place] where the act is done," *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356 (1909). But in the context of § 901(b), a presumption against extraterritoriality makes little sense. That presumption applies almost only to laws governing what people can or cannot do. Section 901(b), however, is not directed to the conduct of persons but is instead directed to New York courts. Thus, § 901(b) is, by its own terms, not extraterritorial insofar as it states that it governs *New York* courts. It is possible that the New York Legislature simply did not realize that New York courts hear claims under other sources of law and that other courts hear claims under New York law, and therefore mistakenly believed that they had written a limit on New York remedies. But because New York set up § 901(b) as a general rule about how its courts operate, my strong presumption is to the contrary.

mensions of [a] claim itself," *post,* at 447. New York clearly crafted § 901(b) with the intent that only certain lawsuits—those for which there were not statutory penalties—could be joined in class actions in New York courts. That decision reflects a policy judgment about which lawsuits should proceed in New York courts in a class form and which should not. As JUSTICE GINSBURG carefully outlines, see *post,* at 443–445, § 901(b) was "apparently" adopted in response to fears that the class-action procedure, applied to statutory penalties, would lead to "annihilating punishment of the defendant." V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006) (internal quotation marks omitted); see also *Sperry* v. *Crompton Corp.*, 8 N. Y. 3d 204, 211, 863 N. E. 2d 1012, 1015 (2007). But statements such as these are not particularly strong evidence that § 901(b) serves to define who can obtain a statutory penalty or that certifying such a class would enlarge New York's remedy. Any device that makes litigation easier makes it easier for plaintiffs to recover damages.

In addition to the fear of excessive recoveries, some opponents of a broad class-action device "argued that there was no *need* to permit class actions in order to encourage litigation . . . when statutory penalties . . . provided an aggrieved party with a sufficient economic incentive to pursue a claim." *Id.*, at 211, 863 N. E. 2d, at 1015 (emphasis added). But those opponents may have felt merely that, for any number of reasons, New York courts should not conduct trials in the class format when that format is unnecessary to motivate litigation.[17] JUSTICE GINSBURG asserts that this could not

[17] To be sure, one could imagine the converse story, that a legislature would create statutory penalties but dictate that such penalties apply only when necessary to overcome the costs and inconvenience of filing a lawsuit, and thus are not necessary in a class action. But it is hard to see how that narrative applies to New York, given that New York's penalty provisions, on their face, apply to all plaintiffs, be they class or individual, and

be true because "suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary." *Post*, at 445. But some people believe that class actions are inefficient or at least unfair, insofar as they join together slightly disparate claims or force courts to adjudicate unwieldy lawsuits. It is not for us to dismiss the possibility that New York legislators shared in those beliefs and thus wanted to exclude the class vehicle when it appeared to be unnecessary.

The legislative history of § 901 thus reveals a classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it *too* easy when the class tool is not required. This is the same sort of calculation that might go into setting filing fees or deadlines for briefs. There is of course a difference of degree between those examples and class certification, but not a difference of kind; the class vehicle may have a greater practical effect on who brings lawsuits than do low filing fees, but that does not transform it into a damages "proscription," *post*, at 447, n. 6, 456, or "limitation," *post*, at 443, and n. 2, 444, 447, 459.[18]

The difference of degree is relevant to the forum shopping considerations that are part of the Rules of Decision Act or *Erie* inquiry. If the applicable federal rule did not govern the particular question at issue (or could be fairly read not to do so), then those considerations would matter, for precisely the reasons given by the dissent. See *post*, at 452–458.

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that § 901(b) addresses penalties that are created under any source of state or federal law.

[18] JUSTICE GINSBURG asserts that class certification in this matter would "transform a $500 case into a $5 million award." *Post*, at 436. But in fact, class certification would transform 10,000 $500 cases into one $5 million case. It may be that without class certification, not all of the potential plaintiffs would bring their cases. But that is true of any procedural vehicle; without a lower filing fee, a conveniently located courthouse, easy-to-use federal procedural rules, or many other features of the federal courts, many plaintiffs would not sue.

But that is not *this* case. As the Court explained in *Hanna*, it is an "incorrect assumption that the rule of *Erie R. Co.* v. *Tompkins* constitutes the appropriate test of . . . the applicability of a Federal Rule of Civil Procedure." 380 U. S., at 469–470. "It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law," but the tests are different and reflect the fact that "they were designed to control very different sorts of decisions." *Id.*, at 471.

Because Rule 23 governs class certification, the only decision is whether certifying a class in this diversity case would "abridge, enlarge or modify" New York's substantive rights or remedies. § 2072(b). Although one can argue that class certification would enlarge New York's "limited" damages remedy, see *post*, at 443, and n. 2, 444, 447, 459, such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b). But given that there are two plausible competing narratives, it seems obvious to me that we should respect the plain textual reading of § 901(b), a rule in New York's procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts. In order to displace a federal rule, there must be more than just a possibility that the state rule is different than it appears.

Accordingly, I concur in part and concur in the judgment.

JUSTICE GINSBURG, with whom JUSTICE KENNEDY, JUSTICE BREYER, and JUSTICE ALITO join, dissenting.

The Court today approves Shady Grove's attempt to transform a $500 case into a $5 million award, although the State creating the right to recover has proscribed this alchemy. If Shady Grove had filed suit in New York state court, the 2% interest payment authorized by New York Ins. Law Ann. § 5106(a) (West 2009) as a penalty for overdue benefits would, by Shady Grove's own measure, amount to no more than

$500. By instead filing in federal court based on the parties' diverse citizenship and requesting class certification, Shady Grove hopes to recover, for the class, statutory damages of more than $5 million. The New York Legislature has barred this remedy, instructing that, unless specifically permitted, "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." N. Y. Civ. Prac. Law Ann. (CPLR) § 901(b) (West 2006). The Court nevertheless holds that Federal Rule of Civil Procedure 23, which prescribes procedures for the conduct of class actions in federal courts, preempts the application of § 901(b) in diversity suits.

The Court reads Rule 23 relentlessly to override New York's restriction on the availability of statutory damages. Our decisions, however, caution us to ask, before undermining state legislation: Is this conflict really necessary? Cf. Traynor, Is This Conflict Really Necessary? 37 Texas L. Rev. 657 (1959). Had the Court engaged in that inquiry, it would not have read Rule 23 to collide with New York's legitimate interest in keeping certain monetary awards reasonably bounded. I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies. Because today's judgment radically departs from that course, I dissent.

I

A

"Under the *Erie* doctrine," it is long settled, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 427 (1996); see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Justice Harlan aptly conveyed the importance of the doctrine; he described *Erie* as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna* v. *Plumer*,

380 U. S. 460, 474 (1965) (concurring opinion). Although we have found *Erie*'s application "sometimes [to be] a challenging endeavor," *Gasperini*, 518 U. S., at 427, two federal statutes mark our way.

The first, the Rules of Decision Act,[1] prohibits federal courts from generating substantive law in diversity actions. See *Erie*, 304 U. S., at 78. Originally enacted as part of the Judiciary Act of 1789, this restraint serves a policy of prime importance to our federal system. We have therefore applied the Act "with an eye alert to . . . avoiding disregard of State law." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 110 (1945).

The second, the Rules Enabling Act, enacted in 1934, authorizes us to "prescribe general rules of practice and procedure" for the federal courts, but with a crucial restriction: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U. S. C. § 2072. Pursuant to this statute, we have adopted the Federal Rules of Civil Procedure. In interpreting the scope of the Rules, including, in particular, Rule 23, we have been mindful of the limits on our authority. See, *e. g.*, *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 845 (1999) (The Rules Enabling Act counsels against "adventurous application" of Rule 23; any tension with the Act "is best kept within tolerable limits."); *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 612–613 (1997). See also *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 503–504 (2001).

If a Federal Rule controls an issue and directly conflicts with state law, the Rule, so long as it is consonant with the Rules Enabling Act, applies in diversity suits. See *Hanna*, 380 U. S., at 469–474. If, however, no Federal Rule or statute governs the issue, the Rules of Decision Act, as inter-

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[1] The Rules of Decision Act directs that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S. C. § 1652.

preted in *Erie*, controls. That Act directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum shopping and yield markedly disparate litigation outcomes. See *Gasperini*, 518 U. S., at 428; *Hanna*, 380 U. S., at 468. Recognizing that the Rules of Decision Act and the Rules Enabling Act simultaneously frame and inform the *Erie* analysis, we have endeavored in diversity suits to remain safely within the bounds of both congressional directives.

B

In our prior decisions in point, many of them not mentioned in the Court's opinion, we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest. "Application of the *Hanna* analysis," we have said, "is premised on a 'direct collision' between the Federal Rule and the state law." *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 749–750 (1980) (quoting *Hanna*, 380 U. S., at 472). To displace state law, a Federal Rule, "when fairly construed," must be " 'sufficiently broad' " so as "to 'control the issue' before the court, thereby leaving *no room* for the operation of that law." *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987) (quoting *Walker*, 446 U. S., at 749–750, and n. 9; emphasis added); cf. *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22, 37–38 (1988) (SCALIA, J., dissenting) ("[I]n deciding whether a federal . . . Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.").

In pre-*Hanna* decisions, the Court vigilantly read the Federal Rules to avoid conflict with state laws. In *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1943), for example, the Court read Federal Rule 8(c), which lists affirmative defenses, to control only the manner of pleading the listed defenses in diversity cases; as to the burden of proof in such cases, *Palmer* held, state law controls.

Six years later, in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), the Court ruled that state law determines when a diversity suit commences for purposes of tolling the state limitations period. Although Federal Rule 3 specified that "[a] civil action is commenced by filing a complaint with the court," we held that the Rule did not displace a state law that tied an action's commencement to service of the summons. *Id.*, at 531–533. The "cause of action [wa]s created by local law," the Court explained, therefore "the measure of it [wa]s to be found only in local law." *Id.*, at 533.

Similarly in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), the Court held applicable in a diversity action a state statute requiring plaintiffs, as a prerequisite to pursuit of a stockholder's derivative action, to post a bond as security for costs. At the time of the litigation, Rule 23, now Rule 23.1, addressed a plaintiff's institution of a derivative action in federal court. Although the Federal Rule specified prerequisites to a stockholder's maintenance of a derivative action, the Court found no conflict between the Rule and the state statute in question; the requirements of both could be enforced, the Court observed. See *id.*, at 556. Burdensome as the security-for-costs requirement may be, *Cohen* made plain, suitors could not escape the upfront outlay by resorting to the federal court's diversity jurisdiction.

In all of these cases, the Court stated in *Hanna*, "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." 380 U. S., at 470. In *Hanna* itself, the Court found the clash "unavoidable," *ibid.*; the petitioner had effected service of process as prescribed by Federal Rule 4(d)(1), but that "how-to" method did not satisfy the special Massachusetts law applicable to service on an executor or administrator. Even as it rejected the Massachusetts prescription in favor of the federal procedure, however, "[t]he majority in Hanna recognized . . . that federal rules . . . must

be interpreted by the courts applying them, and that the process of interpretation can and should reflect an awareness of legitimate state interests." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 593 (6th ed. 2009) (hereinafter Hart & Wechsler).

Following *Hanna*, we continued to "interpre[t] the federal rules to avoid conflict with important state regulatory policies." Hart & Wechsler 593. In *Walker*, the Court took up the question whether *Ragan* should be overruled; we held, once again, that Federal Rule 3 does not directly conflict with state rules governing the time when an action commences for purposes of tolling a limitations period. 446 U. S., at 749–752. Rule 3, we said, addresses only "the date from which various timing requirements of the Federal Rules begin to run," *id.*, at 751, and does not "purpor[t] to displace state tolling rules," *id.*, at 750–751. Significant state policy interests would be frustrated, we observed, were we to read Rule 3 as superseding the state rule, which required actual service on the defendant to stop the clock on the statute of limitations. *Id.*, at 750–752.

We were similarly attentive to a State's regulatory policy in *Gasperini*. That diversity case concerned the standard for determining when the large size of a jury verdict warrants a new trial. Federal and state courts alike had generally employed a "shock the conscience" test in reviewing jury awards for excessiveness. See 518 U. S., at 422. Federal courts did so pursuant to Federal Rule 59(a) which, as worded at the time of *Gasperini*, instructed that a trial court could grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. Rule Civ. Proc. 59(a) (West 1995). In an effort to provide greater control, New York prescribed procedures under which jury verdicts would be examined to determine whether they "deviate[d] materially from what would be reasonable compensation." See

Gasperini, 518 U. S., at 423–425 (quoting CPLR § 5501(c)). This Court held that Rule 59(a) did not inhibit federal-court accommodation of New York's invigorated test.

Most recently, in *Semtek*, we addressed the claim-preclusive effect of a federal-court judgment dismissing a diversity action on the basis of a California statute of limitations. The case came to us after the same plaintiff renewed the same fray against the same defendant in a Maryland state court. (Plaintiff chose Maryland because that State's limitations period had not yet run.) We held that Federal Rule 41(b), which provided that an involuntary dismissal "operate[d] as an adjudication on the merits," did not bar maintenance of the renewed action in Maryland. To hold that Rule 41(b) precluded the Maryland courts from entertaining the case, we said, "would arguably violate the jurisdictional limitation of the Rules Enabling Act," 531 U. S., at 503, and "would in many cases violate [*Erie*'s] federalism principle," *id.*, at 504.

In sum, both before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to "interpre[t] the Federal Rules . . . with sensitivity to important state interests," *Gasperini*, 518 U. S., at 427, n. 7, and a will "to avoid conflict with important state regulatory policies," *id.*, at 438, n. 22 (internal quotation marks omitted).[2] The Court veers away from that approach—and

[2] JUSTICE STEVENS stakes out common ground on this point: "[F]ederal rules," he observes, "must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,' . . . and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of 'the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts,' *Hanna* [v. *Plumer*], 380 U. S. [460, 473 (1965)]." *Ante*, at 418–419 (opinion concurring in part and concurring in judgment). See also *ante*, at 419–420 ("A 'state procedural rule, though undeniably procedural in the ordinary sense of the term,' may exist 'to influence substantive outcomes,' . . . and may in some instances become so bound up with the state-created right or remedy that

conspicuously, its most recent reiteration in *Gasperini*, *ante*, at 405, n. 7—in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord.

C

Our decisions instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute, *e. g.*, *Cohen*, or a procedural rule, *e. g.*, *Gasperini*—warrant our respectful consideration. Yet today, the Court gives no quarter to New York's limitation on statutory damages and requires the lower courts to thwart the regulatory policy at stake: To prevent excessive damages, New York's law controls the penalty to which a defendant may be exposed in a single suit. The story behind § 901(b)'s enactment deserves telling.

In 1975, the Judicial Conference of the State of New York proposed a new class-action statute designed "to set up a flexible, functional scheme" that would provide "an effective, but controlled group remedy." Judicial Conference Report on CPLR, reprinted in 1975 N. Y. Laws pp. 1477, 1493 (McKinney). As originally drafted, the legislation addressed only the procedural aspects of class actions; it specified, for example, five prerequisites for certification, eventually codified at § 901(a), that closely tracked those listed in Rule 23. See CPLR § 901(a) (requiring, for class certification, numer-

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it defines the scope of that substantive right or remedy." (some internal quotation marks omitted)); *ante*, at 420 ("When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice."). Nevertheless, JUSTICE STEVENS sees no reason to read Rule 23 with restraint in this particular case; the Federal Rule preempts New York's damages limitation, in his view, because § 901(b) is "a procedural rule that is not part of New York's substantive law." *Ante*, at 416. This characterization of § 901(b) does not mirror reality, as I later explain. See *infra*, at 452–458. But a majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns.

osity, predominance, typicality, adequacy of representation, and superiority).

While the Judicial Conference proposal was in the New York Legislature's hopper, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty . . . except when expressly authorized in the pertinent statute." *Sperry* v. *Crompton Corp.*, 8 N. Y. 3d 204, 211, 863 N. E. 2d 1012, 1015 (2007). These constituents "feared that recoveries beyond actual damages could lead to excessively harsh results." *Ibid.* "They also argued that there was no need to permit class actions . . . [because] statutory penalties . . . provided an aggrieved party with a sufficient economic incentive to pursue a claim." *Ibid.* Such penalties, constituents observed, often far exceed a plaintiff's actual damages. "When lumped together," they argued, "penalties and class actions produce overkill." Attachment to Letter from G. Perkinson, New York State Council of Retail Merchants, Inc., to J. Gribetz, Executive Chamber (June 4, 1975) (Legislative Report), Bill Jacket, L. 1975, Ch. 207.

Aiming to avoid "annihilating punishment of the defendant," the New York Legislature amended the proposed statute to bar the recovery of statutory damages in class actions. V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006) (internal quotation marks omitted). In his signing statement, Governor Hugh Carey stated that the new statute "empowers the court to prevent abuse of the class action device and provides *a controlled remedy.*" Memorandum on Approving L. 1975, Ch. 207, reprinted in 1975 N. Y. Laws, at 1748 (emphasis added).

"[T]he final bill . . . was the result of a compromise among competing interests." *Sperry*, 8 N. Y. 3d, at 211, 863 N. E. 2d, at 1015. Section 901(a) allows courts leeway in deciding whether to certify a class, but § 901(b) rejects the use of the class mechanism to pursue the particular remedy of statu-

tory damages. The limitation was not designed with the fair conduct or efficiency of litigation in mind. Indeed, suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary. New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end: limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind.[3]

D

Shady Grove contends—and the Court today agrees—that Rule 23 unavoidably preempts New York's prohibition on the recovery of statutory damages in class actions. The Federal Rule, the Court emphasizes, states that Shady Grove's suit "may be" maintained as a class action, which conflicts with § 901(b)'s instruction that it "may not" so proceed. *Ante*, at 399 (internal quotation marks omitted; emphasis deleted). Accordingly, the Court insists, § 901(b) "cannot apply in diversity suits unless Rule 23 is ultra vires." *Ibid.* Concluding that Rule 23 does not violate the Rules Enabling Act, the Court holds that the federal provision controls Shady Grove's ability to seek, on behalf of a class, a statutory penalty of over $5 million. *Ante*, at 406–410 (plurality opinion);

[3] Even in the mine-run case, a class action can result in "potentially ruinous liability." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 143. A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims. See, *e. g.*, *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 476 (1978). When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury. See, *e. g.*, *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F. R. D. 412, 416 (SDNY 1972) (exercising "considerable discretion of a pragmatic nature" to refuse to certify a class because the plaintiffs suffered negligible actual damages but sought statutory damages of $13 million).

ante, at 431–436 (STEVENS, J., concurring in part and concurring in judgment).

The Court, I am convinced, finds conflict where none is necessary. Mindful of the history behind § 901(b)'s enactment, the thrust of our precedent, and the substantive-rights limitation in the Rules Enabling Act, I conclude, as did the Second Circuit and every District Court to have considered the question in any detail,[4] that Rule 23 does not collide with § 901(b). As the Second Circuit well understood, Rule 23 prescribes the considerations relevant to class certification and postcertification proceedings—but it does not command that a particular remedy be available when a party sues in a representative capacity. See 549 F. 3d 137, 143 (2008).[5] Section 901(b), in contrast, trains on that latter issue. Sensibly read, Rule 23 governs procedural aspects of class litiga-

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[4] See, *e. g.*, *In re Automotive Refinishing Paint Antitrust Litigation*, 515 F. Supp. 2d 544, 549–551 (ED Pa. 2007); *Leider* v. *Ralfe*, 387 F. Supp. 2d 283, 289–292 (SDNY 2005); *Dornberger* v. *Metropolitan Life Ins. Co.*, 182 F. R. D. 72, 84 (SDNY 1999). See also *Weber* v. *U. S. Sterling Securities, Inc.*, 282 Conn. 722, 738–739, 924 A. 2d 816, 827–828 (2007) (§ 901(b) applied in Connecticut state court to action governed by New York substantive law).

[5] Shady Grove projects that a dispensation in favor of Allstate would require "courts in all diversity class actions . . . [to] look to state rules and decisional law rather than to Rule 23 . . . in making their class certification decisions." Brief for Petitioner 55. This slippery-slope projection is both familiar and false. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). In this case, CPLR § 901(a) lists the state-law prerequisites for class certification, but Allstate does not contend that § 901(a) overrides Rule 23. Brief for Respondent 18 ("There is no dispute that the criteria for class certification under state law do not apply in federal court; that is the ground squarely occupied by Rule 23."). Federal courts sitting in diversity have routinely applied Rule 23's certification standards, rather than comparable state provisions. See, *e. g.*, *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F. 3d 6, 18–24 (CA1 2008); Order and Reasons in *In re Katrina Canal Breaches Consol. Litigation*, Civ. Action No. 05–4182 (ED La., Aug. 6, 2009).

tion, but allows state law to control the size of a monetary award a class plaintiff may pursue.

In other words, Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself. In this regard, it is immaterial that § 901(b) bars statutory penalties in wholesale, rather than retail, fashion. The New York Legislature could have embedded the limitation in every provision creating a cause of action for which a penalty is authorized; § 901(b) operates as shorthand to the same effect. It is as much a part of the delineation of the claim for relief as it would be were it included claim by claim in the New York Code.

The Court single-mindedly focuses on whether a suit "may" or "may not" be maintained as a class action. See *ante*, at 398–401. Putting the question that way, the Court does not home in on the reason *why*. Rule 23 authorizes class treatment for suits satisfying its prerequisites because the class mechanism generally affords a fair and efficient way to aggregate claims for adjudication. Section 901(b) responds to an entirely different concern; it does not allow class members to recover statutory damages because the New York Legislature considered the result of adjudicating such claims en masse to be exorbitant.[6] The fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers. Cf. Ely, The Irrepressible Myth of *Erie*, 87 Harv. L. Rev. 693, 722 (1974) (It is relevant "whether the state provision embodies a substantive policy or repre-

[6] The Court disputes the strength of the evidence of legislative intent, see *ante*, at 403, but offers no alternative account of § 901(b)'s purpose. Perhaps this silence indicates how very hard it would be to ascribe to § 901(b) *any* purpose bound up with the fairness and efficiency of processing cases. On its face, the proscription is concerned with remedies, *i. e.*, the availability of statutory damages in a lawsuit. Legislative history confirms this objective, but is not essential to revealing it.

sents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation.").

Suppose, for example, that a State, wishing to cap damages in class actions at $1 million, enacted a statute providing that "a suit to recover more than $1 million may not be maintained as a class action." Under the Court's reasoning—which attributes dispositive significance to the words "may not be maintained"—Rule 23 would preempt this provision, never mind that Congress, by authorizing the promulgation of rules of procedure for federal courts, surely did not intend to displace state-created ceilings on damages.[7] The Court suggests that the analysis might differ if the statute "limit[ed] the remedies available in an existing class action," *ante,* at 401, such that Rule 23 might not conflict with a state statute prescribing that "no more than $1 million may be recovered in a class action." There is no real difference in the purpose and intended effect of these two hypothetical statutes. The notion that one directly impinges on Rule 23's domain, while the other does not, fundamentally misperceives the office of Rule 23.[8]

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[7] There is, of course, a difference between "justly administering [a] remedy," *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14 (1941), and prescribing the content of that remedy; if Rule 23 can be read to increase a plaintiff's recovery from $1 million to some greater amount, the Rule has arguably "enlarge[d] . . . [a] substantive right" in violation of the Rules Enabling Act. 28 U. S. C. § 2072(b). The plurality appears to acknowledge this point, stating that the Federal Rules we have found to be in compliance with the Act have not "altered . . . available remedies." *Ante,* at 407–408. But the Court's relentless reading of Rule 23 today does exactly that: The Federal Rule, it says, authorizes the recovery of class-size statutory damages even though the New York provision instructs that such penalties shall not be available.

[8] The Court states that "[w]e cannot rewrite [a state law] to reflect our perception of legislative purpose." *Ante,* at 403. But we can, of course, *interpret the Federal Rules* in light of a State's regulatory policy to decide whether and to what extent a Rule preempts state law. See *supra,* at 439–442. Just as we read Federal Rule 3 in *Walker* v. *Armco Steel Corp.*,

The absence of an inevitable collision between Rule 23 and § 901(b) becomes evident once it is comprehended that a federal court sitting in diversity can accord due respect to both state and federal prescriptions. Plaintiffs seeking to vindicate claims for which the State has provided a statutory penalty may pursue relief through a class action if they forgo statutory damages and instead seek actual damages or injunctive or declaratory relief; any putative class member who objects can opt out and pursue actual damages, if available, and the statutory penalty in an individual action. See, *e. g.*, *Mendez* v. *The Radec Corp.*, 260 F. R. D. 38, 55 (WDNY 2009); *Brzychnalski* v. *Unesco, Inc.*, 35 F. Supp. 2d 351, 353 (SDNY 1999).[9] See also Alexander, Practice Commentaries, at 105 ("Even if a statutory penalty or minimum recovery is involved, most courts hold that it can be waived, thus confining the class recovery to actual damages and eliminating the bar of CPLR 901(b)."). In this manner, the Second Circuit

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446 U. S. 740, 751 (1980), not to govern when a suit commences for purposes of tolling a state statute of limitations (although the Rule indisputably controls when an action commences for federal procedural purposes), so too we could read Rule 23 not to direct when a class action may be maintained for purposes of recovering statutory damages prescribed by state law. On this reading of Rule 23, no rewriting of § 901(b) is necessary to avoid a conflict.

[9] The New York Legislature appears to have anticipated this result. In discussing the remedial bar effected by § 901(b), the bill's sponsor explained that a "statutory class action for actual damages would still be permissible." S. Fink, [Sponsor's] Memorandum, p. 2, Bill Jacket, L. 1975, Ch. 207. See also State Consumer Protection Board Memorandum (May 29, 1975), Bill Jacket, L. 1975, Ch. 207. On this understanding, New York courts routinely authorize class actions when the class waives its right to receive statutory penalties. See, *e. g.*, *Cox* v. *Microsoft Corp.*, 8 App. Div. 3d 39, 778 N. Y. S. 2d 147 (2004); *Pesantez* v. *Boyle Env. Servs., Inc.*, 251 App. Div. 2d 11, 673 N. Y. S. 2d 659 (1998); *Ridge Meadows Homeowners' Assn., Inc.* v. *Tara Development Co.*, 242 App. Div. 2d 947, 665 N. Y. S. 2d 361 (1997); *Super Glue Corp.* v. *Avis Rent A Car System, Inc.*, 132 App. Div. 2d 604, 517 N. Y. S. 2d 764 (1987); *Weinberg* v. *Hertz Corp.*, 116 App. Div. 2d 1, 499 N. Y. S. 2d 693 (1986).

explained, "Rule 23's procedural requirements for class actions can be applied along with the substantive requirement of CPLR 901(b)." 549 F. 3d, at 144. In sum, while phrased as responsive to the question whether certain class actions may begin, § 901(b) is unmistakably aimed at controlling how those actions must end. On that remedial issue, Rule 23 is silent.

Any doubt whether Rule 23 leaves § 901(b) in control of the remedial issue at the core of this case should be dispelled by our *Erie* jurisprudence, including *Hanna*, which counsels us to read Federal Rules moderately and cautions against stretching a Rule to cover every situation it could conceivably reach.[10] The Court states that "[t]here is no reason . . . to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions." *Ante*, at 399. To the contrary, *Palmer*, *Ragan*, *Cohen*, *Walker*, *Gasperini*, and *Semtek* provide good reason to look to the law that creates the right to recover. See *supra*, at 439–442. That is plainly so on a more accurate statement of what is at stake: Is there any reason to read Rule 23 as authorizing a claim for relief when the State that created the remedy disallows its pursuit on behalf of a class? None at all is the answer our federal system should give.

Notably, New York is not alone in its effort to contain penalties and minimum recoveries by disallowing class relief; Congress, too, has precluded class treatment for certain claims seeking a statutorily designated minimum recovery. See, *e. g.*, 15 U. S. C. § 1640(a)(2)(B) (Truth in Lending Act) ("[I]n the case of a class action . . . no minimum recovery shall be applicable."); § 1693m(a)(2)(B) (Electronic Fund

[10] The plurality notes that "we have rejected every statutory challenge to a Federal Rule that has come before us." *Ante*, at 407. But it omits that we have interpreted Rules with due restraint, including Rule 23, thus diminishing prospects for the success of such challenges. See *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 842 (1999); *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 612–613 (1997); *supra*, at 439–443.

Transfer Act) (same); 12 U. S. C. § 4010(a)(2)(B)(i) (Expedited Funds Availability Act) (same). Today's judgment denies to the States the full power Congress has to keep certain monetary awards within reasonable bounds. Cf. *Beard* v. *Kindler*, 558 U. S. 53, 62 (2009) ("In light of . . . federalism and comity concerns . . . it would seem particularly strange to disregard state . . . rules that are substantially similar to those to which we give full force in our own courts."). States may hesitate to create determinate statutory penalties in the future if they are impotent to prevent federal-court distortion of the remedy they have shaped.[11]

By finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*. Had the Court reflected on the respect for state regulatory interests endorsed in our decisions, it would have found no cause to interpret Rule 23 so woodenly—and every reason not to do so. Cf. Traynor, 37 Texas L. Rev., at 669 ("It is bad enough for courts to prattle unintelligibly about choice of law, but unforgiveable when inquiry might have revealed that there was no real conflict.").

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[11] States have adopted a variety of formulations to limit the use of class actions to gain certain remedies or to pursue certain claims, as illustrated by the 96 examples listed in Allstate's brief. Apps. to Brief for Respondent. The Court's "one-size-fits-all" reading of Rule 23, *ante*, at 399, likely prevents the enforcement of *all* of these statutes in diversity actions—including the numerous state statutory provisions that, like § 901(b), attempt to curb the recovery of statutory damages. See, *e. g.,* Cal. Civ. Code Ann. § 2988.5(a)(2) (West 1993); Colo. Rev. Stat. Ann. § 12–14.5–235(d) (2009); Conn. Gen. Stat. § 36a–683(a) (2009); Haw. Rev. Stat. § 489–7.5(b)(1) (2008); Ind. Code § 24–4.5–5–203(a)(2) (West 2004); Ky. Rev. Stat. Ann. § 367.983(1)(c) (West 2006); Mass. Gen. Laws, ch. 167B, § 20(a)(2)(B) (West 2008); Mich. Comp. Laws Ann. § 493.112(3)(c) (West 2005); N. M. Stat. Ann. § 58–16–15(B) (2007); Ohio Rev. Code Ann. § 1351.08(A) (Lexis 2006); Okla. Stat., Tit. 14A, § 5–203(1) (West 2007 Supp.); Wyo. Stat. Ann. § 40–19–119(a)(iii) (2009).

II

Because I perceive no unavoidable conflict between Rule 23 and § 901(b), I would decide this case by inquiring "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court." *Hanna*, 380 U. S., at 468, n. 9. See *Gasperini*, 518 U. S., at 428.

Seeking to pretermit that inquiry, Shady Grove urges that the class-action bar in § 901(b) must be regarded as "procedural" because it is contained in the CPLR, which "govern[s] the *procedure* in civil judicial proceedings *in all courts of the state*." Brief for Petitioner 34 (quoting CPLR § 101; emphasis in original). Placement in the CPLR is hardly dispositive. The provision held "substantive" for *Erie* purposes in *Gasperini* is also contained in the CPLR (§ 5501(c)), as are limitations periods, § 201 *et seq.*, prescriptions plainly "substantive" for *Erie* purposes however they may be characterized for other purposes, see *York*, 326 U. S., at 109–112. See also, *e. g.*, 1 Restatement (Second) of Conflict of Laws § 133, Reporter's Note, p. 369 (1969) (hereinafter Restatement) ("Under the rule of Erie . . . the federal courts have classified the burden of persuasion as to contributory negligence as a matter of substantive law that is governed by the rule of the State in which they sit even though the courts of that State have characterized their rule as procedural for choice-of-law purposes."); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333 (1933).

Shady Grove also ranks § 901(b) as "procedural" because "nothing in [the statute] suggests that it is limited to rights of action based on New York state law, as opposed to federal law or the law of other states"; instead it "applies to actions seeking penalties under *any* statute." Brief for Petitioner 35–36. See also *ante*, at 432 (STEVENS, J., concurring in part and concurring in judgment) (Section 901(b) cannot "be

understood as a rule that . . . serves the function of defining New York's rights or remedies" because its "text . . . expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State.").

It is true that § 901(b) is not specifically *limited* to claims arising under New York law. But neither is it expressly *extended* to claims arising under foreign law. The rule prescribes, without elaboration either way, that "an action to recover a penalty . . . may not be maintained as a class action." We have often recognized that "general words" appearing in a statute may, in fact, have limited application; "[t]he words 'any person or persons,'" for example, "are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *United States* v. *Palmer*, 3 Wheat. 610, 631 (1818) (opinion for the Court by Marshall, C. J.). See also *Small* v. *United States*, 544 U. S. 385, 388 (2005) ("In law, a legislature that uses the statutory phrase 'any person' may or may not mean to include 'persons' outside the jurisdiction of the state." (some internal quotation marks omitted)); *Flora* v. *United States*, 362 U. S. 145, 149 (1960) (The term "'any sum' is a catchall [phrase,] . . . but to say this is not to define what it catches.").

Moreover, Shady Grove overlooks the most likely explanation for the absence of limiting language: New York legislators make law with New York plaintiffs and defendants in mind, *i. e.*, as if New York were the universe. See Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 11 (1963) ("[L]awmakers often speak in universal terms but must be understood to speak with reference to their constituents."); cf. *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993) (presumption against extraterritoriality rooted in part in "the commonsense notion that Congress generally legislates with domestic concerns in mind").

The point was well put by Brainerd Currie in his seminal article on governmental interest analysis in conflict-of-laws cases. The article centers on a now-archaic Massachusetts law that prevented married women from binding themselves by contract as sureties for their husbands. Discussing whether the Massachusetts prescription applied to transactions involving foreign factors (a foreign forum, foreign place of contracting, or foreign parties), Currie observed:

> "When the Massachusetts legislature addresses itself to the problem of married women as sureties, the undeveloped image in its mind is that of *Massachusetts* married women, husbands, creditors, transactions, courts, and judgments. In the history of Anglo-American law the domestic case has been normal, the conflict-of-laws case marginal." Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 231 (1958) (emphasis added).

Shady Grove's suggestion that States must specifically limit their laws to domestic rights of action if they wish their enactments to apply in federal diversity litigation misses the obvious point: State legislators generally do not focus on an interstate setting when drafting statutes.[12]

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[12] Shady Grove's argument that § 901(b) is procedural based on its possible application to foreign claims is also out of sync with our *Erie* decisions, many of them involving state statutes of similarly unqualified scope. The New Jersey law at issue in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), for example, required plaintiffs to post a bond as security for costs in "*any* [stockholder's derivative] action." *Id.*, at 544, n. 1 (quoting 1945 N. J. Laws ch. 131 (emphasis added)). See also, *e. g.*, *Walker*, 446 U. S., at 742–743, and n. 4 (Oklahoma statute deemed "[a]n action" commenced for purposes of the statute of limitations upon service of the summons (quoting Okla. Stat., Tit. 12, § 97 (1971)). Our characterization of a state statute as substantive for *Erie* purposes has never hinged on whether the law applied only to domestic causes of action. To the contrary, we have ranked as substantive a variety of state laws that the state courts apply to federal and out-of-state claims, including statutes of limitations and burden-of-proof prescriptions. See *infra*, at 455–456.

Shady Grove also observes that a New York court has applied § 901(b) to a federal claim for relief under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U. S. C. § 227, see *Rudgayzer & Gratt* v. *Cape Canaveral Tour & Travel, Inc.*, 22 App. Div. 3d 148, 799 N. Y. S. 2d 795 (2005), thus revealing § 901(b)'s "procedural" cast. Brief for Petitioner 36. We note first that the TCPA itself calls for the application of state law. See *Rudgayzer*, 22 App. Div. 3d, at 149–150, 799 N. Y. S. 2d, at 796–797 (federal action authorized in state court "if otherwise permitted by the laws or rules of the court of [the] State" (quoting 47 U. S. C. § 227(b)(3))). See also *Gottlieb* v. *Carnival Corp.*, 436 F. 3d 335, 342 (CA2 2006) (Sotomayor, J.) ("Congress sought, via the TCPA, to enact the functional equivalent of a state law."). The TCPA, the Supreme Court of Connecticut has recognized, thus "carves out an exception to th[e] general rule" that "when *Erie* . . . is reversed . . . , a state court hearing a federal case is normally required to apply federal substantive law": "Under § 227(b)(3) . . . it is state substantive law that determines, as a preliminary matter, whether a federal action under the act may be brought in state court." *Weber* v. *U. S. Sterling Securities, Inc.*, 282 Conn. 722, 736, 924 A. 2d 816, 826 (2007) (in TCPA action governed by New York substantive law, § 901(b) applied even though the claim was pursued in Connecticut state court).

Moreover, statutes qualify as "substantive" for *Erie* purposes even when they have "procedural" thrusts as well. See, *e. g.*, *Cohen*, 337 U. S., at 555; cf. *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 536–538, and n. 1 (1949) (holding diversity case must be dismissed based on state statute that, by its terms, governed only proceedings in state court). Statutes of limitations are, again, exemplary. They supply "substantive" law in diversity suits, see *York*, 326 U. S., at 109–112, even though, as Shady Grove acknowledges, state courts often apply the forum's limitations period as a "procedural" bar to claims arising under the law of another State, see Reply Brief 24, n. 16; Tr. of Oral Arg. 16–17. See also

Restatement §§ 142–143 (when adjudicating a foreign cause of action, State may use either its own or the foreign jurisdiction's statute of limitations, whichever is shorter). Similarly, federal courts sitting in diversity give effect to state laws governing the burden of proving contributory negligence, see *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1943), yet state courts adjudicating foreign causes of action often apply their own local law to this issue. See Restatement § 133 and Reporter's Note.

In short, Shady Grove's effort to characterize § 901(b) as simply "procedural" cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* (pre- and post-*Hanna*) develop, the Rules of Decision Act commands application of the State's law in diversity suits. *Gasperini*, 518 U. S., at 428; *Hanna*, 380 U. S., at 468, n. 9; *York*, 326 U. S., at 109. As this case starkly demonstrates, if federal courts exercising diversity jurisdiction are compelled by Rule 23 to award statutory penalties in class actions while New York courts are bound by § 901(b)'s proscription, "substantial variations between state and federal [money judgments] may be expected." *Gasperini*, 518 U. S., at 430 (quoting *Hanna*, 380 U. S., at 467–468 (internal quotation marks omitted)). The "variation" here is indeed "substantial." Shady Grove seeks class relief that is *ten thousand times* greater than the individual remedy available to it in state court. As the plurality acknowledges, *ante*, at 415, forum shopping will undoubtedly result if a plaintiff need only file in federal instead of state court to seek a massive monetary award explicitly barred by state law. See *Gasperini*, 518 U. S., at 431 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.").[13]

[13] In contrast, many "state rules ostensibly addressed to procedure," *ante*, at 404 (majority opinion)—including pleading standards and rules governing summary judgment, pretrial discovery, and the admissibility of

The "accident of diversity of citizenship," *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, 496 (1941), should not subject a defendant to such augmented liability. See *Hanna*, 380 U. S., at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.").

It is beyond debate that "a statutory cap on damages would supply substantive law for *Erie* purposes." *Gasperini*, 518 U. S., at 428. See also *id.*, at 439–440 (STEVENS, J., dissenting) ("A state-law ceiling on allowable damages . . . is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law."); *id.*, at 464 (SCALIA, J., dissenting) ("State substantive law controls what injuries are compensable and in what amount."). In *Gasperini*, we determined that New York's standard for measuring the alleged excessiveness of a jury verdict was designed to provide a control analogous to a damages cap. *Id.*, at 429. The statute was framed as "a procedural instruction," we noted, "but the State's objective [wa]s manifestly substantive." *Ibid.*

Gasperini's observations apply with full force in this case. By barring the recovery of statutory damages in a class action, § 901(b) controls a defendant's maximum liability in a suit seeking such a remedy. The remedial provision could have been written as an explicit cap: "In any class action seeking statutory damages, relief is limited to the amount the named plaintiff would have recovered in an individual suit." That New York's Legislature used other words to express the very same meaning should be inconsequential.

We have long recognized the impropriety of displacing, in a diversity action, state-law limitations on state-created rem-

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certain evidence—would not so hugely impact forum choices. It is difficult to imagine a scenario that would promote more forum shopping than one in which the difference between filing in state and federal court is the difference between a potential award of $500 and one of $5 million.

edies. See *Woods*, 337 U. S., at 538 (in a diversity case, a plaintiff "barred from recovery in the state court . . . should likewise be barred in the federal court"); *York*, 326 U. S., at 108–109 (federal court sitting in diversity "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantively affect the enforcement of the right as given by the State"). Just as *Erie* precludes a federal court from entering a deficiency judgment when a State has "authoritatively announced that [such] judgments cannot be secured within its borders," *Angel* v. *Bullington*, 330 U. S. 183, 191 (1947), so too *Erie* should prevent a federal court from awarding statutory penalties aggregated through a class action when New York prohibits this recovery. See also *Ragan*, 337 U. S., at 533 ("Where local law qualifies or abridges [a claim], the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie* . . . is transgressed."). In sum, because "New York substantive law governs [this] claim for relief, New York law . . . guide[s] the allowable damages." *Gasperini*, 518 U. S., at 437.[14]

III

The Court's erosion of *Erie*'s federalism grounding impels me to point out the large irony in today's judgment. Shady Grove is able to pursue its claim in federal court only by virtue of the recent enactment of the Class Action Fairness Act of 2005 (CAFA), 28 U. S. C. § 1332(d). In CAFA, Congress opened federal-court doors to state-law-based class actions so long as there is minimal diversity, at least 100 class

[14] There is no question that federal courts can "give effect to the substantive thrust of [§ 901(b)] without untoward alteration of the federal scheme for the trial and decision of civil cases." *Gasperini*, 518 U. S., at 426. There is no risk that individual plaintiffs seeking statutory penalties will flood federal courts with state-law claims that could be managed more efficiently on a class basis; the diversity statute's amount-in-controversy requirement ensures that small state-law disputes remain in state court.

members, and at least $5 million in controversy. *Ibid.* By providing a federal forum, Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions. See, *e. g.*, S. Rep. No. 109–14, p. 4 (2005) (CAFA prevents lawyers from "gam[ing] the procedural rules [to] keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes." (internal quotation marks omitted)); *id.*, at 22 (disapproving "the 'I never met a class action I didn't like' approach to class certification" that "is prevalent in state courts in some localities"). In other words, Congress envisioned fewer—not more—class actions overall. Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind Shady Grove has launched: class actions seeking state-created penalties for claims arising under state law—claims that would be barred from class treatment in the State's own courts. Cf. *Woods*, 337 U. S., at 537 ("[T]he policy of *Erie* . . . preclude[s] maintenance in . . . federal court . . . of suits to which the State ha[s] closed its courts.").[15]

* * *

I would continue to approach *Erie* questions in a manner mindful of the purposes underlying the Rules of Decision Act and the Rules Enabling Act, faithful to precedent, and respectful of important state interests. I would therefore hold that the New York Legislature's limitation on the recovery of statutory damages applies in this case, and would affirm the Second Circuit's judgment.

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[15] It remains open to Congress, of course, to exclude from federal-court jurisdiction under CAFA, 28 U. S. C. § 1332(d), claims that could not be maintained as a class action in state court.

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UNITED STATES *v.* STEVENS

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

No. 08–769. Argued October 6, 2009—Decided April 20, 2010

Congress enacted 18 U. S. C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute addresses only *portrayals* of harmful acts, not the underlying conduct. It applies to any visual or auditory depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place," § 48(c)(1). Another clause exempts depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." § 48(b). The legislative background of § 48 focused primarily on "crush videos," which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish. Respondent Stevens was indicted under § 48 for selling videos depicting dogfighting. He moved to dismiss, arguing that § 48 is facially invalid under the First Amendment. The District Court denied his motion, and Stevens was convicted. The Third Circuit vacated the conviction and declared § 48 facially unconstitutional as a content-based regulation of protected speech.

Held: Section 48 is substantially overbroad, and therefore invalid under the First Amendment. Pp. 468–482.

(a) Depictions of animal cruelty are not, as a class, categorically unprotected by the First Amendment. Because § 48 explicitly regulates expression based on content, it is "'presumptively invalid,' . . . and the Government bears the burden to rebut that presumption." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817. Since its enactment, the First Amendment has permitted restrictions on a few historic categories of speech—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—that "have never been thought to raise any Constitutional problem," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Depictions of animal cruelty should not be added to that list. While the prohibition of animal cruelty has a long history in American law, there is no evidence of a similar tradition prohibiting *depictions* of such cruelty. The Government's proposed test would broadly balance the value of the speech against its societal costs to determine whether the First Amendment even applies. But the First Amendment's free speech guarantee does not extend only to

categories of speech that survive an ad hoc balancing of relative social costs and benefits. The Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. *New York* v. *Ferber*, 458 U. S. 747, distinguished. Pp. 468–472.

(b) Stevens's facial challenge succeeds under existing doctrine. Pp. 472–482.

(1) In the First Amendment context, a law may be invalidated as overbroad if "a 'substantial number' of its applications are unconstitutional, ' "judged in relation to the statute's plainly legitimate sweep." ' " *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6. Stevens claims that common depictions of ordinary and lawful activities constitute the vast majority of materials subject to § 48. The Government does not defend such applications, but contends that the statute is narrowly limited to specific types of extreme material. Section 48's constitutionality thus turns on how broadly it is construed. Pp. 472–473.

(2) Section 48 creates a criminal prohibition of alarming breadth. The statute's definition of a "depiction of animal cruelty" does not even require that the depicted conduct be cruel. While the words "maimed, mutilated, [and] tortured" convey cruelty, "wounded" and "killed" do not. Those words have little ambiguity and should be read according to their ordinary meaning. Section 48 does require that the depicted conduct be "illegal," but many federal and state laws concerning the proper treatment of animals are not designed to guard against animal cruelty. For example, endangered species protections restrict even the humane wounding or killing of animals. The statute draws no distinction based on the reason the conduct is made illegal.

Moreover, § 48 applies to any depiction of conduct that is illegal in the State in which the depiction is created, sold, or possessed, "regardless of whether the . . . wounding . . . or killing took place" there, § 48(c)(1). Depictions of entirely lawful conduct may run afoul of the ban if those depictions later find their way into States where the same conduct is unlawful. This greatly expands § 48's scope, because views about animal cruelty and regulations having no connection to cruelty vary widely from place to place. Hunting is unlawful in the District of Columbia, for example, but there is an enormous national market for hunting-related depictions, greatly exceeding the demand for crush videos or animal fighting depictions. Because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) applies to any magazine or video depicting lawful hunting that is sold in the Nation's Capital. Those seeking to comply with the law face a bewildering maze of regulations from at least 56 separate jurisdictions. Pp. 474–477.

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(3) Limiting § 48's reach to crush videos and depictions of animal fighting or other extreme cruelty, as the Government suggests, requires an unrealistically broad reading of the statute's exceptions clause. The statute only exempts material with "serious" value, and "serious" must be taken seriously. The excepted speech must also fall within one of § 48(b)'s enumerated categories. Much speech does not. For example, most hunting depictions are not obviously instructional in nature. The exceptions clause simply has no adequate reading that results in the statute's banning only the depictions the Government would like to ban.

Although the language of § 48(b) is drawn from the Court's decision in *Miller* v. *California*, 413 U. S. 15, the exceptions clause does not answer every First Amendment objection. Under *Miller*, "serious" value shields depictions of sex from regulation as obscenity. But *Miller* did not determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. Even "'wholly neutral futilities . . . come under the protection of free speech.'" *Cohen* v. *California*, 403 U. S. 15, 25. The First Amendment presumptively extends to many forms of speech that do not qualify for § 48(b)'s serious-value exception, but nonetheless fall within § 48(c)'s broad reach. Pp. 477–480.

(4) Despite the Government's assurance that it will apply § 48 to reach only "extreme" cruelty, this Court will not uphold an unconstitutional statute merely because the Government promises to use it responsibly. Nor can the Court construe this statutory language to avoid constitutional doubt. A limiting construction can be imposed only if the statute "is 'readily susceptible' to such a construction," *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884. To read § 48 as the Government desires requires rewriting, not just reinterpretation. Pp. 480–481.

(5) This construction of § 48 decides the constitutional question. The Government makes no effort to defend § 48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech would satisfy the proper level of scrutiny. But the Government nowhere extends these arguments to other depictions, such as hunting magazines and videos, that are presumptively protected by the First Amendment but that remain subject to § 48. Nor does the Government seriously contest that these presumptively impermissible applications of § 48 far outnumber any permissible ones. The Court therefore does not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. Section 48 is not so

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limited but is instead substantially overbroad, and therefore invalid under the First Amendment. Pp. 481–482.

533 F. 3d 218, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, *post*, p. 482.

Deputy Solicitor General Katyal argued the cause for the United States. On the briefs were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, *Nicole A. Saharsky*, and *Vicki S. Marani*.

Patricia A. Millett argued the cause for respondent. With her on the brief were *Thomas C. Goldstein*, *Kevin R. Amer*, *Jeffrey L. Fisher*, *Lisa B. Freeland*, *Michael J. Novara*, *Karen Sirianni Gerlach*, and *Robert Corn-Revere*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Bill McCollum*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Timothy D. Osterhaus* and *Craig D. Feiser*, Deputy Solicitors General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *Edmund G. Brown, Jr.*, of California, *John Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Kelly A. Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Richard Cordray* of Ohio, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Society for the Prevention of Cruelty to Animals by *Ian C. Schaefer;* for the Animal Legal Defense Fund by *Karen Johnson-McKewan* and *Warrington S. Parker III;* for the Center on the Administration of Criminal Law by *Paul D. Clement*, *Anthony S. Barkow*, and *Rachel E. Barkow;* for a Group of American Law Professors by *Megan A. Senatori* and *Pamela D. Frasch*, both *pro se;* for the Humane Society of the United States by *J. Scott Ballenger*, *Claudia M. O'Brien*, *Melissa B. Arbus*, *Jonathan R. Lovvorn*, and *Kimberly D. Ockene;* for the Northwest

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress enacted 18 U. S. C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial

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Animal Rights Network by *James H. Jones, Jr.;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the Association of American Publishers, Inc., et al. by *R. Bruce Rich, Jonathan Bloom,* and *Michael A. Bamberger;* for the Cato Institute by *Gene C. Schaerr, Geoffrey P. Eaton, Ilya Shapiro,* and *Linda T. Coberly;* for Bruce Ackerman et al. by *Craig Green, pro se;* for the DKT Liberty Project et al. by *Paul M. Smith, Katherine A. Fallow, Steven R. Shapiro,* and *John B. Morris, Jr.;* for the Endangered Breed Association et al. by *Judith A. Brecka;* for the First Amendment Lawyers Association by *Cathy E. Crosson, Clyde F. DeWitt III,* and *Lawrence G. Walters;* for the National Coalition Against Censorship et al. by *Andrew E. Tauber, Jeffrey P. Cunard,* and *Joan E. Bertin;* for the National Rifle Association of America, Inc., by *R. Hewitt Pate III, Ryan A. Shores,* and *Lewis F. Powell III;* for the National Shooting Sports Foundation, Inc., by *Lawrence G. Keane* and *Christopher P. Johnson;* for the Professional Outdoor Media Association et al. by *Beth Heifetz;* for the Reporters Committee for Freedom of the Press et al. by *Lucy A. Dalglish, Gregg P. Leslie, Kevin M. Goldberg, David Ardia, Marshall W. Anstandig, Mickey H. Osterreicher, George Freeman, René P. Milam, Barbara L. Camens, William Jay Powell,* and *Bruce W. Sanford;* for the Safari Club International et al. by *Douglas S. Burdin* and *William J. McGrath;* and for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler.*

Henry Mark Holzer and *Lance J. Gotko* filed a brief for the International Society for Animal Rights as *amicus curiae.*

gain" in interstate or foreign commerce. § 48(a).[1] A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." § 48(c)(1). In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." § 48(b).

The legislative background of § 48 focused primarily on the interstate market for "crush videos." According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. H. R. Rep. No. 106–397, p. 2 (1999) (hereinafter H. R. Rep.). Crush videos often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes,"

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[1] The statute reads in full:

"§ 48. Depiction of animal cruelty

"(a) CREATION, SALE, OR POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

"(c) DEFINITIONS.—In this section—

"(1) the term 'depiction of animal cruelty' means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

"(2) the term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States."

sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain." *Ibid.* Apparently these depictions "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.*, at 2–3. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. See Brief for United States 25, n. 7 (listing statutes). But crush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct. See H. R. Rep., at 3; accord, Brief for State of Florida et al. as *Amici Curiae* 11.

This case, however, involves an application of § 48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, see Brief for United States 26, n. 8 (listing statutes), and has been restricted by federal law since 1976. Animal Welfare Act Amendments of 1976, § 17, 90 Stat. 421, 7 U. S. C. § 2156. Respondent Robert J. Stevens ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960's and 1970's.[2] A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene of a pit bull attacking a domestic farm pig. 533 F. 3d 218, 221 (CA3 2008) (en banc). On the basis of these videos, Stevens was indicted on three counts of violating § 48.

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[2] The Government contends that these dogfights were unlawful at the time they occurred, while Stevens disputes the assertion. Reply Brief for United States 25, n. 14 (hereinafter Reply Brief); Brief for Respondent 44, n. 18.

Stevens moved to dismiss the indictment, arguing that § 48 is facially invalid under the First Amendment. The District Court denied the motion. It held that the depictions subject to § 48, like obscenity or child pornography, are categorically unprotected by the First Amendment. 2:04–cr–00051–ANB (WD Pa., Nov. 10, 2004), App. to Pet. for Cert. 65a–71a. It went on to hold that § 48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. *Id.*, at 71a–75a. The jury convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release. App. 37.

The en banc Third Circuit, over a three-judge dissent, declared § 48 facially unconstitutional and vacated Stevens's conviction. 533 F. 3d 218. The Court of Appeals first held that § 48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty, *id.*, at 224, and n. 6, and rejected the Government's analogy between animal cruelty depictions and child pornography, *id.*, at 224–232.

The Court of Appeals then held that § 48 could not survive strict scrutiny as a content-based regulation of protected speech. *Id.*, at 232. It found that the statute lacked a compelling Government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. *Id.*, at 232–235. It therefore held § 48 facially invalid.

In an extended footnote, the Third Circuit noted that § 48 "might also be unconstitutionally overbroad," because it "potentially covers a great deal of constitutionally protected speech" and "sweeps [too] widely" to be limited only by prosecutorial discretion. *Id.*, at 235, n. 16. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari. 556 U. S. 1181 (2009).

II

The Government's primary submission is that § 48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). Section 48 explicitly regulates expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is "'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000) (quoting *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); citation omitted).

"From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *Id.*, at 382–383. These "historic and traditional categories long familiar to the bar," *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (KENNEDY, J., concurring in judgment)—including obscenity, *Roth* v. *United States*, 354 U. S. 476, 483 (1957), defamation, *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952), fraud, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976), incitement, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949)—are "well-defined

and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942).

The Government argues that "depictions of animal cruelty" should be added to the list. It contends that depictions of "illegal acts of animal cruelty" that are "made, sold, or possessed for commercial gain" necessarily "lack expressive value," and may accordingly "be regulated as *unprotected* speech." Brief for United States 10 (emphasis added). The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a "'First Amendment Free Zone.'" *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. Reply Brief 12, n. 8; see, *e. g.*, The Body of Liberties § 92 (Mass. Bay Colony 1641), reprinted in American Historical Documents 1000–1904, 43 Harvard Classics 66, 79 (C. Eliot ed. 1910) ("No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use"). But we are unaware of any similar tradition excluding *depictions* of animal cruelty from "the freedom of speech" codified in the First Amendment, and the Government points us to none.

The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," Reply Brief 12, n. 8, and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's "'legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them]

unworthy of First Amendment protection,' " Brief for United States 23 (quoting 533 F. 3d, at 243 (Cowen, J., dissenting)), and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for United States 8; see also *id.*, at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being " 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R. A. V.*, *supra*, at 383 (quoting *Chaplinsky*, *supra*, at 572). In *New York* v. *Ferber*, 458 U. S. 747 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because "the balance of competing interests is clearly struck," *id.*, at 763–764. The Government derives its proposed test from these descriptions in our precedents. See Brief for United States 12–13.

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U. S., at 763. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. *Id.*, at 756–757, 762. But our decision did not rest on this "balance of competing interests" alone. *Id.*, at 764. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.*, at 759, 761. As we noted, "'[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" *Id.*, at 761–762 (quoting *Giboney*, 336 U. S., at 498). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. See *Osborne* v. *Ohio*, 495 U. S. 103, 110 (1990) (describing *Ferber* as finding "persuasive" the argument that the advertising and sale of child pornography was "an integral part" of its unlawful production (internal quotation marks omitted)); *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 249–250 (2002) (noting that distribution and sale "were intrinsically related to the sexual abuse of children," giving the speech at issue "a proximate link to the crime from which it came" (internal quotation marks omitted)).

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

III

Because we decline to carve out from the First Amendment any novel exception for § 48, we review Stevens's First Amendment challenge under our existing doctrine.

A

Stevens challenged § 48 on its face, arguing that any conviction secured under the statute would be unconstitutional. The court below decided the case on that basis, 533 F. 3d, at 231, n. 13, and we granted the Solicitor General's petition for certiorari to determine "whether 18 U. S. C. 48 is facially invalid under the Free Speech Clause of the First Amendment," Pet. for Cert. I.

To succeed in a typical facial attack, Stevens would have to establish "that no set of circumstances exists under which [§ 48] would be valid," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep," *Washington* v. *Glucksberg*, 521 U. S. 702, 740, n. 7 (1997) (STEVENS, J., concurring in judgments) (internal quotation marks omitted). Which standard applies in a typical case is a matter of dispute that we need not and do not address, and neither *Salerno* nor *Glucksberg* is a speech case. Here the Government asserts that Stevens cannot prevail because § 48 is plainly legitimate as applied to crush videos and animal fighting depictions. Deciding this case through

a traditional facial analysis would require us to resolve whether these applications of § 48 are in fact consistent with the Constitution.

In the First Amendment context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008) (internal quotation marks omitted). Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. Brief for Respondent 22–25. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. Brief for United States 8. As the parties have presented the issue, therefore, the constitutionality of § 48 hinges on how broadly it is construed. It is to that question that we now turn.[3]

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[3] The dissent contends that because there has not been a ruling on the validity of the statute as applied to Stevens, our consideration of his facial overbreadth claim is premature. *Post*, at 482, and n. 1, 483, 484 (opinion of ALITO, J.). Whether or not that conclusion follows, here no as-applied claim has been preserved. Neither court below construed Stevens's briefs as adequately developing a separate attack on a defined subset of the statute's applications (say, dogfighting videos). See 533 F. 3d 218, 231, n. 13 (CA3 2008) (en banc) ("Stevens brings a facial challenge to the statute"); App. to Pet. for Cert. 65a, 74a. Neither did the Government, see Brief for United States in No. 05–2497 (CA3), p. 28 (opposing "the appellant's facial challenge"); accord, Brief for United States 4. The sentence in Stevens's appellate brief mentioning his unrelated sufficiency-of-the-evidence challenge hardly developed a First Amendment as-applied claim. See *post*, at 482–483, n. 1. Stevens's constitutional argument is a general one. And unlike the challengers in *Washington State Grange*, Stevens does not "rest on factual assumptions . . . that can be evaluated only in the context of an as-applied challenge." 552 U. S., at 444.

B

As we explained two Terms ago, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 553 U. S. 285, 293 (2008). Because § 48 is a federal statute, there is no need to defer to a state court's authority to interpret its own law.

We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "'depiction of animal cruelty'" nowhere requires that the depicted conduct be cruel. That text applies to "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." § 48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." Reply Brief 6; see also Tr. of Oral Arg. 17–19. (The dissent hinges on the same assumption. See *post*, at 486–487, 489.) The Government bases this argument on the definiendum, "depiction of animal cruelty," cf. *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004), and on "'the commonsense canon of *noscitur a sociis*.'" Reply Brief 7 (quoting *Williams*, 553 U. S., at 294). As that canon recognizes, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." *Id.*, at 294. Likewise, an unclear definitional phrase may take meaning from the term to be defined, see *Leocal*, *supra*, at 11 (interpreting a "'substantial risk'" of the "us[e]" of "physical force" as part of the definition of "'crime of violence'").

But the phrase "wounded . . . or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to "'kill' is 'to deprive of life.'" Brief for United States 14 (quoting Webster's Third New Interna-

tional Dictionary 1242 (1993)). We agree that "wounded" and "killed" should be read according to their ordinary meaning. Cf. *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 252 (2004). Nothing about that meaning requires cruelty.

While not requiring cruelty, § 48 does require that the depicted conduct be "illegal." But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." § 48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.[4]

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the

[4] The citations in the dissent's appendix are beside the point. The cited statutes stand for the proposition that hunting is not covered by animal cruelty laws. But the reach of § 48 is, as we have explained, not restricted to depictions of conduct that violates a law specifically directed at animal cruelty. It simply requires that the depicted conduct be "illegal." § 48(c)(1). The Government implicitly admits as much, arguing that "instructional videos for hunting" are saved by the statute's exceptions clause, not that they fall outside the prohibition in the first place. Reply Brief 6.

same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be "a broad societal consensus" against cruelty to animals, Brief for United States 2, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. D. C. Code Munic. Regs., tit. 19, § 1560 (June 2004). Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, see Mediaweek, Sept. 29, 2008, p. 28, and hunting television programs, videos, and Web sites are equally popular, see Brief for Professional Outdoor Media Association et al. as *Amici Curiae* 9–10. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Compare *ibid.* and Brief for National Rifle Association of America, Inc., as *Amicus Curiae* 12 (hereinafter NRA Brief) (estimating that hunting magazines alone account for $135 million in annual retail sales) with Brief for United States 43–44, 46 (suggesting $1 million in crush video sales per year, and noting that Stevens earned $57,000 from his videos). Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. Some States permit hunting with crossbows, Ga. Code Ann. § 27–3–4(1) (2007); Va. Code Ann. § 29.1–519(A)(6) (Lexis 2008 Cum. Supp.), while others forbid it, Ore. Admin. Rule 635–065–0725 (2009), or restrict it only to the disabled,

N. Y. Envir. Conserv. Law Ann. § 11–0901(16) (West 2005). Missouri allows the "canned" hunting of ungulates held in captivity, Mo. Code Regs. Ann., tit. 3, 10–9.560(1) (2009), but Montana restricts such hunting to certain bird species, Mont. Admin. Rule 12.6.1202(1) (2007). The sharp-tailed grouse may be hunted in Idaho, but not in Washington. Compare Idaho Admin. Code § 13.01.09.606 (2009) with Wash. Admin. Code § 232–28–342 (2009).

The disagreements among the States—and the "commonwealth[s], territor[ies], or possession[s] of the United States," 18 U. S. C. § 48(c)(2)—extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. Compare, *e. g.*, Fla. Stat. Ann. § 828.23(5) (West 2006) (excluding poultry from humane slaughter requirements) with Cal. Food & Agric. Code Ann. § 19501(b) (West 2001) (including some poultry). California has recently banned cutting or "docking" the tails of dairy cattle, which other States permit. 2009 Cal. Legis. Serv. Ch. 344 (S. B. 135) (West). Even cockfighting, long considered immoral in much of America, see *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 575 (1991) (SCALIA, J., concurring in judgment), is legal in Puerto Rico, see 15 Laws P. R. Ann. § 301 (Supp. 2008); *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 342 (1986), and was legal in Louisiana until 2008, see La. Rev. Stat. Ann. § 14:102.23 (West) (effective Aug. 15, 2008). An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of § 48(a).

C

The only thing standing between defendants who sell such depictions and five years in federal prison—other than the mercy of a prosecutor—is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, jour-

nalistic, historical, or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value. Reply Brief 6. Thus, the Government argues, § 48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting, see Brief for United States 47–48), and perhaps other depictions of "extreme acts of animal cruelty." *Id.*, at 41.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with "redeeming societal value," *id.*, at 9, 16, 23, "'at least some minimal value,'" Reply Brief 6 (quoting H. R. Rep., at 4), or anything more than "scant social value," Reply Brief 11, is excluded under § 48(b). But the text says "serious" value, and "serious" should be taken seriously. We decline the Government's invitation—advanced for the first time in this Court—to regard as "serious" anything that is not "scant." (Or, as the dissent puts it, "'trifling.'" *Post*, at 487.) As the Government recognized below, "serious" ordinarily means a good bit more. The District Court's jury instructions required value that is "significant and of great import," App. 132, and the Government defended these instructions as properly relying on "a commonly accepted meaning of the word 'serious,'" Brief for United States in No. 05–2497 (CA3), p. 50.

Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos "have primarily entertainment value" and are designed to "entertai[n] the

viewer, marke[t] hunting equipment, or increas[e] the hunting community." Brief for Safari Club International et al. as *Amici Curiae* 12. The National Rifle Association agrees that "much of the content of hunting media . . . is merely *recreational* in nature." NRA Brief 28. The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. *Post*, at 487–488. But § 48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.

The Government explains that the language of § 48(b) was largely drawn from our opinion in *Miller* v. *California*, 413 U. S. 15 (1973), which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value," *id.*, at 24. See Reply Brief 8, 9, and n. 5. According to the Government, this incorporation of the *Miller* standard into § 48 is therefore surely enough to answer any First Amendment objection. Reply Brief 8–9.

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. 413 U. S., at 24–25. Limiting *Miller*'s exception to "serious" value ensured that "'[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.'" *Id.*, at 25, n. 7 (quoting *Kois* v. *Wisconsin*, 408 U. S. 229, 231 (1972) (*per curiam*)). We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from Government regulation. Even "'[w]holly neutral futil-

ities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" *Cohen* v. *California*, 403 U. S. 15, 25 (1971) (quoting *Winters* v. *New York*, 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting); alteration in original).

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c).

D

Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.*, at 6–7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 473 (2001).

This prosecution is itself evidence of the danger in putting faith in Government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." See Statement by President William J. Clinton upon Signing H. R. 1887, 34 Weekly Comp. of Pres. Doc. 2557 (1999). No one suggests that the videos in this case fit that description. The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 516 (2009). "[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884 (1997). We "'will not rewrite a . . . law to conform it to constitutional requirements,'" *id.*, at 884–885 (quoting *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988); omission in original), for doing so would constitute a "serious invasion of the legislative domain," *United States* v. *Treasury Employees*, 513 U. S. 454, 479, n. 26 (1995), and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place," *Osborne*, 495 U. S., at 121. To read § 48 as the Government desires requires rewriting, not just reinterpretation.

* * *

Our construction of § 48 decides the constitutional question; the Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of § 48.

Nor does the Government seriously contest that the presumptively impermissible applications of § 48 (properly construed) far outnumber any permissible ones. However "growing" and "lucrative" the markets for crush videos and dogfighting depictions might be, see Brief for United States

43, 46 (internal quotation marks omitted), they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of § 48, see *supra*, at 477. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

JUSTICE ALITO, dissenting.

The Court strikes down in its entirety a valuable statute, 18 U. S. C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention.[1]

[1] Respondent argued at length that the evidence was insufficient to prove that the particular videos he sold lacked any serious scientific, educational, or historical value and thus fell outside the exception in § 48(b). See Brief for Appellant in No. 05–2497 (CA3), pp. 72–79. He added that, if the evidence in this case was held to be sufficient to take his videos outside the scope of the exception, then "this case presents . . . a situation" in which "a constitutional violation occurs." *Id.*, at 71. See also *id.*, at 47 ("The applicability of 18 U. S. C. § 48 to speech which is not a crush video or an appeal to some prurient sexual interest constitutes a restriction of protected speech, and an unwarranted violation of the First

The Court of Appeals—incorrectly, in my view—declined to decide whether § 48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision does not endorse the Court of Appeals' reasoning, but it nevertheless strikes down § 48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, *United States* v. *Williams*, 553 U. S. 285, 293 (2008) (internal quotation marks omitted), a potion that generally should be administered only as "a last resort," *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 39 (1999) (internal quotation marks omitted).

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court's conclusion that § 48 bans a substantial quantity of protected speech.

I

A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights. *New York* v. *Ferber*, 458 U. S. 747, 767 (1982). The First Amendment overbreadth doctrine carves out a narrow exception to that general rule. See *id.*, at 768; *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–612 (1973). Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to

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Amendment's free speech guarantee"); Brief for Respondent 55 ("Stevens' speech does not fit within any existing category of unprotected, prosecutable speech"); *id.*, at 57 ("[T]he record as a whole demonstrates that Stevens' speech cannot constitutionally be punished"). Contrary to the Court, *ante*, at 473, n. 3 (citing 533 F. 3d 218, 231, n. 13 (CA3 2008) (en banc)), I see no suggestion in the opinion of the Court of Appeals that respondent did not preserve an as-applied challenge.

whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others. See, *e. g., Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 483 (1989) ("Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*"); see also *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462, n. 20 (1978) (describing the doctrine as one "under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him").

The "strong medicine" of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. As we said in *Fox*, *supra*, at 484–485, "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied." Accord, *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 11 (1988); see also *Broadrick*, *supra*, at 613; *United Reporting Publishing Corp.*, *supra*, at 45 (STEVENS, J., dissenting).

I see no reason to depart here from the generally preferred procedure of considering the question of overbreadth only as a last resort.[2] Because the Court has addressed the overbreadth question, however, I will explain why I do not think that the record supports the conclusion that § 48, when properly interpreted, is overly broad.

II

The overbreadth doctrine "strike[s] a balance between competing social costs." *Williams*, 553 U. S., at 292. Specifically, the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its applications is per-

[2] For the reasons set forth below, this is not a case in which the challenged statute is unconstitutional in all or almost all of its applications.

fectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech." *Ibid.* "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.*

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. See, *e. g.*, *id.*, at 301–302; see also *Ferber*, *supra*, at 773; *Houston* v. *Hill*, 482 U. S. 451, 466–467 (1987). Accordingly, we have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, "from the text of [the law] *and from actual fact*," that substantial overbreadth exists. *Virginia* v. *Hicks*, 539 U. S. 113, 122 (2003) (quoting *New York State Club Assn.*, *supra*, at 14; emphasis added; internal quotation marks omitted; alteration in original). Similarly, "there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 801 (1984) (emphasis added).

III

In holding that § 48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. See *ante*, at 473, 481. Instead, the Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions, but the Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. See *ante*, at 476. But hunting is legal in all 50 States, and § 48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. §§ 48(a), (c). Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside § 48's reach.

Straining to find overbreadth, the Court suggests that § 48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District—undoubtedly because of its urban character—does not permit hunting within its boundaries. *Ante*, at 475–476. The Court also suggests that, because some States prohibit a particular type of hunting (*e. g.*, hunting with a crossbow or "canned" hunting) or the hunting of a particular animal (*e. g.*, the "sharp-tailed grouse"), § 48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place. See *ante*, at 475–477.

The Court's interpretation is seriously flawed. "When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *Ferber*, 458 U. S., at 769, n. 24. See also *Williams*, *supra*, at 307 (STEVENS, J., concurring) ("[T]o the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters").

Applying this canon, I would hold that § 48 does not apply to depictions of hunting. First, because § 48 targets depictions of "animal cruelty," I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions

of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. See *ante*, at 475 (interpreting "[t]he text of § 48(c)" to ban a depiction of "the humane slaughter of a stolen cow"). Virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else specifically exempt lawful hunting activities,[3] so the statutory prohibition set forth in § 48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

Second, even if the hunting of wild animals were otherwise covered by § 48(a), I would hold that hunting depictions fall within the exception in § 48(b) for depictions that have "serious" (*i. e.*, not "trifling"[4]) "scientific," "educational," or "historical" value. While there are certainly those who find hunting objectionable, the predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view. Since 1972, when Congress called upon the President to designate a National Hunting and Fishing Day, see S. J. Res. 117, 92d Cong., 2d Sess. (1972), 86 Stat. 133, Presidents have regularly issued proclamations extolling the values served by hunting. See Presidential Proclamation No. 8421, 74 Fed. Reg. 49305 (Pres. Obama 2009) (hunting and fishing are "ageless pursuits" that promote "the conservation and restoration of numerous species and their natural habitats"); Presidential

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[3] See Appendix, *infra* (citing statutes); B. Wagman, S. Waisman, & P. Frasch, Animal Law: Cases and Materials 92 (4th ed. 2010) ("Most anti-cruelty laws also include one or more exemptions," which often "exclud[e] from coverage (1) whole classes of animals, such as wildlife or farm animals, or (2) specific activities, such as hunting"); Note, Economics and Ethics in the Genetic Engineering of Animals, 19 Harv. J. L. & Tech. 413, 432 (2006) ("Not surprisingly, state laws relating to the humane treatment of wildlife, including deer, elk, and waterfowl, are virtually non-existent").

[4] Webster's Third New International Dictionary 2073 (1976); Random House Dictionary of the English Language 1303 (1966). While the term "serious" may also mean "weighty" or "important," *ibid.*, we should adopt the former definition if necessary to avoid unconstitutionality.

Proclamation No. 8295, 73 Fed. Reg. 57233 (Pres. Bush 2008) (hunters and anglers "add to our heritage and keep our wildlife populations healthy and strong," and "are among our foremost conservationists"); Presidential Proclamation No. 7822, 69 Fed. Reg. 59539 (Pres. Bush 2004) (hunting and fishing are "an important part of our Nation's heritage," and "America's hunters and anglers represent the great spirit of our country"); Presidential Proclamation No. 4682, 44 Fed. Reg. 53149 (Pres. Carter 1979) (hunting promotes conservation and an appreciation of "healthy recreation, peaceful solitude and closeness to nature"); Presidential Proclamation No. 4318, 39 Fed. Reg. 35315 (Pres. Ford 1974) (hunting furthers "appreciation and respect for nature" and preservation of the environment). Thus, it is widely thought that hunting has "scientific" value in that it promotes conservation, "historical" value in that it provides a link to past times when hunting played a critical role in daily life, and "educational" value in that it furthers the understanding and appreciation of nature and our country's past and instills valuable character traits. And if hunting itself is widely thought to serve these values, then it takes but a small additional step to conclude that depictions of hunting make a nontrivial contribution to the exchange of ideas. Accordingly, I would hold that hunting depictions fall comfortably within the exception set out in § 48(b).

I do not have the slightest doubt that Congress, in enacting § 48, had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly. See H. R. Rep. No. 106–397, p. 8 (1999) (hereinafter H. R. Rep.) ("[D]epictions of ordinary hunting and fishing activities do not fall within the scope of the statute"); 145 Cong. Rec. 25894 (1999) (Rep. McCollum) ("[T]he sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill"); *id.*, at 25895 (Rep. Smith) ("[L]et us be clear as to what this legislation will not do. It will in no way prohibit hunting, fishing, or wildlife videos"). Indeed, even *opponents* acknowledged

that § 48 was not intended to reach ordinary hunting depictions. See *ibid.* (Rep. Scott); *id.*, at 25897 (Rep. Paul).

For these reasons, I am convinced that § 48 has no application to depictions of hunting. But even if § 48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho, see *ante*, at 476–477), those isolated applications would hardly show that § 48 bans a substantial amount of protected speech.

B

Although the Court's overbreadth analysis rests primarily on the proposition that § 48 substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows. See *ante*, at 477.

Such examples do not show that the statute is substantially overbroad, for two reasons. First, as explained above, § 48 can reasonably be construed to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, and anticruelty laws do not ban the sorts of acts depicted in the Court's hypotheticals. See, *e. g.*, Idaho Code § 25–3514 (Lexis 2000) ("No part of this chapter [prohibiting cruelty to animals] shall be construed as interfering with or allowing interference with . . . [t]he humane slaughter of any animal normally and commonly raised as food, or for production of fiber . . . [or] [n]ormal or accepted practices of . . . animal husbandry"); Kan. Stat. Ann. § 21–4310(b) (2007) ("The provisions of this section shall not apply . . . with respect to farm animals, normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals"); Md. Crim. Law Code Ann. § 10–603 (Lexis 2002) (sections prohibiting animal cruelty "do not apply to . . . customary and normal veterinary

and agricultural husbandry practices including dehorning, castration, tail docking, and limit feeding").

Second, nothing in the record suggests that anyone has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in § 48(b). Depictions created to show proper methods of slaughter or tail docking would presumably have serious "educational" value, and depictions created to focus attention on methods thought to be inhumane or otherwise objectionable would presumably have either serious "educational" or "journalistic" value or both. In short, the Court's examples of depictions involving the docking of tails and humane slaughter do not show that § 48 suffers from any overbreadth, much less substantial overbreadth.

The Court notes, finally, that cockfighting, which is illegal in all States, is still legal in Puerto Rico, *ante,* at 477, and I take the Court's point to be that it would be impermissible to ban the creation, sale, or possession in Puerto Rico of a depiction of a cockfight that was legally staged in Puerto Rico.[5] But assuming for the sake of argument that this is correct, this veritable sliver of unconstitutionality would not be enough to justify striking down § 48 *in toto.*

In sum, we have a duty to interpret § 48 so as to avoid serious constitutional concerns, and § 48 may reasonably be construed not to reach almost all, if not all, of the depictions that the Court finds constitutionally protected. Thus, § 48 does not appear to have a large number of unconstitutional

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[5] Since the Court has taken pains not to decide whether § 48 would be unconstitutional as applied to graphic dogfight videos, including those depicting fights occurring in countries where dogfighting is legal, I take it that the Court does not intend for its passing reference to cockfights to mean either that all depictions of cockfights, whether legal or illegal under local law, are protected by the First Amendment or that it is impermissible to ban the sale or possession in the States of a depiction of a legal cockfight in Puerto Rico.

applications. Invalidation for overbreadth is appropriate only if the challenged statute suffers from *substantial* overbreadth—judged not just in absolute terms, but in relation to the statute's "plainly legitimate sweep." *Williams*, 553 U. S., at 292. As I explain in the following Part, § 48 has a substantial core of constitutionally permissible applications.

IV

A

1

As the Court of Appeals recognized, "the primary conduct that Congress sought to address through its passage [of § 48] was the creation, sale, or possession of 'crush videos.'" 533 F. 3d 218, 222 (CA3 2008) (en banc). A sample crush video, which has been lodged with the Clerk, records the following event:

> "[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone." Brief for Humane Society of United States as *Amicus Curiae* 2 (hereinafter Humane Society Brief).

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. See 533 F. 3d, at 223, and n. 4 (citing statutes); H. R. Rep., at 3. But before the enactment of § 48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which "often appeal to persons with a very specific sexual fetish," *id.*, at 2, were made in secret, generally without a live audience, and "the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where

the cruelty was being inflicted or the date of the activity be ascertained from the depiction," *id.*, at 3. Thus, law enforcement authorities often were not able to identify the parties responsible for the torture. See Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 106th Cong., 1st Sess., 1 (1999) (hereinafter Hearing on Depictions of Animal Cruelty). In the rare instances in which it was possible to identify and find the perpetrators, they "often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations." H. R. Rep., at 3; see also 145 Cong. Rec. 25896 (Rep. Gallegly) ("[I]t is the prosecutors from around this country, Federal prosecutors as well as State prosecutors, that have made an appeal to us for this"); Hearing on Depictions of Animal Cruelty 21 ("If the production of the video is not discovered during the actual filming, then prosecution for the offense is virtually impossible without a cooperative eyewitness to the filming or an undercover police operation"); *id.*, at 34–35 (discussing example of case in which state prosecutor "had the defendant telling us he produced these videos," but where prosecution was not possible because the State could not prove where or when the tape was made).

In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that "[b]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas websites shut down in the wake of § 48. Now, after the Third Circuit's decision [facially invalidating the statute], crush videos are

already back online." Humane Society Brief 5 (citations omitted).

2

The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber*, 458 U. S. 747, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber*'s reasoning dictates a similar conclusion here.

In *Ferber*, an important factor—I would say the most important factor—was that child pornography involves the commission of a crime that inflicts severe personal injury to the "children who are made to engage in sexual conduct for commercial purposes." *Id.*, at 753 (internal quotation marks omitted). The *Ferber* Court repeatedly described the production of child pornography as child "abuse," "molestation," or "exploitation." See, *e. g.*, *id.*, at 749 ("In recent years, the exploitive use of children in the production of pornography has become a serious national problem"); *id.*, at 758, n. 9 ("Sexual molestation by adults is often involved in the production of child sexual performances"). As later noted in *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 249 (2002), in *Ferber* "[t]he production of the work, not its content, was the target of the statute." See also 535 U. S., at

250 (*Ferber* involved "speech that itself is the record of sexual abuse").

Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. As the Court put it, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." 458 U. S., at 759. The Court added:

> "[T]here is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. . . . The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.*, at 759–760.

See also *id.*, at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials").

Third, the *Ferber* Court noted that the value of child pornography "is exceedingly modest, if not *de minimis*," and that any such value was "overwhelmingly outweigh[ed]" by "the evil to be restricted." *Id.*, at 762–763.

All three of these characteristics are shared by § 48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess

them with the intent to make a profit may be similarly culpable. (For example, in some cases, crush videos were commissioned by purchasers who specified the details of the acts that they wanted to see performed. See H. R. Rep., at 3; Hearing on Depictions of Animal Cruelty 27.) To the extent that § 48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by § 48—the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, unlike the child pornography statute in *Ferber* or its federal counterpart, 18 U. S. C. § 2252, § 48(b) provides an exception for depictions having any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

It must be acknowledged that § 48 differs from a child pornography law in an important respect: Preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. It was largely for this reason that the Court of Appeals concluded that *Ferber* did not support the constitutionality of § 48. 533 F. 3d, at 228 ("Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm"). But while protecting children is unquestionably *more* important than protecting animals, the

Government also has a compelling interest in preventing the torture depicted in crush videos.

The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country. In *Ferber*, the Court noted that "virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography,'" and the Court declined to "second-guess [that] legislative judgment."[6] 458 U. S., at 758. Here, likewise, the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals.

Section 48's ban on trafficking in crush videos also helps to enforce the criminal laws and to ensure that criminals do not profit from their crimes. See 145 Cong. Rec. 25897 (1999) (Rep. Gallegly) ("The state has an interest in enforcing its existing laws. Right now, the laws are not only being violated, but people are making huge profits from promoting the violations"); *id.*, at 10685 (1999) (same) (explaining that he introduced the House version of the bill because "criminals should not profit from [their] illegal acts"). We have already judged that taking the profit out of crime is a compelling interest. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 119 (1991).

In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress' effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

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[6] In other cases, we have regarded evidence of a national consensus as proof that a particular government interest is compelling. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 118 (1991) (State's compelling interest "in ensuring that victims of crime are compensated by those who harm them" evidenced by fact that "[e]very State has a body of tort law serving exactly this interest"); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 624–625 (1984) (citing state laws prohibiting discrimination in public accommodations as evidence of the compelling governmental interest in ensuring equal access).

B

Application of the *Ferber* framework also supports the constitutionality of § 48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia, Brief for United States 26–27, and n. 8 (citing statutes), and under federal law constitute a felony punishable by imprisonment for up to five years, 7 U. S. C. § 2156 *et seq.* (2006 ed. and Supp. II); 18 U. S. C. § 49 (2006 ed., Supp. II).

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a "low-profile, clandestine industry," and "the need to market the resulting products requires a visible apparatus of distribution." *Ferber*, 458 U. S., at 760. In such circumstances, Congress had reasonable grounds for concluding that it would be "difficult, if not impossible, to halt" the underlying exploitation of dogs by pursuing only those who stage the fights. *Id.*, at 759–760; see 533 F. 3d, at 246 (Cowen, J., dissenting) (citing evidence establishing "the existence of a lucrative market for depictions of animal cruelty," including videos of dogfights, "which in turn provides a powerful incentive to individuals to create [such] videos").

The commercial trade in videos of dogfights is "an integral part of the production of such materials," *Ferber*, *supra*, at 761. As the Humane Society explains, "[v]ideotapes memorializing dogfights are integral to the success of this criminal industry" for a variety of reasons. Humane Society Brief 5. For one thing, some dogfighting videos are made "solely for the purpose of selling the video (and not for a live audience)." *Id.*, at 9. In addition, those who stage dogfights profit not just from the sale of the videos themselves, but from the

gambling revenue they take in from the fights; the videos "encourage [such] gambling activity because they allow those reluctant to attend actual fights for fear of prosecution to still bet on the outcome." *Ibid.;* accord, Brief for Center on the Administration of Criminal Law as *Amicus Curiae* 12 ("Selling videos of dogfights effectively abets the underlying crimes by providing a market for dogfighting while allowing actual dogfights to remain underground"); *ibid.* ("These videos are part of a 'lucrative market' where videos are produced by a 'bare-boned, clandestine staff' in order to permit the actual location of dogfights and the perpetrators of these underlying criminal activities to go undetected" (citation omitted)). Moreover, "[v]ideo documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess—proof demanded by potential buyers and critical to the underground market." Humane Society Brief 9. Such recordings may also serve as "'training' videos for other fight organizers." *Ibid.* In short, because videos depicting live dogfights are essential to the success of the criminal dogfighting subculture, the commercial sale of such videos helps to fuel the market for, and thus to perpetuate the perpetration of, the criminal conduct depicted in them.

Third, depictions of dogfights that fall within § 48's reach have by definition no appreciable social value. As noted, § 48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess. As the Humane Society explains:

> "The abused dogs used in fights endure physical torture and emotional manipulation throughout their lives to

> predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with sticks, and electrocution. Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed. As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones. Losing dogs are routinely refused treatment, beaten further as 'punishment' for the loss, and executed by drowning, hanging, or incineration." *Id.*, at 5–6 (footnotes omitted).

For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes. As with crush videos, moreover, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities. See *Ferber*, *supra*, at 757–758; *Simon & Schuster*, 502 U. S., at 119.

In sum, § 48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are "substantial" in relation to its "plainly legitimate sweep." *Williams*, 553 U. S., at 292. Accordingly, I would reject respondent's claim that § 48 is facially unconstitutional under the overbreadth doctrine.

* * *

For these reasons, I respectfully dissent.

APPENDIX

As the following chart makes clear, virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else specifically exempt lawful hunting activities.

Alaska	Alaska Stat. § 11.61.140(c)(4) (2008) ("It is a defense to a prosecution under this section that the conduct of the defendant . . . was necessarily incidental to lawful fishing, hunting or trapping activities")
Arizona	Ariz. Rev. Stat. Ann. §§ 13–2910(C)(1), (3) (West Supp. 2009) ("This section does not prohibit or restrict . . . [t]he taking of wildlife or other activities permitted by or pursuant to title 17 . . . [or] [a]ctivities regulated by the Arizona game and fish department or the Arizona department of agriculture")
Arkansas	Ark. Code Ann. § 5–62–105(a) (Supp. 2009) ("This subchapter does not prohibit any of the following activities: . . . (9) Engaging in the taking of game or fish through hunting, trapping, or fishing, or engaging in any other activity authorized by Arkansas Constitution, Amendment 35, by § 15–41–101 et seq., or by any Arkansas State Game and Fish Commission regulation promulgated under either Arkansas Constitution, Amendment 35, or statute")
California	Cal. Penal Code Ann. § 599c (West 1999) ("No part of this title shall be construed as interfering with any of the laws of this state known as the 'game laws,' . . . or to interfere with the right to kill all animals used for food")
Colorado	Colo. Rev. Stat. Ann. § 18–9–201.5(2) (2009) ("In case of any conflict between this part 2 [prohibiting cruelty to animals] or section 35–43–126, [Colo. Rev. Stat.], and section 35–43–126, [Colo. Rev. Stat.], and the wildlife statutes of the state, said wildlife statutes shall control"), § 18–9–202(3) ("Nothing in this part 2 shall be construed to amend or in any manner change the authority of the wildlife commission, as established in title 33, [Colo. Rev. Stat.], or to prohibit any conduct therein authorized or permitted")

Connecticut	Conn. Gen. Stat. § 53–247(b) (2009) ("Any person who maliciously and intentionally maims, mutilates, tortures, wounds or kills an animal shall be fined not more than five thousand dollars or imprisoned not more than five years or both. The provisions of this subsection shall not apply to . . . any person . . . while lawfully engaged in the taking of wildlife")
Delaware	Del. Code Ann., Tit. 11, § 1325(f) (2007) ("This section shall not apply to the lawful hunting or trapping of animals as provided by law")
Florida	Fla. Stat. § 828.122(9)(b) (2007) ("This section shall not apply to . . . [a]ny person using animals to pursue or take wildlife or to participate in any hunting regulated or subject to being regulated by the rules and regulations of the Fish and Wildlife Conservation Commission")
Georgia	Ga. Code Ann. § 16–12–4(e) (2007) ("The provisions of this Code section shall not be construed as prohibiting conduct which is otherwise permitted under the laws of this state or of the United States, including, but not limited to . . . hunting, trapping, fishing, [or] wildlife management")
Hawaii	Haw. Rev. Stat. § 711–1108.5(1) (2008 Cum. Supp.) ("A person commits the offense of cruelty to animals in the first degree if the person intentionally or knowingly tortures, mutilates, or poisons or causes the torture, mutilation, or poisoning of any pet animal or equine animal resulting in serious bodily injury or death of the pet animal or equine animal")
Idaho	Idaho Code § 25–3515 (Lexis 2000) ("No part of this chapter shall be construed as interfering with, negating or preempting any of the laws or rules of the department of fish and game of this state . . . or to interfere with the right to kill, slaughter, bag or take all animals used for food")
Illinois	Ill. Comp. Stat., ch. 510, § 70/13 (West 2006) ("In case of any alleged conflict between this Act . . . and the 'Wildlife Code of Illinois' or 'An Act to define and require the use of humane methods in the handling, preparation for slaughter, and slaughter of livestock for meat or meat products to be offered for sale', . . . the provisions of those Acts shall prevail" (footnotes omitted)), § 70/3.03(b)(1) ("For the purposes of this Section,

	'animal torture' does not include any death, harm, or injury caused to any animal by . . . any hunting, fishing, trapping, or other activity allowed under the Wildlife Code, the Wildlife Habitat Management Areas Act, or the Fish and Aquatic Life Code" (footnotes omitted))
Indiana	Ind. Code § 35–46–3–5(a) (West 2004) (subject to certain exceptions not relevant here, "this chapter [prohibiting "Offenses Relating to Animals"] does not apply to . . . [f]ishing, hunting, trapping, or other conduct authorized under [Ind. Code §] 14–22")
Iowa	Iowa Code § 717B.2(5) (2009) ("This section [banning 'animal abuse'] shall not apply to . . . [a] person taking, hunting, trapping, or fishing for a wild animal as provided in chapter 481A"), § 717B.3A(2)(*e*) ("This section [banning 'animal torture'] shall not apply to . . . [a] person taking, hunting, trapping, or fishing for a wild animal as provided in chapter 481A")
Kansas	Kan. Stat. Ann. § 21–4310(b)(3) (2007) ("The provisions of this section shall not apply to . . . killing, attempting to kill, trapping, catching or taking of any animal in accordance with the provisions of chapter 32 [Wildlife, Parks and Recreation] or chapter 47 [Livestock and Domestic Animals] of the Kansas Statutes Annotated")
Kentucky	Ky. Rev. Stat. Ann. §§ 525.130(2)(a), (e) (Lexis 2008) ("Nothing in this section shall apply to the killing of animals . . . [p]ursuant to a license to hunt, fish, or trap . . . [or] [f]or purposes relating to sporting activities"), § 525.130(3) ("Activities of animals engaged in hunting, field trials, dog training other than training a dog to fight for pleasure or profit, and other activities authorized either by a hunting license or by the Department of Fish and Wildlife shall not constitute a violation of this section")
Louisiana	La. Rev. Stat. Ann. § 14:102.1(C)(1) (West Supp. 2010) ("This Section shall not apply to . . . [t]he lawful hunting or trapping of wildlife as provided by law")
Maine	Me. Rev. Stat. Ann., Tit. 17, § 1031(1)(G) (West Supp. 2009) (providing that hunting and trapping an animal is not a form of prohibited animal cruelty if "permitted pursuant to" parts of state code regulating the shooting of large game, inland fisheries, and wildlife)
Maryland	Md. Crim. Law Code Ann. § 10–603(3) (Lexis 2002) ("Sections 10–601 through 10–608 of this subtitle do

	not apply to . . . an activity that may cause unavoidable physical pain to an animal, including . . . hunting, if the person performing the activity uses the most humane method reasonably available")
Michigan	Mich. Comp. Laws Ann. §§ 750.50(11)(a), (b) (West Supp. 2009) ("This section does not prohibit the lawful killing or other use of an animal, including . . . [f]ishing . . . [h]unting, [or] trapping [as regulated by state law]"), §§ 750.50b(9)(a), (b) ("This section does not prohibit the lawful killing of an animal pursuant to . . . [f]ishing . . . [h]unting, [or] trapping [as regulated by state law]")
Missouri	Mo. Rev. Stat. § 578.007(3) (2000) ("The provisions of sections 578.005 to 578.023 shall not apply to . . . [h]unting, fishing, or trapping as allowed by" state law)
Montana	Mont. Code Ann. § 45–8–211(4)(d) (2009) ("This section does not prohibit . . . lawful fishing, hunting, and trapping activities")
Nebraska	Neb. Rev. Stat. § 28–1013(4) (2008) (exempting "[c]ommonly accepted practices of hunting, fishing, or trapping")
Nevada	Nev. Rev. Stat. §§ 574.200(1), (3) (2007) (provisions of Nevada law banning animal cruelty "do not . . . [i]nterfere with any of the fish and game laws . . . [or] the right to kill all animals and fowl used for food")
New Hampshire	N. H. Rev. Stat. Ann. § 644:8(II) (West Supp. 2009) ("In this section, 'animal' means a domestic animal, a household pet or a wild animal in captivity")
New Jersey	N. J. Stat. Ann. § 4:22–16(c) (West 1998) ("Nothing contained in this article shall be construed to prohibit or interfere with . . . [t]he shooting or taking of game or game fish in such manner and at such times as is allowed or provided by the laws of this State")
New Mexico	N. M. Stat. Ann. § 30–18–1(I)(1) (Supp. 2009) ("The provisions of this section do not apply to . . . fishing, hunting, falconry, taking and trapping")
New York	N. Y. Agric. & Mkts. Law Ann. § 353–a(2) (West 2004) ("Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing")
North Carolina	N. C. Gen. Stat. Ann. § 14–360(c)(1) (Lexis 2009) ("[T]his section shall not apply to . . . [t]he lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission . . . ")

Appendix to opinion of ALITO, J.

North Dakota	N. D. Cent. Code Ann. § 36–21.1–01(5)(a) (Lexis Supp. 2009) ("'Cruelty' or 'torture' . . . does not include . . . [a]ny activity that requires a license or permit under chapter 20.1–03 [which governs gaming and other licenses]")
Oregon	Ore. Rev. Stat. § 167.335 (2007) ("Unless gross negligence can be shown, the provisions of [certain statutes prohibiting animal cruelty] do not apply to . . . (7) [l]awful fishing, hunting and trapping activities")
Pennsylvania	18 Pa. Cons. Stat. § 5511(a)(3)(ii) (2008) ("This subsection [banning killing, maiming, or poisoning of domestic animals or zoo animals] shall not apply to . . . the killing of any animal or fowl pursuant to . . . The Game Law"), § 5511(c)(1) ("A person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses any animal, or neglects any animal as to which he has a duty of care")
Rhode Island	R. I. Gen. Laws § 4–1–3(a) (Lexis 1998) (prohibiting "[e]very owner, possessor, or person having the charge or custody of any animal" from engaging in certain acts of unnecessary cruelty), §§ 4–1–5(a), (b) (prohibiting only "[m]alicious" injury to or killing of animals and further providing that "[t]his section shall not apply to licensed hunters during hunting season or a licensed business killing animals for human consumption")
South Carolina	S. C. Code Ann. § 47–1–40(C) (Supp. 2009) ("This section does not apply to . . . activity authorized by Title 50 [consisting of laws on Fish, Game, and Watercraft]")
South Dakota	S. D. Codified Laws § 40–1–17 (2004) ("The acts and conduct of persons who are lawfully engaged in any of the activities authorized by Title 41 [Game, Fish, Parks and Forestry] . . . and persons who properly kill any animal used for food and sport hunting, trapping, and fishing as authorized by the South Dakota Department of Game, Fish and Parks, are exempt from the provisions of this chapter")
Tennessee	Tenn. Code Ann. § 39–14–201(1) (2010 Supp.) ("'Animal' means a domesticated living creature or a wild creature previously captured"), § 39–14–201(4) ("[N]othing in this part shall be construed as prohibiting the shooting of birds or game for the purpose of human food or the use of animate targets by incorporated gun clubs")
Texas	Tex. Penal Code Ann. § 42.092(a)(2) (West Supp. 2009) ("'Animal' means a domesticated living creature, in-

	cluding any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal"), § 42.092(f)(1)(A) ("It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful . . . form of conduct occurring solely for the purpose of or in support of . . . fishing, hunting, or trapping")
Utah	Utah Code Ann. § 76–9–301(1)(b)(ii)(D) (Lexis 2008) ("'Animal' does not include . . . wildlife, as defined in Section 23–13–2, including protected and unprotected wildlife, if the conduct toward the wildlife is in accordance with lawful hunting, fishing, or trapping practices or other lawful practices"), § 76–9–301(9)(C) ("This section does not affect or prohibit . . . the lawful hunting of, fishing for, or trapping of, wildlife")
Vermont	Vt. Stat. Ann., Tit. 13, § 351b(1) (2009) ("This subchapter shall not apply to . . . activities regulated by the department of fish and wildlife pursuant to Part 4 of Title 10")
Virginia	Va. Code Ann. § 3.2–6570(D) (Lexis 2008) ("This section shall not prohibit authorized wildlife management activities or hunting, fishing or trapping [as regulated by state law]")
Washington	Wash. Rev. Code § 16.52.180 (2008) ("No part of this chapter shall be deemed to interfere with any of the laws of this state known as the 'game laws' . . . or to interfere with the right to kill animals to be used for food")
West Virginia	W. Va. Code Ann. § 61–8–19(f) (Lexis Supp. 2009) ("The provisions of this section do not apply to lawful acts of hunting, fishing, [or] trapping")
Wisconsin	Wis. Stat. § 951.015(1) (2007–2008) ("This chapter may not be interpreted as controverting any law regulating wild animals that are subject to regulation under ch. 169 [regulating, among other things, hunting], [or] the taking of wild animals")
Wyoming	Wyo. Stat. Ann. § 6–3–203(m)(iv) (2009) ("Nothing in subsection (a), (b) or (n) of this section shall be construed to prohibit . . . [t]he hunting, capture or destruction of any predatory animal or other wildlife in any manner not otherwise prohibited by law")

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CONKRIGHT ET AL. *v.* FROMMERT ET AL.

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

No. 08–810. Argued January 20, 2010—Decided April 21, 2010

Petitioners are Xerox Corporation's pension plan (Plan) and the Plan's current and former administrators (Plan Administrator). Respondents are employees who left Xerox in the 1980's, received lump-sum distributions of retirement benefits earned up to that point, and were later rehired. To account for the past distributions when calculating respondents' current benefits, the Plan Administrator initially interpreted the Plan to call for an approach that has come to be known as the "phantom account" method. Respondents challenged that method in an action under the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted summary judgment for the Plan, but the Second Circuit vacated and remanded. It held that the Plan Administrator's interpretation was unreasonable and that respondents had not received adequate notice that the phantom account method would be used to calculate their benefits. On remand, the Plan Administrator proposed a new interpretation of the Plan that accounted for the time value of the money respondents had previously received. The District Court declined to apply a deferential standard to this interpretation, and adopted instead an approach proposed by respondents that did not account for the time value of money. Affirming in relevant part, the Second Circuit held that the District Court was correct not to apply a deferential standard on remand, and that the District Court's decision on the merits was not an abuse of discretion.

Held: The District Court should have applied a deferential standard of review to the Plan Administrator's interpretation of the Plan on remand. Pp. 512–522.

(a) This Court addressed the standard for reviewing the decisions of ERISA plan administrators in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101. *Firestone* looked to "principles of trust law" for guidance. *Id.*, at 111. Under trust law, the appropriate standard depends on the language of the instrument creating the trust. When a trust instrument gives the trustee "power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable." *Ibid.* Under *Firestone* and the Plan's terms, the Plan Administrator here would normally be entitled to deference when interpreting the Plan. The Court of Appeals, however, crafted an exception to *Fire-*

stone deference, holding that a court need not apply a deferential standard when a plan administrator's previous construction of the same plan terms was found to violate ERISA. Pp. 512–513.

(b) The Second Circuit's "one-strike-and-you're-out" approach has no basis in *Firestone*, which set out a broad standard of deference with no suggestion that it was susceptible to ad hoc exceptions. This Court held in *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U. S. 105, 115, that a plan administrator operating under a systemic conflict of interest is nonetheless still entitled to deferential review. In light of that ruling, it is difficult to see why a single honest mistake should require a different result. Nor is the Second Circuit's decision supported by the considerations on which *Firestone* and *Glenn* were based—the plan's terms, trust law principles, and ERISA's purposes. The Plan grants the Plan Administrator general interpretive authority without suggesting that the authority is limited to first efforts to construe the Plan. An exception to *Firestone* deference is also not required by trust law principles, which serve as a guide under ERISA but do not "tell the entire story." *Varity Corp.* v. *Howe*, 516 U. S. 489, 497. Trust law does not resolve the specific question whether courts may strip a plan administrator of *Firestone* deference after one good-faith mistake, but the guiding principles underlying ERISA do.

ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 215. *Firestone* deference preserves this "careful balancing" and protects the statute's interests in efficiency, predictability, and uniformity. Respondents claim that deference is less important once a plan administrator's interpretation has been found unreasonable, but the interests in efficiency, predictability, and uniformity do not suddenly disappear simply because of a single honest mistake, as illustrated by this case. When the District Court declined to apply a deferential standard of review on remand, the court made the case more complicated than necessary. Respondents' approach threatens to interject additional issues into ERISA litigation that "would create further complexity, adding time and expense to a process that may already be too costly for many [seeking] redress." *Glenn*, *supra*, at 116–117. This case also demonstrates the harm to predictability and uniformity that would result from stripping a plan administrator of *Firestone* deference. The District Court's interpretation does not account for the time value of money, but respondents' own actuarial expert testified that fairness required recognizing that principle. Respondents do not dispute that the District Court's approach would place them in a better position than employees who never left the company. If other courts construed the

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Plan to account for the time value of money, moreover, Xerox could be placed in an impossible situation in which the Plan is subject to different interpretations and obligations in different States. Pp. 513–521.

(c) Respondents claim that plan administrators will adopt unreasonable interpretations of their plans seriatim, receiving deference each time, thereby undermining the prompt resolution of benefit disputes, driving up litigation costs, and discouraging employees from challenging administrators' decisions. These concerns are overblown because there is no reason to think that deference would be required in the extreme circumstances that respondents foresee. Multiple erroneous interpretations of the same plan provision, even if issued in good faith, could support a finding that a plan administrator is too incompetent to exercise his discretion fairly, cutting short the rounds of costly litigation that respondents fear. Applying a deferential standard of review also does not mean that the plan administrator will always prevail on the merits. It means only that the plan administrator's interpretation "will not be disturbed if reasonable." *Firestone, supra*, at 111. The lower courts should have applied the standard established in *Firestone* and *Glenn*. Pp. 521–522.

535 F. 3d 111, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 522. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Robert A. Long, Jr., argued the cause for petitioners. With him on the briefs were *Robert D. Wick*, *Jonathan L. Marcus*, *Christian J. Pistilli*, *Michael D. Ryan*, and *Margaret A. Clemens*.

Peter K. Stris argued the cause for respondents. With him on the brief were *Brendan S. Maher*, *Shaun P. Martin*, and *John A. Strain*.

Matthew D. Roberts argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Kneedler*, *Deborah Greenfield*, *Elizabeth Hopkins*, and *Edward D. Sieger*.*

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*Briefs of *amici curiae* urging reversal were filed for the Business Roundtable et al. by *Jeffrey A. Lamken*, *Michael G. Pattillo, Jr.*, *Quentin*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is "an enormously complex and detailed statute," *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 262 (1993), and the plans that administrators must construe can be lengthy and complicated. (The one at issue here runs to 81 pages, with 139 sections.) We held in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101 (1989), that an ERISA plan administrator with discretionary authority to interpret a plan is entitled to deference in exercising that discretion. The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan. We hold that it does not.

I

As in many ERISA matters, the facts of this case are exceedingly complicated. Fortunately, most of the factual details are unnecessary to the legal issues before us, so we cover them only in broad strokes. This case concerns Xerox Corporation's pension plan, which is covered by ERISA, 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* Petitioners are the plan itself (hereinafter Plan), and the Plan's current

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Riegel, *Robin S. Conrad*, and *Shane B. Kawka;* and for the ERISA Industry Committee et al. by *Christopher Landau*, *Howard Shapiro*, and *Amy Covert.*

Briefs of *amici curiae* urging affirmance were filed for AARP by *Mary Ellen Signorille* and *Melvin R. Radowitz;* for Law Professors by *Paul M. Secunda* and *Donald T. Bogan*, both *pro se;* for the National Employment Lawyers Association by *Jeffrey Greg Lewis*, *Teresa S. Renaker*, *Lynn L. Sarko*, and *Karin Bornstein Swope;* for Janice C. Amara et al. by *Stephen R. Bruce;* and for Richard C. Capone by *Rishi Bhandari.*

Sri Srinivasan and *Irving L. Gornstein* filed a brief for Chief Actuaries as *amici curiae.*

and former administrators (hereinafter Plan Administrator). See § 1002(16)(A)(i); App. 32a. Respondents are Xerox employees who left the company in the 1980's, received lump-sum distributions of retirement benefits they had earned up to that point, and were later rehired. See 328 F. Supp. 2d 420, 424 (WDNY 2004); Brief for Respondents 9–10. The dispute giving rise to this case concerns how to account for respondents' past distributions when calculating their current benefits—that is, how to avoid paying respondents the same benefits twice.

The Plan Administrator initially interpreted the Plan to call for an approach that has come to be known as the "phantom account" method. 328 F. Supp. 2d, at 424. Essentially, that method calculated the hypothetical growth that respondents' past distributions would have experienced if the money had remained in Xerox's investment funds, and reduced respondents' present benefits accordingly. See *id.*, at 426–428; App. to Pet. for Cert. 146a. After the Plan Administrator denied respondents' administrative challenges to that method, respondents filed suit in federal court under ERISA, 29 U. S. C. § 1132(a)(1)(B). See 328 F. Supp. 2d, at 428–429. The District Court granted summary judgment for the Plan, applying a deferential standard of review to the Plan Administrator's interpretation. See *id.*, at 430–431, 439. The Second Circuit vacated and remanded, holding that the Plan Administrator's interpretation was unreasonable and that respondents had not been adequately notified that the phantom account method would be used to calculate their benefits. See 433 F. 3d 254, 257, 265–269 (2006).

The phantom account method having been exorcised from the Plan, the District Court on remand considered other approaches for adjusting respondents' present benefits in light of their past distributions. See 472 F. Supp. 2d 452, 456–458 (WDNY 2007). The Plan Administrator submitted an affidavit proposing an approach that, like the phantom account method, accounted for the time value of the money that re-

spondents had previously received. But unlike the phantom account method, the Plan Administrator's new approach did not calculate the present value of a past distribution based on events that occurred after the distribution was made. Instead, the new approach used an interest rate that was fixed at the time of the distribution, thereby calculating the current value of the distribution based on information that was known at the time of the distribution. See App. to Pet. for Cert. 147a–153a. Petitioners argued that the District Court should apply a deferential standard of review to this approach, and accept it as a reasonable interpretation of the Plan. See Defendants' Pre-Hearing Brief Addressed to Remedies in No. 00–CV–6311 (WDNY), pp. 7–8; Defendants' Pre-Hearing Reply Brief Addressing Remedies in No. 00–CV–6311 (WDNY), p. 2.

The District Court did not apply a deferential standard of review. Nor did it accept the Plan Administrator's interpretation. Instead, after finding the Plan to be ambiguous, the District Court adopted an approach proposed by respondents that did not account for the time value of money. Under that approach, respondents' present benefits were reduced only by the nominal amount of their past distributions—thereby treating a dollar distributed to respondents in the 1980's as equal in value to a dollar distributed today. See 472 F. Supp. 2d, at 457–458. The Second Circuit affirmed in relevant part, holding that the District Court was correct not to apply a deferential standard on remand, and that the District Court's decision on the merits was not an abuse of discretion. See 535 F. 3d 111, 119 (2008).

Petitioners asked us to grant certiorari on two questions: (1) whether the District Court owed deference to the Plan Administrator's interpretation of the Plan on remand, and (2) whether the Court of Appeals properly granted deference to the District Court on the merits. Pet. for Cert. i. We granted certiorari on both, 557 U. S. 933 (2009), but find it necessary to decide only the first.

II

A

This Court addressed the standard for reviewing the decisions of ERISA plan administrators in *Firestone*, 489 U. S. 101. Because ERISA's text does not directly resolve the matter, we looked to "principles of trust law" for guidance. *Id.*, at 109, 111. We recognized that, under trust law, the proper standard of review of a trustee's decision depends on the language of the instrument creating the trust. See *id.*, at 111–112. If the trust documents give the trustee "power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable." *Id.*, at 111. Based on these considerations, we held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.*, at 115.

We expanded *Firestone*'s approach in *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U. S. 105 (2008). In determining the proper standard of review when a plan administrator operates under a conflict of interest, we again looked to trust law, the terms of the plan at issue, and the principles of ERISA—plus, of course, our precedent in *Firestone*. See 554 U. S., at 110–116. We held that, when the terms of a plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict. See *id.*, at 115–116.

It is undisputed that, under *Firestone* and the terms of the Plan, the Plan Administrator here would normally be entitled to deference when interpreting the Plan. See 328 F. Supp. 2d, at 430–431 (observing that the Plan grants the Plan Administrator "broad discretion in making decisions relative to the Plan"). The Court of Appeals, however, crafted an exception to *Firestone* deference. Specifically,

the Second Circuit held that a court need not apply a deferential standard "where the administrator ha[s] previously construed the same [plan] terms and we found such a construction to have violated ERISA." 535 F. 3d, at 119. Under that view, the District Court here was entitled to reject a reasonable interpretation of the Plan offered by the Plan Administrator, solely because the Court of Appeals had overturned a previous interpretation by the Administrator. Cf. *ibid.* (accepting the District Court's chosen method as one of "several reasonable alternatives").

B

We reject this "one-strike-and-you're-out" approach. Brief for Petitioners 51. As an initial matter, it has no basis in the Court's holding in *Firestone*, which set out a broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions like the one adopted by the Court of Appeals. See 489 U. S., at 111, 115. Indeed, we refused to create such an exception to *Firestone* deference in *Glenn*, recognizing that ERISA law was already complicated enough without adding "special procedural or evidentiary rules" to the mix. 554 U. S., at 116. If, as we held in *Glenn*, a systemic conflict of interest does not strip a plan administrator of deference, see *id.*, at 115, it is difficult to see why a single honest mistake would require a different result.

Nor is the Court of Appeals' decision supported by the considerations on which our holdings in *Firestone* and *Glenn* were based—namely, the terms of the plan, principles of trust law, and the purposes of ERISA. See *supra*, at 512. First, the Plan here grants the Plan Administrator general authority to "[c]onstrue the Plan." App. to Pet. for Cert. 141a–142a. Nothing in that provision suggests that the grant of authority is limited to first efforts to construe the Plan.

Second, the Court of Appeals' exception to *Firestone* deference is not required by principles of trust law. Trust law is unclear on the narrow question before us. A leading treatise states that a court will strip a trustee of his discretion when there is reason to believe that he will not exercise that discretion fairly—for example, upon a showing that the trustee has already acted in bad faith:

> "If the trustee's failure to pay a reasonable amount [to the beneficiary of the trust] is due to a failure to exercise [the trustee's] discretion honestly and fairly, the court may well fix the amount [to be paid] itself. On the other hand, if the trustee's failure to provide reasonably for the beneficiary is due to a mistake as to the trustee's duties or powers, and there is no reason to believe the trustee will not fairly exercise the discretion once the court has determined the extent of the trustee's duties and powers, the court ordinarily will not fix the amount but will instead direct the trustee to make reasonable provision for the beneficiary's support." 3 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts § 18.2.1, pp. 1348–1349 (5th ed. 2007) (hereinafter Scott and Ascher) (citing cases; footnote omitted).

This is not surprising—if the settlor who creates a trust grants discretion to the trustee, it seems doubtful that the settlor would want the trustee divested entirely of that discretion simply because of one good-faith mistake.[1]

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[1] The dissent is wrong to suggest a lack of case support for this interpretation of trust law. *Post,* at 531–534 (opinion of BREYER, J.). See, *e. g.*, *Hanford* v. *Clancy,* 87 N. H. 458, 461, 183 A. 271, 272–273 (1936) ("Affirmative orders of disposition, such as the court made in this case, may *only* be sustained if, under the circumstances, there is but one reasonable disposition possible. If more than one reasonable disposition could be made, then the trustee *must* make the choice" (emphasis added)); *In re Will of Sullivan,* 144 Neb. 36, 40–41, 12 N. W. 2d 148, 150–151 (1943) (although trustees erred in not providing any support to plaintiff, "the court was *without authority* to determine the amount of support to which plaintiff

Here the lower courts made no finding that the Plan Administrator had acted in bad faith or would not fairly exercise his discretion to interpret the terms of the Plan. Thus, if the District Court had followed the trust law principles set out in Scott and Ascher, it should not have "act[ed] as a substitute trustee," *Eaton* v. *Eaton*, 82 N. H. 216, 218, 132 A. 10, 11 (1926), and stripped the Plan Administrator of the deference he would otherwise enjoy under *Firestone* and the terms of the Plan.

Other trust law sources, however, point the other way. For example, the Restatement (Second) of Trusts states that "the court will control the trustee in the exercise of a power where he acts beyond the bounds of a reasonable judgment." 1 Restatement (Second) of Trusts § 187, Comment *i*, p. 406 (1957). Another treatise states that, after a trustee has abused his discretion, "[s]ometimes the court decides for the trustee how he should act, either by stating the exact result it desires to achieve, or by fixing some limits on the trustee's

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was entitled from the trust fund" because "the court has *no authority* to substitute its judgment for that of the trustees" (emphasis added)); *Eaton* v. *Eaton*, 82 N. H. 216, 218–219, 132 A. 10, 11 (1926) ("[The trustee's] failure to administer the fund properly did not entitle the court to act as a substitute trustee. . . . [W]ithin the limits of reasonableness the trustee *alone* may exercise discretion, since that is what the will requires" (emphasis added) (cited in 3 A. Scott & W. Fratcher, Law of Trusts § 187.1, pp. 30–31 (4th ed. 1988))); *In re Estate of Marré*, 18 Cal. 2d 184, 190, 114 P. 2d 586, 590–591 (1941) (lower court erred in setting amount of payments to beneficiary after ruling that trustees had mistakenly failed to make payment; "[i]t is well settled that the courts will not attempt to exercise discretion which has been confided to a trustee unless it is clear that the trustee has abused his discretion in some manner. . . . The amounts to be paid should therefore be determined in the discretion of the trustees" (cited in 3 Scott and Ascher 1349, n. 4 (5th ed. 2007))); *Finch* v. *Wachovia Bank & Trust Co.*, 156 N. C. App. 343, 348, 577 S. E. 2d 306, 310 (2003) (agreeing with lower court that trustee abused its discretion, but vacating the court's remedial order because it would "strip discretion from the trustee and replace it with the judgment of the court"). See also Brief for Petitioners 40–43.

action and giving him leeway within those limits." G. Bogert & G. Bogert, Law of Trusts and Trustees § 560, p. 223 (2d rev. ed. 1980).

The unclear state of trust law on the question was perhaps best captured by the Texas Supreme Court:

> "There is authority for ordering a dismissal of the case to afford the trustee an opportunity to exercise a reasonable discretion in arriving at the amount of payments to be made in the light of our discussion of the problem and after a proper consideration of the many factors involved. On the other hand, there is authority for remanding the case to the trial court to hear evidence and in the exercise of its supervisory jurisdiction to fix the amount of such payments. There is still other authority for remanding the case to the trial court to hear evidence and fix the boundaries of a reasonable discretion to be exercised by the trustee within maximum and minimum limits." *State* v. *Rubion*, 158 Tex. 43, 54–55, 308 S. W. 2d 4, 11 (1957) (citations omitted).

While we are "guided by principles of trust law" in ERISA cases, *Firestone*, 489 U. S., at 111, we have recognized before that "trust law does not tell the entire story," *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996); see *ibid.* ("In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements"); Brief for Respondents 50 (pressing same view as the dissent but concluding that the dispute over trust law "need not be resolved"). Here trust law does not resolve the specific issue before us, but the guiding principles we have identified underlying ERISA do.

Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place.

Lockheed Corp. v. *Spink*, 517 U. S. 882, 887 (1996). We have therefore recognized that ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 215 (2004) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 54 (1987)). Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity Corp.*, *supra*, at 497. ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355, 379 (2002).

Firestone deference protects these interests and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the "careful balancing" on which ERISA is based. Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 11 (1987). Indeed, a group of prominent actuaries tells us that it is impossible even to determine whether an ERISA plan is solvent (a duty imposed on actuaries by federal law,

see 29 U. S. C. §§ 1023(a)(4), (d)) if the plan is interpreted to mean different things in different places. See Brief for Chief Actuaries as *Amici Curiae* 5–11.

Respondents and the United States as *amicus curiae* do not question that deference to plan administrators serves these important purposes. Rather, they argue that deference is less important once a plan administrator has issued an interpretation of a plan found to be unreasonable. But the interests in efficiency, predictability, and uniformity—and the manner in which they are promoted by deference to reasonable plan construction by administrators—do not suddenly disappear simply because a plan administrator has made a single honest mistake.

This case illustrates the point. Consider first the interest in efficiency, an interest that Xerox has pursued by granting the Plan Administrator authority to construe the Plan. On remand from the Court of Appeals, if the District Court had applied a deferential standard of review under *Firestone*, the question before it would have been whether the Plan Administrator's interpretation of the Plan was reasonable. After answering that question, the case might well have been over. Instead, the District Court declined to defer, and therefore had to answer the more complicated question of how best to interpret the Plan.

The prospect of increased litigation costs inherent in respondents' approach does not end there. Under respondents' and the Government's view, the question whether a deferential standard of review was required in this case turns on whether the Plan Administrator was interpreting the "same terms" or deciding the "same issue" on remand. See Brief for Respondents 43, 46–48, 53, and n. 13; Brief for United States as *Amicus Curiae* 13–15, 23. Whether that condition is satisfied will not always be clear. Indeed, petitioners dispute that question here, arguing that the Plan Administrator confronted an entirely new issue on remand—how to interpret the Plan, knowing that specific provisions

requiring use of the phantom account method could not be applied to respondents due to a lack of notice. See Brief for Petitioners 50–51. Respondents would force the parties to litigate this potentially complicated "same issue" or "same terms" question before a district court could even decide whether deference is owed to a plan administrator's view. As we recognized in *Glenn*, there is little place in the ERISA context for these sorts of "special procedural rules [that] would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress." 554 U. S., at 116–117.

The position of respondents and the Government could interject other additional issues into ERISA litigation. For example, even under their view, the District Court here *could* have granted deference to the Plan Administrator; the court merely was not *required* to do so. See Brief for Respondents 43, 49–50, 52–53; Brief for United States as *Amicus Curiae* 23–24. That raises the question of how a court is to decide between the two options; respondents' answer is to weigh an indeterminate number of factors, which would only further complicate ERISA proceedings. See Tr. of Oral Arg. 34, 40–45.

This case also demonstrates the harm to the interest in predictability that would result from stripping a plan administrator of *Firestone* deference. After declining to apply a deferential standard here, the District Court adopted an interpretation of the Plan that does not account for the time value of money. 472 F. Supp. 2d, at 458; 535 F. 3d, at 119. In the actuarial world, this is heresy, and highly unforeseeable. Indeed, the actuaries tell us that they have never encountered an ERISA plan resembling this one that did not include some adjustment for the time value of money. Brief for Chief Actuaries as *Amici Curiae* 12.

Respondents' own actuarial expert testified before the District Court that fairness would require recognizing the time value of money in some fashion. See App. 127a, 130a.

And respondents and the Government do not dispute that the District Court's approach, which does not account for the fact that respondents were able to use their past distributions as they saw fit for over 20 years, would place respondents in a better position than employees who never left the company. Cf. Brief for Respondents 42–43; Brief for United States as *Amicus Curiae* 32–33. Deference to plan administrators, who have a duty to all beneficiaries to preserve limited plan assets, see *Varity Corp.*, 516 U. S., at 514, helps prevent such windfalls for particular employees.

Finally, this case demonstrates the uniformity problems that arise from creating ad hoc exceptions to *Firestone* deference. If other courts were to adopt an interpretation of the Plan that does account for the time value of money, Xerox could be placed in an impossible situation. Similar Xerox employees could be entitled to different benefits depending on where they live, or perhaps where they bring a legal action. Cf. 29 U. S. C. § 1132(e)(2) (permitting suit "where the plan is administered, where the breach took place, or where a defendant resides or may be found"). In fact, that may already be the case. In similar litigation over the Plan, the Ninth Circuit also rejected the use of the phantom account method, but held that the Plan Administrator should utilize actuarial principles in accounting for rehired employees' past distributions—which would presumably include taking some cognizance of the time value of money. See *Miller* v. *Xerox Corp. Retirement Income Guarantee Plan*, 464 F. 3d 871, 875–876 (2006); Brief for ERISA Industry Committee et al. as *Amici Curiae* 8–9. Thus, failing to defer to the Plan Administrator here could well cause the Plan to be subject to different interpretations in California and New York. "Uniformity is impossible, however, if plans are subject to different legal obligations in different States." *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 148 (2001). *Firestone* deference serves to avoid that result and to preserve the

"careful balancing" of interests that ERISA represents. *Pilot Life Ins. Co.*, 481 U. S., at 54.

C

In spite of all this, respondents and the Government argue that requiring the District Court to apply *Firestone* deference in this case would actually disserve the purposes of ERISA. They argue that continued deference would encourage plan administrators to adopt unreasonable interpretations of plans in the first instance, as administrators would anticipate a second chance to interpret their plans if their first interpretations were rejected. And they argue that plan administrators would be able to proceed seriatim through several interpretations of their plans, each time receiving deference, thereby undermining the prompt resolution of disputes over benefits, driving up litigation costs, and discouraging employees from challenging the decisions of plan administrators at all.

All this is overblown. There is no reason to think that deference would be required in the extreme circumstances that respondents foresee. Under trust law, a trustee may be stripped of deference when he does not exercise his discretion "honestly and fairly." 3 Scott and Ascher 1348. Multiple erroneous interpretations of the same plan provision, even if issued in good faith, might well support a finding that a plan administrator is too incompetent to exercise his discretion fairly, cutting short the rounds of costly litigation that respondents fear.

Applying a deferential standard of review does not mean that the plan administrator will prevail on the merits. It means only that the plan administrator's interpretation of the plan "will not be disturbed if reasonable." *Firestone*, 489 U. S., at 111; see also *ibid.* ("'Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion'"

(quoting 1 Restatement (Second) of Trusts § 187)). Thus, far from "impos[ing] [a] rigid and inflexible requirement" that courts must defer to plan administrators, *post*, at 529, we simply hold that the lower courts should have applied the standard established in *Firestone* and *Glenn*.

III

The Court of Appeals erred in holding that the District Court could refuse to defer to the Plan Administrator's interpretation of the Plan on remand, simply because the Court of Appeals had found a previous related interpretation by the Administrator to be invalid. Because we reverse on that ground, we do not reach the question whether the Court of Appeals also erred in applying a deferential standard of review to the decision of the District Court on the merits.[2]

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

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

I agree with the Court that "[p]eople make mistakes," *ante*, at 509, but I do not share its view of the law applicable to those mistakes. To explain my view, I shall describe the three significant mistakes involved in this case.

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[2] The Government raises an additional argument—that the District Court should not have deferred to the Plan Administrator's second interpretation of the Plan because that interpretation would have violated ERISA's notice requirements. See Brief for United States as *Amicus Curiae* 25–26. That is an argument about the merits, not the proper standard of review, and we leave it to be decided, if necessary, on remand.

I

A

The first mistake is that of Xerox Corporation's pension plan (Plan) and its administrators (collectively, Plan Administrator or Administrator), petitioners here. The Plan, as I understand it, pays employees the highest of three benefits upon retirement. App. 29a–31a. These benefits are calculated as follows (I simplify and use my own words, not those of the Plan):

(1) *"The Pension":* Take your average salary for your five highest salary years at Xerox; multiply by 1.4 percent; and multiply again by the number of years you worked at Xerox (up to 30). *Id.*, at 7a–11a, 29a–30a. Thus, if the average salary of your five highest paid years was $50,000 and you worked at Xerox for 30 years, you would be entitled to receive $21,000 per year ($50,000 × 1.4 percent × 30).

(2) *"The Cash Account":* Every year, Xerox credits 5 percent of your salary to a cash account. *Id.*, at 40a. This account accrues interest at a yearly fixed rate 1 percent above the 1-year Treasury bill rate. *Id.*, at 41a. To determine your benefits under this approach, take the balance of your cash account, and convert the final amount to an annuity. *Id.*, at 31a. Thus, if you have accrued, say, $200,000 in your account, and the relevant annuity rate at the time of your retirement is 7 percent, you would be entitled to receive approximately $14,000 per year upon your retirement (approximately $200,000 × 7 percent).

(3) *"The Investment Account":* Before 1990, Xerox contributed to an employee profit-sharing plan. *Id.*, at 33a–34a. Thus, all employees who were hired by the end of 1989 have an investment account that consists of all of the contributions Xerox made to this profit-sharing plan (prior to its discontinuation) and the investment

> returns on those contributions. *Id.*, at 33a–36a. To determine your benefits under this approach, take the balance of your investment account, and convert the final amount to an annuity. *Id.*, at 31a. Thus, just like the cash account, if you have accrued $400,000 in your account, and the relevant annuity rate at the time of your retirement is 7 percent, you would be entitled to receive approximately $28,000 per year upon your retirement (approximately $400,000 × 7 percent).

Given these three examples, the retiring employee's pension would come from the investment account, and the employee would receive $28,000 per year.

This case concerns one aspect of Xerox's retirement plan, namely, the way in which the Plan treats employees who leave Xerox and later return, working for additional years before their ultimate retirement. The Plan has long treated such leaving-and-returning employees as follows (again, I simplify and use my own words):

First, when an employee initially leaves, she is paid a lump-sum distribution equivalent to the benefits she has accrued up to that point (*i. e.*, the highest of her pension, her cash account, or, if she was hired before the end of 1989, her investment account). See *ante*, at 510.

Second, when the employee returns, she again begins to accrue amounts in her cash account, App. 40a–41a, starting from scratch. (She accrues nothing in her investment account, because Xerox no longer makes profit-sharing contributions. *Id.*, at 34a.) Thus, by the time of her retirement the employee may not have accrued much money in this account.

Third, a rehired employee's pension is calculated in the way I have set forth above, with her entire tenure at Xerox (both before her departure and after her return) taken into account. See Brief for Petitioners 9–10.

Fourth, the employee's benefits calculation is adjusted to take account of the fact that the employee has already re-

ceived a lump-sum distribution from the Plan. See App. 32a; Brief for Petitioners 10–11.

This case is about the adjustment that takes place during step four. It concerns the way in which the Plan Administrator calculates that adjustment so as to reflect the fact that a retiring leaving-and-returning employee has already received a distribution when she initially left Xerox. Before 1989, the Plan Administrator calculated the adjusted amount by taking the benefits distribution previously received (say, $100,000) and adjusting it to equal the amount that would have existed in the investment account had no distribution been made. *Ibid.* Thus, if an employee had not left Xerox, and if the $100,000 had been left in her investment account for, say, 20 years, that amount would likely have increased dramatically—perhaps doubling, tripling, or quadrupling in amount, depending upon how well the Plan's investments performed.

It is this *hypothetical* sum—termed the "phantom account," *ante*, at 510—that is at issue in this case. Xerox's pre-1989 Plan assumed that a rehired employee had this hypothetical sum on hand at the time of her final retirement from the company, and in effect subtracted the amount from the employee's benefits upon her departure. Brief for Petitioners 10–11; cf. *ante*, at 510. Depending on how the Plan's investments did over time, the Administrator's use of this "phantom account" could have a substantial impact on a rehired employee's benefits. (See Appendix, *infra*, for an example of how this "phantom account" works.)

When the Plan Administrator amended Xerox's Employee Retirement Income Security Act of 1974 (ERISA) Plan in 1989, however, it made what it tells us was an "inadverten[t]" omission. Brief for Petitioners 11, n. 3. In a section of the 1989 Plan applicable to the roughly 100 leaving-and-returning employees who are plaintiffs here, the Plan said that it would "offset" the retiring employees' "accrued benefit" (as ordinarily calculated) "by the accrued benefit attrib-

utable" to the prior lump-sum "distribution" those employees received when they initially left Xerox. App. 32a. *But the Plan said nothing about how it would calculate this "offset."* In other words, the Plan said nothing about the Administrator's use of the "phantom account."

This led to the first mistake in this case. Despite the Plan's failure to include language explaining how the Administrator would take into account an employee's prior distribution, the Plan Administrator continued to employ the "phantom account" methodology. In essence, the Administrator read the 1989 Plan to include the language that had been omitted—an interpretation that, as described below, see Part I–B, *infra,* the Court of Appeals found to be arbitrary and capricious and in violation of ERISA.

B

The District Court committed the second mistake in this case. In 1999, respondents, nearly 100 employees who left and were later rehired by Xerox, brought this lawsuit. *Ante,* at 510; Brief for Petitioners ii–iii, 12. They pointed out that the 1989 Plan said that it would decrease their retirement benefits to reflect the fact that they had already received a lump-sum benefits distribution when they initially left Xerox. But, they added, neither the 1989 Plan, nor the 1989 Plan's Summary Plan Description, said anything about whether (or how) the Administrator would adjust their previous benefits distribution to take into account that they had received the distribution well before their retirement. They thus claimed that the Plan Administrator could not use the "phantom account" methodology to adjust their previous distributions. See Brief for United States as *Amicus Curiae* 4–5.

The District Court, however, rejected respondents' claims. 328 F. Supp. 2d 420 (WDNY 2004). The court accepted the Administrator's argument that the 1989 Plan implicitly incorporated the "phantom account" approach that had previously

been part of Xerox's retirement plan. *Id.*, at 433–434. And the court thus held in favor of petitioners—thereby committing the second mistake in this case. *Id.*, at 439.

On appeal, the Second Circuit disagreed with the District Court and vacated the District Court's decision in relevant part. 433 F. 3d 254 (2006). The Court of Appeals concluded that, because the 1989 Plan said nothing about how the Administrator would adjust the previous benefits distributions, it was "arbitrary and capricious" for the Administrator to interpret the 1989 Plan as if it still incorporated the "phantom account." *Id.*, at 265–266, and n. 11. And the Court of Appeals thus held that the language of the Plan and the Summary Plan Description, at the least, violated ERISA by failing to provide respondents with fair notice that the Administrator was going to use the "phantom account" approach. See *id.*, at 265 (discussing 29 U. S. C. § 1022); see also 433 F. 3d, at 263, 267–268 (holding that the Administrator's attempt to apply the "phantom account" to respondents violated two other ERISA provisions: 29 U. S. C. § 1054(h)'s notice requirement and § 1054(g)'s prohibition on retroactive benefit cutbacks). Rather, the court noted, respondents "likely believed"—based on the language of the Plan—"that their past distributions would only be factored into their [current] benefits calculations by taking into account the amounts they had actually received." 433 F. 3d, at 267.

In light of these conclusions, the Court of Appeals recognized the need to devise a remedy for the Administrator's abuse of discretion and ERISA violations—a remedy that took into account the previous benefits distributions respondents had received in a manner consistent with the 1989 Plan. The court therefore remanded the case to the District Court, with the following instructions:

> "On remand, the remedy crafted by the district court for those employees [in the respondents' situation] should utilize an appropriate [pre-1989 Plan] calculation to determine their benefits. We recognize the difficulty

> that this task poses . . . . As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Id.*, at 268.

On remand, the District Court invited the parties to submit remedial recommendations. Brief for Petitioners 14. The Plan Administrator proposed an approach that would adjust respondents' previous benefits distributions by adding interest, and, as a fallback, the Administrator suggested that the Plan should treat respondents as new hires. *Ante*, at 510–511; Brief for United States as *Amicus Curiae* 6–7. The District Court rejected these suggestions and concluded that the "appropriate" remedy was the one suggested by the Second Circuit: no adjustment to the prior distributions received by respondents. 472 F. Supp. 2d 452, 458 (WDNY 2007). The court stated that this remedy was "straightforward; it adequately prevent[ed] employees from receiving a windfall[;] and . . . it most clearly reflect[ed] what a reasonable employee would have anticipated based on the not-very-clear language in the Plan." *Ibid.* And the Court of Appeals, finding that the District Court did not abuse its discretion in crafting a remedy, affirmed. 535 F. 3d 111 (CA2 2008).

II

The third mistake, I believe, is the Court's. As the majority recognizes, *ante*, at 512, "principles of trust law" guide this Court in "determining the appropriate standard" by which to review the actions of an ERISA plan administrator. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 111–113 (1989); see also *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U. S. 105, 111 (2008); *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 218–219 (2004); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985). And, as the majority also recognizes, *ante*, at 512, where an ERISA plan grants an administrator the discretionary authority to interpret plan terms, trust law *requires*

a court to defer to the plan administrator's interpretation of plan terms. See, *e. g.*, *Glenn*, *supra*, at 111. But the majority further concludes that trust law "does not resolve the specific issue before" the Court in this case—*i. e.*, whether a court is *required* to defer to an administrator's *second attempt* at interpreting plan documents, even after the court has already determined that the administrator's first attempt amounted to an abuse of discretion. *Ante*, at 516. In my view, this final conclusion is erroneous, as trust law imposes no such rigid and inflexible requirement.

The Second Circuit found the Administrator's interpretation of the Plan to be arbitrary and capricious and in violation of ERISA, and it made clear that the District Court's task on remand was to "craf[t]" a "remedy." See 433 F. 3d, at 268. Trust law treatise writers say that in these circumstances a court *may* (but need not) exercise its own discretion rather than defer to a trustee's interpretation of trust language. See G. Bogert & G. Bogert, Law of Trusts and Trustees § 560, pp. 222–223 (2d rev. ed. 1980) (hereinafter Bogert & Bogert) (after finding an abuse of discretion, a court may "decid[e] for the trustee how he should act," possibly by "stating the exact result" the court "desires to achieve"); see also 2 Restatement (Third) of Trusts § 50, p. 258 (2001) (hereinafter Third Restatement) ("A discretionary power conferred upon the trustee . . . is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee"); 1 Restatement (Second) of Trusts § 187, p. 402 (1957) (hereinafter Second Restatement) ("Where discretion is conferred upon the trustee . . . , its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion"); see also *Firestone*, *supra*, at 111. Judges deciding trust law cases have said the same. See, *e. g.*, *Colton* v. *Colton*, 127 U. S. 300, 322 (1888) (stating that it was the "duty of the court" to determine the trust payments due after rejecting the trustee's interpretation); *State* v. *Rubion*, 158 Tex. 43, 55, 308 S. W.

2d 4, 11 (1957) ("Considering that we have held that there has already been an abuse of discretion by the trustee . . . , we have concluded that a remand of the case to the trial court for the definite establishment of amounts to be paid will better promote a speedy administration of justice and a final termination of this litigation"); *Glenn*, *supra*, at 130 (SCALIA, J., dissenting) (court may exercise discretion under trust law when a "trustee had discretion but abused it"). In short, the controlling trust law principle appears to be that, "[w]here the court finds that there has been an abuse of a discretionary power, the decree to be rendered is in its discretion." Bogert & Bogert § 560, at 222.

Of course, the fact that trust law grants courts discretion does not mean that they will exercise that discretion in all instances. The majority refers to the 2007 edition of Scott on Trusts, *ante*, at 514, which says that, if there is "no reason" to doubt that a trustee "will . . . fairly exercise" his "discretion," then courts "*ordinarily* will not fix the amount" of a payment "but will instead direct the trustee to make reasonable provision for the beneficiary's support," 3 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts § 18.2.1, pp. 1348–1349 (5th ed. 2007) (hereinafter Scott) (emphasis added). As this passage demonstrates, there are situations in which a court will typically defer to a trustee's remedial suggestion. The word "ordinarily" confirms, however, that the Scott treatise writers recognize that there are instances in which courts will *not* defer. And other treatises indicate that black letter trust law gives the district courts authority to decide which instances are which. See Bogert & Bogert § 560, at 222–223 (when there is an abuse of discretion, a court "may set aside the transaction," "award damages to the beneficiary," or "order a new decision to be made in the light of rules expounded by the court"); 2 Third Restatement § 50, and Comment *b*, at 261 (discussing similar remedial options); 1 Second Restatement § 187, and Comment *b*, at 402 (same); see also 3 Third Restatement § 87, and

Comment *c*, at 244–245 (noting that "judicial intervention on the ground of abuse" is allowed when a "good faith," yet "unreasonable," decision is made by a trustee); *Rubion*, *supra*, at 54–55, 308 S. W. 2d, at 11 (discussing a court's remedial options).

Nevertheless, the majority reads the Scott treatise as establishing an absolute requirement that courts defer to a trustee's fallback position absent "reason to believe that [the trustee] will not exercise [his] discretion fairly—for example, upon a showing that the trustee has already acted in bad faith." *Ante*, at 514. And based on this reading, the majority further concludes that the existence of the Scott treatise creates uncertainty as to whether, under basic trust law principles, a court has the power to craft a remedy for a trustee's abuse of discretion. *Ante*, at 514–516.

It is unclear to me, however, why the majority reads the passage from Scott as creating a war among treatise writers, compare *ante*, at 514 (discussing Scott), with *ante*, at 515–516 (discussing Bogert), when the relevant passages can so easily be read as consistent with one another. I simply read the Scott treatise language as identifying circumstances in which courts typically *choose* to defer to an administrator's fallback position. The treatise does not suggest that the law prohibits a court from acting on its own in the exercise of its broad remedial authority—authority that trust law plainly grants to supervising courts. See *supra*, at 530.

A closer look at the Scott treatise confirms this understanding. The treatise cites seven cases in support of the passage upon which the majority relies. See 3 Scott § 18.2.1, at 1349, n. 4. Three of these cases explicitly state that a court *may* exercise its discretion to craft a remedy if a trustee has previously abused its discretion. See *Old Colony Trust Co.* v. *Rodd*, 356 Mass. 584, 589, 254 N. E. 2d 886, 889 (1970) ("A court of equity may control a trustee in the exercise of a fiduciary discretion if it fails to observe standards of judgment apparent from the applicable instrument");

In re Estate of Marré, 18 Cal. 2d 184, 190, 114 P. 2d 586, 590–591 (1941) ("It is well settled that the courts will not attempt to exercise discretion which has been confided to a trustee *unless* it is clear that the trustee has abused his discretion *in some manner*" (emphasis added)); *In re Estate of Ferrall*, 92 Cal. App. 2d 712, 716–717, 207 P. 2d 1077, 1079–1080 (1949) (following *In re Estate of Marré*). Three other cases are inapposite because their circumstances do not involve *any* allegation of abuse of discretion by the trustee. See *In re Trusts of Ziegler*, 157 So. 2d 549, 550 (Fla. App. 1963) *(per curiam)* ("There is no contention here that the court . . . would not retain its rights, upon appropriate petition or other pleadings by an interested party, to review an alleged abuse, if any, of the discretion exercised by the trustees"); *In re Estate of Grubel*, 37 Misc. 2d 910, 911, 235 N. Y. S. 2d 21, 23 (Surr. Ct. 1962) (stating that "in the *first* instance" it is the "proper function of the trustees" to set an amount to be paid (emphasis added)); *Orr* v. *Moses*, 94 N. H. 309, 312, 52 A. 2d 128, 130 (1947) (declining to construe will because none "of the parties now assert claims adverse to any position taken by the trustee"). In the final case, the court decided that, on the facts before it, it did not need to control the trustees' discretion. See *In re Estate of Stillman*, 107 Misc. 2d 102, 111, 433 N. Y. S. 2d 701, 708 (Surr. Ct. 1980) ("The fine record of the trustees in enhancing the equity of these trusts while earning substantial income, also persuades the court of the wisdom of retaining their services as fiduciaries"). Which of these cases says that, after the trustee has abused its discretion, a district court *must* still defer to the trustee? *None of them do.* I repeat: Not a single case cited by the Scott treatise writers supports the majority's reading of the treatise.

The majority seeks to justify its reading of the Scott treatise by referring to four cases that Scott does not cite. See *ante*, at 514–515, n. 1. I am not surprised that the treatise does not refer to these cases. In the first three, a court

thought it best, when a trustee had not yet exercised judgment about a particular matter, to direct the trustee to do so. See *In re Will of Sullivan*, 144 Neb. 36, 40–41, 12 N. W. 2d 148, 150–151 (1943) (finding that the trustees' "failure to act" was erroneous, and directing the trustees to exercise their discretion in setting a payment amount); *Eaton* v. *Eaton*, 82 N. H. 216, 218, 132 A. 10, 11 (1926) (same); *Finch* v. *Wachovia Bank & Trust Co.*, 156 N. C. App. 343, 347–348, 577 S. E. 2d 306, 309–310 (2003) (holding trustee erred by "[f]ail[ing] to exercise judgment," and directing it to do so). The fourth case concerns circumstances so distant from those before us that it is difficult to know what to say. (The question was whether the beneficiary of a small trust had title in certain trust assets or whether the trustee had discretionary power to allocate them in her best interest; the court held the latter, adding that, if the trustee acted unreasonably, the lower court in that particular case should seek to have the trustee removed rather than trying to administer the trust funds itself.) See *Hanford* v. *Clancy*, 87 N. H. 458, 460–461, 183 A. 271, 272–273 (1936).

I cannot read these four cases, or any other case to which the majority refers, as holding that a court, as a general matter, is *required* to defer to a trust administrator's *second attempt* at exercising discretion. And I am aware of no such case. In contrast, the Restatement and Bogert and Scott treatises identify numerous cases in which courts have remedied a trustee's abuse of discretion by ordering the trustee to pay a specific amount. See 2 Third Restatement § 50, Reporter's Note, at 283 (citing cases such as *Coker* v. *Coker*, 208 Ala. 354, 94 So. 566 (1922)); Bogert & Bogert § 560, at 223, n. 19 (citing cases such as *Rubion*); 3 Scott § 18.2.1, at 1348–1349, nn. 3–4 (citing cases such as *Emmert* v. *Old Nat. Bank of Martinsburg,* 162 W. Va. 48, 246 S. E. 2d 236 (1978)); see also Brief for United States as *Amicus Curiae* 18 (listing cases). I thus do not find trust law "unclear" on this matter. *Ante*, at 514. When a trustee abuses its discretion, trust law

grants courts the authority either to defer anew to the trustee's discretion or to craft a remedy. See, *e. g.*, 3 A. Scott & W. Fratcher, Scott on Trusts § 187, pp. 14–15 (4th ed. 1988) ("This ordinarily means that so long as [the trustee] acts not only in good faith and from proper motives, but also within the bounds of reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment").

Nor does anything in the present case suggest that the District Court abused its remedial authority. The Second Circuit stated that the interpretive problem on remand was in essence a remedial problem. See 433 F. 3d, at 268. It added that the remedial problem was "difficul[t]" and that "the district court . . . may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.* The Administrator had previously abused his discretionary power. *Id.*, at 265–268. And the District Court found that the Administrator's primary remedial suggestion on remand—adjusting respondents' previous benefits distributions by adding interest—probably would have violated ERISA's notice provisions. 472 F. Supp. 2d, at 457. Under these circumstances, the District Court reasonably could have found a need to use its own remedial judgment, rather than rely on the Administrator's—which is just what the Second Circuit said. 535 F. 3d, at 119.

Moreover, even if the "narrow" trust law "question before us" were difficult, *ante*, at 514—which it is not—this difficulty would not excuse the Court from trying to do its best to work out a legal solution that nonetheless respects basic principles of trust law. "Congress invoked the common law of trusts" in enacting ERISA, and this Court has thus repeatedly looked to trust law in order to determine "the particular duties and powers" of ERISA plan administrators. *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S., at 570–572; see also,

e. g., *Glenn*, 554 U. S., at 111; *Davila*, 542 U. S., at 218–219; *Firestone*, 489 U. S., at 111–113. While, as the majority recognizes, *ante*, at 516, trust law may "not tell the entire story," *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996), I am aware of no other case in which this Court has simply ignored trust law (on the basis that it was unclear) and crafted a legal rule based on nothing but "the guiding principles we have identified underlying ERISA," *ante*, at 516. See *Varity*, *supra*, at 497 ("In some instances, *trust law will offer only a starting point*, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements" (emphasis added)).

In any event, it is far from clear that the Court's legal rule reflects an appropriate analysis of ERISA-based policy. To the contrary, the majority's absolute "one free honest mistake" rule is impractical, for it requires courts to determine what is "honest," encourages appeals on the point, and threatens to delay further proceedings that already take too long. (Respondents initially filed this retirement benefits case in 1999.) See *Glenn*, 554 U. S., at 116–117. It also ignores what we previously have pointed out—namely, that abuses of discretion "arise in too many contexts" and "concern too many circumstances" for this Court "to come up with a one-size-fits-all procedural [approach] that is likely to promote fair and accurate" benefits determinations. *Ibid.* And, finally, the majority's approach creates incentives for administrators to take "one free shot" at employer-favorable plan interpretations and to draft ambiguous retirement plans in the first instance with the expectation that they will have repeated opportunities to interpret (and possibly reinterpret) the ambiguous terms. I thus fail to see how the majority's "one free honest mistake" approach furthers ERISA's core purpose of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 90 (1983); see also, *e. g.*,

29 U. S. C. § 1001(b) (noting that ERISA was enacted "to protect . . . employee benefit plans and their beneficiaries"); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 83 (1995) (discussing ERISA's central "goa[l]" of "enab[ing] plan beneficiaries to learn their rights and obligations at any time"); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 148 (1985) (ERISA was enacted "to protect contractually defined benefits").

The majority does identify ERISA-related factors—*e. g.*, promoting predictability and uniformity, encouraging employers to adopt strong plans—that it believes favor giving more power to plan administrators. See *ante*, at 517–521. But, in my view, these factors are, at the least, offset by the factors discussed above—*e. g.*, discouraging administrators from writing opaque plans and interpreting them aggressively—that argue to the contrary. At best, the policies at issue—some arguing in one direction, some the other—are far less able than trust law to provide a "guiding principle." Thus, I conclude that here, as elsewhere, trust law ultimately provides the best way for courts to approach the administration and interpretation of ERISA. See, *e. g.*, *Firestone*, *supra*, at 111–113. And trust law here, as I have said, leaves to the supervising court the decision as to how much weight to give to a plan administrator's remedial opinion.

III

Since the District Court was not required to defer to the Administrator's fallback position, I should consider the second question presented, namely, whether the Court of Appeals properly reviewed the District Court's decision under an "abuse of discretion" standard. *Ante*, at 511 (acknowledging, but not reaching, this issue). The answer to this question depends upon how one characterizes the Court of Appeals' decision. If the court deferred to the District Court's interpretation of Plan terms, then the Court of Appeals most likely should have reviewed the decision *de novo*. See *Fire-*

stone, *supra*, at 112; cf. *Davila*, *supra*, at 210 ("Any dispute over the precise terms of the plan is resolved by a court under a *de novo* review standard"). If instead the Court of Appeals deferred to the District Court's creation of a remedy, in significant part on the basis of "equitable principles," then it properly reviewed the District Court decision for "abuse of discretion." See, *e. g.*, *Cook* v. *Liberty Life Assurance Co. of Boston*, 320 F. 3d 11, 24 (CA1 2003); *Zervos* v. *Verizon N. Y., Inc.*, 277 F. 3d 635, 648 (CA2 2002); *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F. 3d 1154, 1163 (CA9 2001); *Halpin* v. *W. W. Grainger, Inc.*, 962 F. 2d 685, 697 (CA7 1992).

The District Court opinion contains language that supports either characterization. On the one hand, the court wrote that its task was to "interpret the Plan as written." 472 F. Supp. 2d, at 457. On the other hand, the court said that "virtually nothing is set forth in either the Plan or the [Summary Plan Description]" about how to treat prior distributions; and, in describing its task, it said that the Court of Appeals had directed it to use "equitable principles" in fashioning a remedy. *Ibid.* Ultimately, the District Court appears to have used both the Plan language and equitable principles to arrive at its conclusion. See *id.*, at 457–459.

The Court of Appeals, too, used language that supports both characterizations. Compare 535 F. 3d, at 117 (noting that the District Court "applied [Plan] terms" in crafting its remedy), with *id.*, at 117–119 (describing the District Court's decision as the "craft[ing]" of a "remedy" and acknowledging that it had directed the District Court to use "equitable principles" in doing so). But the Court of Appeals ultimately treated the District Court's opinion as if it primarily created a fair remedy. *Ibid.* Given the prior Court of Appeals opinion's language, *supra*, at 527–528 (quoting 433 F. 3d, at 268), I believe that view is a fair, indeed a correct, view. And I consequently believe the Court of Appeals properly reviewed the result for an "abuse of discretion."

Petitioners argue that, because respondents were seeking relief under 29 U. S. C. § 1132(a)(1)(B), the Court of Appeals was, in effect, prohibited from treating the remedy as anything other than an application of a plan's terms. Brief for Petitioners 55–56; Reply Brief for Petitioners 3, 16–17, and n. 8. While this provision allows plaintiffs only to "enforce" or "clarify" rights or to "recover benefits" *"under the terms of the plan,"* § 1132(a)(1)(B) (emphasis added), it does not so limit a court's remedial authority, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 221 (2002) (In § 1132(a)(1)(B), "Congress authorized 'a participant or beneficiary' to bring a civil action . . . without referenc[ing] whether the relief sought is legal or equitable"). The provision thus does not prohibit a court from shaping relief through the application of equitable principles, as trust law plainly permits. See, *e. g.*, 2 Third Restatement § 50, and Comment *b*, at 261 (discussing remedial options); Bogert & Bogert § 870, at 123–126 (2d rev. ed. 1995). Indeed, a court that finds, for example, that an administrator provided employees with inadequate notice of a plan's terms (as was true here) may have no alternative but to rely significantly upon those principles. Cf. 29 U. S. C. § 1104(a)(1)(D) (plan fiduciary must "discharge his dut[y] . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent" with ERISA).

For these reasons I would affirm the decision of the Court of Appeals. And I therefore respectfully dissent from the majority's contrary determination.

APPENDIX

The "Phantom Account"

This Appendix provides a simplified and illustrative example of, as I understand it, how the "phantom account" works. For the purposes of this Appendix, I make the following assumptions: John worked at Xerox for 10 years from 1970 to

1980. At the time of his departure from Xerox, he was issued a lump-sum benefits distribution of $140,000. He was then rehired in January 1989, and he worked for Xerox for five more years before retiring (until December 1993), earning $50,000 each year of his second term of employment. I also assume that (1) Xerox's contribution to John's investment account was $2,500 in 1989 (the last year such accounts were offered), (2) Xerox's contributions to John's cash and investment accounts are always made on the final day of the year, (3) the rate of return in John's cash and investment accounts is always 5 percent, and (4) annuity rates are also always 5 percent. (For the sake of simplicity, I treat all annuities as perpetuities, meaning that I calculate the present value of the annuities thusly: Present Value = Annual Payment/Annuity Rate.)

Given the above assumptions, John's pension upon his retirement would be $10,500 per year ($50,000 × 1.4 percent × 15 years), which has a present value of $210,000 ($10,500 ÷ 5 percent). John's cash and investment accounts at the end of his fifth year would look as follows (While Xerox's ERISA Plan did not include cash accounts until 1990, each employee's opening cash account balance was credited with the balance of his investment account at the end of 1989. The figures for John's cash account in 1989 thus reflect the performance of his investment account. In addition, all numbers are rounded to the nearest hundred):

Year	(A) Inv. Account: Xerox Contributions	(B) Inv. Account: Accrued Since Return	(C) Inv. Account: Phantom Account	(D) Inv. Account: Total (Columns B + C)	(E) Cash Account: Xerox Contributions	(F) Cash Account: Accrued Since Return	(G) Cash Account: Phantom Account	(H) Cash Account: Total (Columns F + G)
1989	2,500	2,500	217,200	219,700	2,500	2,500	217,200	219,700
1990	0	2,600	228,000	230,600	2,500	5,100	228,000	233,100
1991	0	2,800	239,400	242,200	2,500	7,900	239,400	247,300
1992	0	2,900	251,400	254,300	2,500	10,800	251,400	262,200
1993	0	3,000	264,000	267,000	2,500	13,800	264,000	277,800

Now, as far as I understand it, John's retirement benefits are calculated as follows, see 433 F. 3d, at 260:

First, the Plan Administrator would choose which of John's three accounts would yield him the greatest benefits. In making this comparison, the Plan Administrator would assume that John had never left Xerox when calculating John's pension. The Plan Administrator would also assume, when calculating the value of John's cash and investment accounts, that the lump-sum distribution John had received from Xerox had remained invested in his accounts. (In other words, the Plan Administrator would include the "phantom account" in his calculations. The total value of this phantom account in 1989, when John rejoined Xerox, is equal to John's lump-sum distribution of $\$140{,}000 \times 1.05^9$, or approximately $217,200.)

The Plan Administrator would thus compare John's pension, column D, and column H to determine John's benefit. As you can see above, column H provides the greatest benefit, so John's cash account would be used to calculate the benefits he would receive upon retirement.

Second, the Plan Administrator would "offset" John's prior distribution against his current benefits to determine the amount of benefits John would actually receive. Thus, the Plan Administrator would take the "total" value of John's cash account, including the "phantom account" ($277,800), and subtract out the value of the "phantom account" ($264,000). The total present value of the benefits John would receive upon his second retirement would thus be $13,800.

This means that John would receive approximately $690 annually ($\$13{,}800 \times 5$ percent) upon retirement under the Plan Administrator's "phantom account" approach. In comparison, if John had simply been treated as a new employee when he was rehired, his pension would have entitled him to at least $3,500 annually ($\$50{,}000 \times 1.4$ percent $\times 5$ years) upon his retirement. And the impact of the "phantom account"

may have been even more dramatic with respect to some of the respondents in this case. See Brief for Respondents 24 (describing how respondent Paul Frommert erroneously received a report claiming that his retirement benefits were $2,482.00 per month, before later discovering that, because of the "phantom account," his actual monthly pension was $5.31 per month); see also App. 63a.

Syllabus

PERDUE, GOVERNOR OF GEORGIA, ET AL. *v.* KENNY A., BY HIS NEXT FRIEND WINN, ET AL.

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

No. 08–970. Argued October 14, 2009—Decided April 21, 2010

Title 42 U. S. C. § 1988 authorizes courts to award a "reasonable" attorney's fee for prevailing parties in civil rights actions. Half of respondents' $14 million fee request was based on their calculation of the "lodestar," *i. e.*, the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community. The other half represented a fee enhancement for superior work and results, supported by affidavits claiming that the lodestar would be insufficient to induce lawyers of comparable skill and experience to litigate this case. Awarding fees of about $10.5 million, the District Court found that the proposed hourly rates were "fair and reasonable," but that some of the entries on counsel's billing records were vague and that the hours claimed for many categories were excessive. The court therefore cut the lodestar to approximately $6 million, but enhanced that award by 75%, or an additional $4.5 million. The Eleventh Circuit affirmed in reliance on its precedent.

Held:

1. The calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in extraordinary circumstances. Pp. 550–557.

(a) The lodestar approach has "achieved dominance in the federal courts." *Gisbrecht* v. *Barnhart*, 535 U. S. 789, 801. Although imperfect, it has several important virtues: It produces an award that approximates the fee the prevailing attorney would have received for representing a paying client who was billed by the hour in a comparable case; and it is readily administrable, see, *e. g.*, *Burlington* v. *Dague*, 505 U. S. 557, 566, and "objective," *Hensley* v. *Eckerhart*, 461 U. S. 424, 433, thereby cabining trial judges' discretion, permitting meaningful judicial review, and producing reasonably predictable results. Pp. 550–552.

(b) This Court has established six important rules that lead to today's decision. First, a "reasonable" fee is one that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case, see *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565, but that does not provide "a form of economic relief to improve the financial lot of attorneys," *ibid.*

Second, there is a "strong" presumption that the lodestar method yields a sufficient fee. See, *e. g.*, *id.*, at 564. Third, the Court has never sustained an enhancement of a lodestar amount for performance, but has repeatedly said that an enhancement may be awarded in "rare" and "exceptional" circumstances. *E. g.*, *id.*, at 565. Fourth, "the lodestar includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee." *Id.*, at 566. An enhancement may not be based on a factor that is subsumed in the lodestar calculation, such as the case's novelty and complexity, see, *e. g.*, *Blum* v. *Stenson*, 465 U. S. 886, 898, or the quality of an attorney's performance, *Delaware Valley*, *supra*, at 566. Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. *E. g.*, *Blum*, 465 U. S., at 901. Sixth, an applicant seeking an enhancement must produce "specific evidence" supporting the award, *id.*, at 899, 901, to assure that the calculation is objective and capable of being reviewed on appeal. Pp. 552–553.

(c) The Court rejects any contention that a fee determined by the lodestar method may not be enhanced in any situation. The "strong presumption" that the lodestar is reasonable may be overcome in those rare circumstances in which the lodestar does not adequately account for a factor that may properly be considered in determining a reasonable fee. Pp. 553–554.

(d) The Court treats the quality of an attorney's performance and the results obtained as one factor, since superior results are relevant only to the extent it can be shown that they stem from superior attorney performance and not another factor, such as inferior performance by opposing counsel. The circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation are "rare" and "exceptional." Enhancements should not be awarded without specific evidence that the lodestar fee would not have been "adequate to attract competent counsel." *Blum*, *supra*, at 897. First, an enhancement may be appropriate where the method used to determine the hourly rate does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate formula takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, the trial judge should adjust the hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate. Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. In such cases, the enhancement amount must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard

interest rate to the qualifying expense outlays. Third, an enhancement may be appropriate where an attorney's performance involves exceptional delay in the payment of fees. In such a case, the enhancement should be calculated by a method similar to that used for an exceptional delay in expense reimbursement. Enhancements are not appropriate on the ground that departures from hourly billing are becoming more common. Nor can they be based on a flawed analogy to the increasingly popular practice of paying attorneys a reduced hourly rate with a bonus for obtaining specified results. Pp. 554–557.

2. The District Court did not provide proper justification for the 75% fee enhancement it awarded in this case. It commented that the enhancement was necessary to compensate counsel at the appropriate hourly rate, but the effect was to raise the top rate from $495 to more than $866 per hour, while nothing in the record shows that this is an appropriate figure for the relevant market. The court also emphasized that counsel had to make extraordinary outlays for expenses and wait for reimbursement, but did not calculate the amount of the enhancement attributable to this factor. Similarly, the court noted that counsel did not receive fees on an ongoing basis during the case, but did not sufficiently link this to proof that the delay was outside the normal range expected by attorneys who rely on § 1988 for fees. Nor did the court calculate the cost to counsel of any extraordinary and unwarranted delay. And its reliance on the contingency of the outcome contravenes *Dague*, *supra*, at 565. Finally, insofar as the court relied on a comparison of counsel's performance in this case with that of counsel in unnamed prior cases, it did not employ a methodology that permitted meaningful appellate review. While determining a "reasonable attorney's fee" is within the trial judge's sound discretion under § 1988, that discretion is not unlimited. The judge must provide a reasonably specific explanation for all aspects of a fee determination, including any enhancement. Pp. 557–559.

532 F. 3d 1209, 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. 560, and THOMAS, J., *post*, p. 560, filed concurring opinions. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, GINSBURG, and SOTOMAYOR, JJ., joined, *post*, p. 561.

Mark H. Cohen argued the cause for petitioners. With him on the briefs were *Thurbert E. Baker*, Attorney General of Georgia, *Dennis R. Dunn*, Deputy Attorney General, *Sha-*

Counsel

len S. Nelson, Senior Assistant Attorney General, and *Elizabeth M. Williamson*, Assistant Attorney General.

Pratik A. Shah argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Katyal*, *Michael Jay Singer*, and *Jeffrica Jenkins Lee*.

Paul D. Clement argued the cause for respondents. With him on the brief were *Marcia Robinson Lowry*, *Ira P. Lustbader*, and *Jeffrey O. Bramlett*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, and *Corey L. Maze*, Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Daniel S. Sullivan* of Alaska, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Peter J. Nickles* of the District of Columbia, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Greg Zoeller* of Indiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jon Bruning* of Nebraska, *Catherine C. Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for the Association County Commissioners of Georgia by *James F. Grubiak;* for the National Governors Association et al. by *Richard Ruda;* for the National Sheriffs' Association et al. by *Travis Wisdom* and *Robert Spence;* for the Old Republic Insurance Co. et al. by *Mark E. Solomons*, *Laura Metcoff Klaus*, and *Francis Edwin Froelich;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice et al. by *Jeffrey Robert White;* for the Civil Rights Clinic at Howard University School of Law by *Aderson Bellegarde François;* for Lucian A. Bebchuk et al. by *Deanne E. Maynard* and *W. Stephen Smith;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Michael B. de Leeuw*, *Sarah Crawford*, *Susan Silverstein*, *Kenneth W. Zeller*, *Steven R. Shapiro*, *Judith G. Storandt*, *Judith L. Lichtman*, *Marc*

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether the calculation of an attorney's fee, under federal fee-shifting statutes, based on the "lodestar," *i. e.*, the number of hours worked multiplied by the prevailing hourly rates, may be increased due to superior performance and results.[1] We have stated in previous cases that such an increase is permitted in extraordinary circumstances, and we reaffirm that rule. But as we have also said in prior cases, there is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified. Because the District Court did not apply these standards, we reverse the decision below and remand for further proceedings consistent with this opinion.

H. Morial, *Dina Lassow*, and *Allison M. Zieve;* for the Liberty Legal Institute et al. by *Kelly J. Shackelford*, *Hiram S. Sasser III*, *Ilya Shapiro*, *William H. Mellor*, *Scott Bullock*, *Jay Alan Sekulow*, *Mathew Staver*, and *James Bopp, Jr.;* for the NAACP Legal Defense & Educational Fund, Inc., by *John Payton*, *Debo P. Adegbile*, *Matthew Colangelo*, *Joshua Civin*, and *Kristen Clarke;* and for the New York State Bar Association et al. by *Lisa E. Cleary.*

Briefs of *amici curiae* were filed for the National School Boards Association by *Thomas E. Wheeler II*, *Francisco M. Negrón, Jr.*, *Naomi E. Gittins*, *Thomas E. M. Hutton*, and *Lisa E. Soronen;* and for Small Private Law Firms That Rely on Statutory Fee Awards in Public Interest Litigation by *Sanford Jay Rosen.*

[1] JUSTICE BREYER would have us answer this question "Yes" and then end the opinion. See *post*, at 562 (opinion concurring in part and dissenting in part). Such an opinion would be of little use to the bench or bar and would pointlessly invite an additional round of litigation. The issue of the standards to be applied in granting an enhancement is fairly subsumed within the question that we agreed to decide and has been extensively discussed in the briefs filed in this case.

I

A

Respondents (plaintiffs below) are children in the Georgia foster-care system and their next friends. They filed this class action on behalf of 3,000 children in foster care and named as defendants the Governor of Georgia and various state officials (petitioners in this case). Claiming that deficiencies in the foster-care system in two counties near Atlanta violated their federal and state constitutional and statutory rights, respondents sought injunctive and declaratory relief, as well as attorney's fees and expenses.

The United States District Court for the Northern District of Georgia eventually referred the case to mediation, where the parties entered into a consent decree, which the District Court approved. The consent decree resolved all pending issues other than the fees that respondents' attorneys were entitled to receive under 42 U. S. C. § 1988.[2]

B

Respondents submitted a request for more than $14 million in attorney's fees. Half of that amount was based on their calculation of the lodestar—roughly 30,000 hours multiplied by hourly rates of $200 to $495 for attorneys and $75 to $150 for nonattorneys. In support of their fee request, respondents submitted affidavits asserting that these rates were within the range of prevailing market rates for legal services in the relevant market.

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[2] Title 42 U. S. C. § 1988(b) provides:

"In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." (Citations omitted.)

The other half of the amount that respondents sought represented a fee enhancement for superior work and results. Affidavits submitted in support of this request claimed that the lodestar amount "would be generally insufficient to induce lawyers of comparable skill, judgment, professional representation and experience" to litigate this case. See, *e. g.*, App. 80. Petitioners objected to the fee request, contending that some of the proposed hourly rates were too high, that the hours claimed were excessive, and that the enhancement would duplicate factors that were reflected in the lodestar amount.

The District Court awarded fees of approximately $10.5 million. See 454 F. Supp. 2d 1260, 1296 (ND Ga. 2006). The District Court found that the hourly rates proposed by respondents were "fair and reasonable," *id.*, at 1285, but that some of the entries on counsel's billing records were vague and that the hours claimed for many of the billing categories were excessive. The court therefore cut the nontravel hours by 15% and halved the hourly rate for travel hours. This resulted in a lodestar calculation of approximately $6 million.

The court then enhanced this award by 75%, concluding that the lodestar calculation did not take into account "(1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no on[-]going reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case." *Id.*, at 1288. The court stated that respondents' attorneys had exhibited "a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.*, at 1289. The court also commented that the results obtained were "'extraordinary'" and added that "[a]fter 58

years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.*, at 1290. The enhancement resulted in an additional $4.5 million fee award.

Relying on prior Circuit precedent, a panel of the Eleventh Circuit affirmed. 532 F. 3d 1209 (2008). The panel held that the District Court had not abused its discretion by failing to make a larger reduction in the number of hours for which respondents' attorneys sought reimbursement, but the panel commented that it "would have cut the billable hours more if we were deciding the matter in the first instance" and added that the hourly rates approved by the District Court also "appear[ed] to be on the generous side." *Id.*, at 1220, and n. 2. On the question of the enhancement, however, the panel splintered, with each judge writing a separate opinion.

Judge Carnes concluded that binding Eleventh Circuit precedent required that the decision of the District Court be affirmed, but he opined that the reasoning in our opinions suggested that no enhancement should be allowed in this case. He concluded that the quality of the attorneys' performance was "adequately accounted for 'either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rates.'" *Id.*, at 1225 (quoting *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565–566 (1986) *(Delaware Valley I)*). He found that an enhancement could not be justified based on delay in the recovery of attorney's fees and reimbursable expenses because such delay is a routine feature of cases brought under 42 U. S. C. § 1983. And he reasoned that the District Court had contravened our holding in *Burlington* v. *Dague*, 505 U. S. 557 (1992), when it relied on "'the fact that class counsel's compensation was totally contingent upon prevailing in this action.'" 532 F. 3d, at 1226, 1228 (quoting affidavit in support of fee request).

Judge Wilson concurred in the judgment but disagreed with Judge Carnes' view that Eleventh Circuit precedent is inconsistent with our decisions. Judge Hill also concurred in the judgment but expressed no view about the correctness of the prior Circuit precedent.

The Eleventh Circuit denied rehearing en banc over the dissent of three judges. See 547 F. 3d 1319 (2008). Judge Wilson filed an opinion concurring in the denial of rehearing; Judge Carnes, joined by Judges Tjoflat and Dubina, filed an opinion dissenting from the denial of rehearing; and Judge Tjoflat filed a separate dissent, contending, among other things, that the District Court, by basing the enhancement in large part on a comparison of the performance of respondents' attorneys with all of the unnamed attorneys whose work he had observed during his professional career, had improperly rendered a decision that was effectively unreviewable on appeal and had essentially served as a witness in support of the enhancement. *Id.*, at 1326–1327.

We granted certiorari. 556 U. S. 1165 (2009).

II

The general rule in our legal system is that each party must pay its own attorney's fees and expenses, see *Hensley* v. *Eckerhart*, 461 U. S. 424, 429 (1983), but Congress enacted 42 U. S. C. § 1988 in order to ensure that federal rights are adequately enforced. Section 1988 provides that a prevailing party in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs."[3] Unfortunately, the statute does not explain what Congress meant by a"reasonable" fee, and therefore the task of identifying an appropriate methodology for determining a "reasonable" fee was left for the courts.

One possible method was set out in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717–719 (CA5 1974),

[3] Virtually identical language appears in many of the federal fee-shifting statutes. See *Burlington* v. *Dague*, 505 U. S. 557, 562 (1992).

which listed 12 factors that a court should consider in determining a reasonable fee.[4] This method, however, "gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Delaware Valley I*, *supra*, at 563.

An alternative, the lodestar approach, was pioneered by the Third Circuit in *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161 (1973), appeal after remand, 540 F. 2d 102 (1976), and "achieved dominance in the federal courts" after our decision in *Hensley*. *Gisbrecht* v. *Barnhart*, 535 U. S. 789, 801 (2002). "Since that time, '[t]he "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.' " *Ibid.* (quoting *Dague*, *supra*, at 562).

Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to "the prevailing market rates in the relevant community." *Blum* v. *Stenson*, 465 U. S. 886, 895 (1984). Developed after the practice of hourly billing had become widespread, see *Gisbrecht*, *supra*, at 801, the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. Second, the lodestar method is readily administrable, see *Dague*, *supra*, at 566; see also

[4] These factors were: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Hensley* v. *Eckerhart*, 461 U. S. 424, 430, n. 3 (1983).

Buckhannon Board & Care Home, Inc. v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 609 (2001); and unlike the *Johnson* approach, the lodestar calculation is "objective," *Hensley*, *supra*, at 433, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

III

Our prior decisions concerning the federal fee-shifting statutes have established six important rules that lead to our decision in this case.

First, a "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. See *Delaware Valley I*, 478 U. S., at 565 ("[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied"); *Blum*, *supra*, at 897 ("[A] reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys" (ellipsis, brackets, and internal quotation marks omitted)). Section 1988's aim is to enforce the covered civil rights statutes, not to provide "a form of economic relief to improve the financial lot of attorneys." *Delaware Valley I*, *supra*, at 565.

Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. See *Dague*, 505 U. S., at 562; *Delaware Valley I*, *supra*, at 565; *Blum*, *supra*, at 897; see also *Gisbrecht*, *supra*, at 801–802. Indeed, we have said that the presumption is a "strong" one. *Dague*, *supra*, at 562; *Delaware Valley I*, *supra*, at 565.

Third, although we have never sustained an enhancement of a lodestar amount for performance, see Brief for United States as *Amicus Curiae* 12, 17, we have repeatedly said that enhancements may be awarded in "'rare'" and "'exceptional'" circumstances. *Delaware Valley I*, *supra*, at 565; *Blum*, *supra*, at 897; *Hensley*, *supra*, at 435.

Fourth, we have noted that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee," *Delaware Valley I*, *supra*, at 566, and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation, see *Dague*, *supra*, at 562–563; *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, 726–727 (1987) *(Delaware Valley II)* (plurality opinion); *Blum*, 465 U. S., at 898. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors "presumably [are] fully reflected in the number of billable hours recorded by counsel." *Ibid.* We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." *Delaware Valley I*, *supra*, at 566.

Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. *Dague*, *supra*, at 561; *Blum*, 465 U. S., at 901–902.

Finally, a fee applicant seeking an enhancement must produce "specific evidence" that supports the award. *Id.*, at 899, 901 (An enhancement must be based on "evidence that enhancement was necessary to provide fair and reasonable compensation"). This requirement is essential if the lodestar method is to realize one of its chief virtues, *i. e.*, providing a calculation that is objective and capable of being reviewed on appeal.

IV

A

In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. In-

stead, there is a "strong presumption" that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

B

In this case, we are asked to decide whether either the quality of an attorney's performance or the results obtained are factors that may properly provide a basis for an enhancement. We treat these two factors as one. When a plaintiff's attorney achieves results that are more favorable than would have been predicted based on the governing law and the available evidence, the outcome may be attributable to superior performance and commitment of resources by plaintiff's counsel. Or the outcome may result from inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck. Since none of these latter causes can justify an enhanced award, superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance. Thus, we need only consider whether superior attorney performance can justify an enhancement. And in light of the principles derived from our prior cases, we inquire whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation. We conclude that there are a few such circumstances but that these circumstances are indeed "rare" and "exceptional," and require specific evidence that the lodestar fee would not have been "adequate to attract competent counsel," *Blum*, *supra*, at 897 (internal quotation marks omitted).

First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attor-

ney's true market value, as demonstrated in part during the litigation.[5] This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar)[6] or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate.

Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, 532 F. 3d, at 1227, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

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[5] Respondents correctly note that an attorney's "brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience." Brief for Respondents 14. But as we said in *Blum* v. *Stenson*, 465 U. S. 886, 898 (1984), "[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates."

[6] See, *e. g.*, *Salazar* v. *District of Columbia*, 123 F. Supp. 2d 8 (DC 2000); *Laffey* v. *Northwest Airlines, Inc.*, 572 F. Supp. 354 (DC 1983), aff'd in part, rev'd in part, 746 F. 2d 4 (CADC 1984).

Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. See *ibid.* Compensation for this delay is generally made "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." *Missouri* v. *Jenkins*, 491 U. S. 274, 282 (1989) (internal quotation marks omitted). But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

We reject the suggestion that it is appropriate to grant performance enhancements on the ground that departures from hourly billing are becoming more common. As we have noted, the lodestar was adopted in part because it provides a rough approximation of general billing practices, and accordingly, if hourly billing becomes unusual, an alternative to the lodestar method may have to be found. However, neither respondents nor their *amici* contend that that day has arrived. Nor have they shown that permitting the award of enhancements on top of the lodestar figure corresponds to prevailing practice in the general run of cases.

We are told that, under an increasingly popular arrangement, attorneys are paid at a reduced hourly rate but receive a bonus if certain specified results are obtained, and this practice is analogized to the award of an enhancement such as the one in this case. Brief for Respondents 55–57. The analogy, however, is flawed. An attorney who agrees, at the outset of the representation, to a *reduced hourly rate* in exchange for the opportunity to earn a performance bonus is

in a position far different from an attorney in a § 1988 case who is compensated at the *full prevailing rate* and then seeks a performance enhancement in addition to the lodestar amount after the litigation has concluded. Reliance on these comparisons for the purposes of administering enhancements, therefore, is not appropriate.

V

In the present case, the District Court did not provide proper justification for the large enhancement that it awarded. The court increased the lodestar award by 75% but, as far as the court's opinion reveals, this figure appears to have been essentially arbitrary. Why, for example, did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?

The District Court commented that the enhancement was the "minimum enhancement of the lodestar necessary to reasonably compensate [respondents'] counsel." 454 F. Supp. 2d, at 1290. But the effect of the enhancement was to increase the top rate for the attorneys to more than $866 per hour,[7] and the District Court did not point to anything in the record that shows that this is an appropriate figure for the relevant market.

The District Court pointed to the fact that respondents' counsel had to make extraordinary outlays for expenses and

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[7] JUSTICE BREYER's reliance on the *average* hourly rate for all of respondents' attorneys is highly misleading. See *post*, at 570. In calculating the lodestar, the District Court found that the hourly rate for each of these attorneys was "eminently fair and reasonable" and "consistent with the prevailing market rates in Atlanta for comparable work." 454 F. Supp. 2d, at 1285–1286. JUSTICE BREYER's calculation of an average hourly rate for all attorney hours reflects nothing more than the fact that much of the work was performed by attorneys whose "fair and reasonable" market rate was below the market average. There is nothing unfair about compensating these attorneys *at the very rate that they requested.*

had to wait for reimbursement, *id.*, at 1288, but the court did not calculate the amount of the enhancement that is attributable to this factor. Similarly, the District Court noted that respondents' counsel did not receive fees on an ongoing basis while the case was pending, but the court did not sufficiently link this factor to proof in the record that the delay here was outside the normal range expected by attorneys who rely on § 1988 for the payment of their fees or quantify the disparity. Nor did the court provide a calculation of the cost to counsel of any extraordinary and unwarranted delay. And the court's reliance on the contingency of the outcome contravenes our holding in *Dague*. See 505 U. S., at 565.

Finally, insofar as the District Court relied on a comparison of the performance of counsel in this case with the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review. Needless to say, we do not question the sincerity of the District Court's observations, and we are in no position to assess their accuracy. But when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method—providing an objective and reviewable basis for fees, see *id.*, at 566—is undermined.

Determining a "reasonable attorney's fee" is a matter that is committed to the sound discretion of a trial judge, see 42 U. S. C. § 1988 (permitting court, "in its discretion," to award fees), but the judge's discretion is not unlimited. It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such an explanation is given, adequate appellate review is not feasible, and without such review, widely disparate awards may be made, and awards may be influenced (or at least, may appear to be influenced) by a judge's subjective opinion regarding particular attorneys or the importance of the case. In addition, in future cases,

defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement. See *Marek* v. *Chesny*, 473 U. S. 1, 7 (1985) ("'[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff'").

Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute's aim.[8] In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services. Cf. *Horne* v. *Flores*, 557 U. S. 433, 448 (2009) (payment of money pursuant to a federal-court order diverts funds from other state or local programs).

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[8] JUSTICE BREYER's opinion dramatically illustrates the danger of allowing a trial judge to award a huge enhancement not supported by any discernible methodology. That approach would retain the $4.5 million enhancement here so that respondents' attorneys would earn as much as the attorneys at some of the richest law firms in the country. *Post*, at 570–571. These fees would be paid by the taxpayers of Georgia, where the annual per capita income is less than $34,000, see Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2010, p. 437 (2009) (Table 665) (figures for 2008), and the annual salaries of attorneys employed by the State range from $48,000 for entry-level lawyers to $118,000 for the highest paid division chief, see Brief for State of Alabama et al. as *Amici Curiae* 10, and n. 3 (citing National Association of Attorneys General, Statistics on the Office of the Attorney General, Fiscal Year 2006, pp. 37–39). Section 1988 was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide such a windfall.

* * *

For all these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

If one were to ask an attorney or a judge to name the significant cases of his or her career, it would be unsurprising to find the list includes a case then being argued or just decided. When immersed in a case, lawyers and judges find within it a fascination, an intricacy, an importance that transcends what the detached observer sees. So the pending or just completed case will often seem extraordinary to its participants. That is the dynamic of the adversary system, the system that so well serves the law.

It is proper for the Court today to reject the proposition that all enhancements are barred; still, it must be understood that extraordinary cases are presented only in the rarest circumstances.

With these comments, I join in full the opinion of the Court.

JUSTICE THOMAS, concurring.

Nearly 30 years ago, a group of attorneys sought a fee award under 42 U. S. C. § 1988 after "achiev[ing] only limited success" litigating their clients' constitutional claims. *Hensley* v. *Eckerhart*, 461 U. S. 424, 431 (1983). This Court's opinion resolving their claim for fees observed that "in some cases of *exceptional* success an enhanced award" of attorney's fees under § 1988 "may be justified." *Id.*, at 435 (emphasis added). That observation plainly was dictum, but one year later this Court relied on it to reject the "argument that an 'upward adjustment' " to the lodestar calculation "is never permissible." *Blum* v. *Stenson*, 465 U. S. 886, 897 (1984). Yet "we have never sustained an enhancement of a

lodestar amount for performance," *ante,* at 552, and our jurisprudence since *Blum* has charted "a decisional arc that bends decidedly against enhancements," 532 F. 3d 1209, 1221 (CA11 2008) (Carnes, J.). See also *ante,* at 552–553.

Today the Court holds, consistent with *Hensley* and *Blum,* that a lodestar fee award under § 1988 may be enhanced for attorney performance in a "few" circumstances that "are indeed 'rare' and 'exceptional.'" *Ante,* at 554. But careful readers will observe the precise limitations that the Court imposes on the availability of such enhancements. See *ante,* at 554–557; see also *ante,* at 560 (KENNEDY, J., concurring) ("[I]t must be understood that extraordinary cases are presented only in the rarest circumstances"). These limitations preserve our prior cases and advance our attorney's fees jurisprudence further along the decisional arc that Judge Carnes described. I agree with the Court's approach and its conclusion because, as the Court emphasizes, see *ante,* at 553, the lodestar calculation will in virtually every case already reflect all indicia of attorney performance relevant to a fee award.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, concurring in part and dissenting in part.

We granted certiorari in this case to consider "whether the calculation of an attorney's fee" that is "based on the 'lodestar,'" *ante,* at 546 (opinion of the Court), can "*ever* be enhanced based solely on [the] quality of [the lawyers'] performance and [the] results obtained," Pet. for Cert. i (emphasis added). The Court answers that question in the affirmative. See *ante,* at 546 ("We have stated in previous cases that such an increase is permitted in extraordinary circumstances, and we reaffirm that rule"); see also *ante,* p. 560 (KENNEDY, J., concurring). As our prior precedents make clear, the lodestar calculation "does not end the [fee] inquiry" because there "remain other considerations that may lead

the district court to adjust the fee upward." *Hensley* v. *Eckerhart*, 461 U. S. 424, 434 (1983). For that reason, "[t]he lodestar method was never intended to be conclusive in all circumstances." *Ante*, at 553. Instead, as the Court today reaffirms, when "superior attorney performance," *ante*, at 554, leads to "exceptional success an enhanced award may be justified," *Hensley*, *supra*, at 435; see also *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565 (1986); *Blum* v. *Stenson*, 465 U. S. 886, 896–900 (1984). I agree with that conclusion.

Where the majority and I part ways is with respect to a question that is not presented, but that the Court obliquely, and in my view inappropriately, appears to consider nonetheless—namely, whether the lower courts correctly determined *in this case* that exceptional circumstances justify a lodestar enhancement. See Parts IV–V, *ante;* see also *ante*, p. 560 (KENNEDY, J., concurring). I would not reach that issue, which lies beyond the narrow question that we agreed to consider. See 556 U. S. 1165 (2009) (limiting review to the first question presented); Pet. for Cert. i (stating question); see also *Glover* v. *United States*, 531 U. S. 198, 205 (2001) ("As a general rule . . . we do not decide issues outside the questions presented . . . "). Nor do I believe that this Court, which is twice removed from the litigation underlying the fee determination, is properly suited to resolve the fact-intensive inquiry that 42 U. S. C. § 1988 demands. But even were I to engage in that inquiry, I would hold that the District Court did not abuse its discretion in awarding an enhancement. And I would therefore affirm the judgment of the Court of Appeals.

As the Court explains, the basic question that must be resolved when considering an enhancement to the lodestar is whether the lodestar calculation "adequately measure[s]" an attorney's "value," as "demonstrated" by his performance "during the litigation." *Ante*, at 554–555. While I understand the need for answering that question through the appli-

cation of standards, I also believe that the answer inevitably involves an element of judgment. Moreover, when reviewing a district court's answer to that question, an appellate court must inevitably give weight to the fact that a district court is better situated to provide that answer. For it is the district judge, and only the district judge, who will have read all of the motions filed in the case, witnessed the proceedings, and been able to evaluate the attorneys' overall performance in light of the objectives, context, legal difficulty, and practical obstacles present in the case. In a word, the district judge will have observed the attorneys' true "value, *as demonstrated . . . during the litigation.*" *Ante*, at 555 (emphasis added). By contrast, a court of appeals, faced with a cold and perhaps lengthy record, will inevitably have less time and opportunity to determine whether the lawyers have done an exceptionally fine job. And this Court is yet less suited to performing that inquiry. Accordingly, determining whether a fee enhancement is warranted in a given case "is a matter that is committed to the sound discretion of a trial judge," *ante,* at 558, and the function of appellate courts is to review that judge's determination for an abuse of such discretion. See *Pierce* v. *Underwood*, 487 U. S. 552, 571 (1988); see also *General Elec. Co.* v. *Joiner*, 522 U. S. 136, 143 (1997) ("[D]eference . . . is the hallmark of abuse-of-discretion review").

This case well illustrates why our tiered and functionally specialized judicial system places the task of determining an attorney's fee award primarily in the district court's hands. The plaintiffs' lawyers spent eight years investigating the underlying facts, developing the initial complaint, conducting court proceedings, and working out final relief. The District Court's docket, with over 600 entries, consists of more than 18,000 pages. Transcripts of hearings and depositions, along with other documents, have produced a record that fills 20 large boxes. Neither we, nor an appellate panel, can easily read that entire record. Nor should we attempt to

second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect.

My own review of this expansive record cannot possibly be exhaustive. But those portions of the record I have reviewed lead me to conclude, like the Court of Appeals, that the District Judge did not abuse his discretion when awarding an enhanced fee. I reach this conclusion based on four considerations.

First, the record indicates that the lawyers' objective in this case was unusually important and fully consistent with the central objectives of the basic federal civil-rights statute, Rev. Stat. § 1979, 42 U. S. C. § 1983. Moreover, the problem the attorneys faced demanded an exceptionally high degree of skill and effort. Specifically, these lawyers and their clients sought to have the State of Georgia reform its entire foster-care system—a system that much in the record describes as well below the level of minimal constitutional acceptability. The record contains investigative reports, mostly prepared by Georgia's own Office of the Child Advocate, which show, for example, the following:

- The State's foster-care system was unable to provide essential medical and mental health services; children consequently and unnecessarily suffered illness and lifelong medical disabilities, such as permanent hearing loss, due to failures on the part of the State to administer basic care and antibiotics. See, *e. g.*, Doc. 3, Exh. 3C, pp. 11–13.
- Understaffing and improper staffing placed children in the care of individuals with dangerous criminal records; children were physically assaulted by the staff, locked outside of the shelters at night as punishment, and abused in other ways. See, *e. g.*, Doc. 50, pp. 32–36, 55; Doc. 3, Exh. 3A, pp. 2–6; Doc. 3, Exh. 2, pp. 4–5; Doc. 52, Exh. 1, pp. 6, 12–15, 34.

- The shelters themselves were "unsanitary and dilapidated," "unclean," infested with rats, "overcrowded," unsafe, and "'out of control.'" See, *e. g.*, Doc. 3, Exh. 3A, at 1–2; Doc. 3, Exh. 3B, p. 2; Doc. 50, at 29.
- Due to improper supervision and other deficiencies at the shelters, 20% of the children abused drugs; some also became victims of child prostitution. See *id.*, at 39; Doc. 3, Exh. 3A, at 3.
- Systemic failures also caused vulnerable children to suffer regular beatings and sexual abuse, including rape, at the hands of more aggressive shelter residents. See, *e. g.*, Doc. 50, at 18–22, 54–55; Doc. 52, Exh. 1, at 7–10, 26; Doc. 3, Exh. 3B, at 3 ("[A child] was beaten so badly by eight other [children] that he suffered severe internal bleeding"); *id.*, at 4 (describing violent sexual assault and rape).
- Not surprisingly, many children—upwards of 5 per day and over 750 per year—tried to escape these conditions; others tried to commit suicide. See, *e. g.*, Doc. 50, at 27–28, 54; Doc. 52, Exh. 18, p. 4 (under seal) (at least 25% of children run away from shelters); Doc. 52, Exh. 18E, pp. 1–11, 18–19 (under seal) (daily logs); see also Doc. 50, Exh. 1, pp. 37, 54 (describing suicide attempts) (all docket entries above and hereinafter refer to No. 1:02–cv–1686 (ND Ga.) (case below)).

The State's Office of the Child Advocate, whose reports provide much of the basis for the foregoing description, concluded that the system was "operating in crisis mode" and that any private operator who ran such a system "would never be licensed to care for children." Office of the Child Advocate for the Protection of Children Annual Rep. 10, 14 (2001), Record, Doc. 3, Exh. 3C (hereinafter OCA 2001 Rep.); accord, *id.*, Exh. 3A, at 1. The advocate noted that neither her investigative reports nor national news publicity (including a television program that highlighted a 5-year-old foster

child's death from beatings) had prompted corrective action by the State. OCA 2001 Rep. 1, 14.

The advocate further stated that litigation was necessary to force reform. *Id.*, at 14–15. And she repeatedly asked the State to give her office the authority to conduct that litigation. See Office of the Child Advocate Advisory Committee, Annual Effectiveness Rep. 4 (2002), online at http://www.georgia.gov/vgn/images/portal/cit_1210/7/22/84622967effectiveness2003.pdf (all Internet materials as visited Apr. 16, 2010, and available in Clerk of Court's case file) ("[F]or the Office to be truly effective, it must possess the authority to compel change [and] . . . to initiate litigation on behalf of children. Such authority is widely considered by other states' Child Advocates as crucial to effecting meaningful change for children"); Office of the Child Advocate Advisory Committee, Annual Effectiveness Rep. 13 (2003–2004), online at http://gachildadvocate.org/vgn/images/portal/cit_1210/48/16/84624761OCA_Effectiveness_Report2003_2004.doc (same); Office of the Child Advocate Advisory Committee, Annual Effectiveness Rep. 11 (2004–2005), online at http://www.georgia.gov/vgn/images/portal/cit_1210/31/23/102387685OCA%20Effectiveness%20Report%202004-2005.doc (same). But the State did not grant the child advocate's office the litigating authority she sought. See 2000 Ga. Laws p. 245, as codified, Ga. Code Ann. § 15–11–173 (2008).

The upshot is that the plaintiffs' attorneys did what the child advocate could not do: They initiated this lawsuit. They thereby assumed the role of "a 'private attorney general' " by filling an enforcement void in the State's own legal system, a function "that Congress considered of the highest priority," *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam)*, and "meant to promote in enacting § 1988," *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 793 (1989).

Second, the course of the lawsuit was lengthy and arduous. The plaintiffs and their lawyers began with factual investiga-

tions beyond those which the child advocate had already conducted. See, *e. g.*, Record, Docs. 50–52 (partially under seal). They then filed suit. And the State met the plaintiffs' efforts with a host of complex procedural, as well as substantive, objections. The State, for example, argued that the law forbade the plaintiffs to investigate the shelters; on the eve of a state-court decision that might have approved the investigations, the State then removed the case to federal court; the State then sought protective orders preventing the attorneys from speaking to the shelters' staff; and, after losing its motions, the State delayed to the point where the District Court "was forced to admonish [the] State Defendants for 'relying on technical legal objections to discovery requests in order to delay and hinder the discovery process.'" 454 F. Supp. 2d 1260, 1268 (ND Ga. 2006) (quoting Record, Doc. 145, p. 4). See also Record, Doc. 1; *id.*, Doc. 3, pp. 9–10; *id.*, Docs. 26, 28–29, 44, 60.

In the meantime, the State moved for dismissal, basing the motion on complex legal doctrines such as *Younger* abstention and the *Rooker-Feldman* doctrine, which the District Court found inapplicable. 218 F. R. D. 277, 284–290 (ND Ga. 2003). See *Younger* v. *Harris*, 401 U. S. 37 (1971); *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923); and *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983). The State also opposed the petitioners' request to certify a class of the 3,000 children in foster care, but the District Court again rejected the State's argument. 218 F. R. D., at 299–302. And, after that, the State filed a lengthy motion for summary judgment, Record, Docs. 243–245, which plaintiffs' attorneys opposed in thorough briefing supported by comprehensive exhibits, see *id.*, Docs. 254–258, 260. After losing that motion and eventually agreeing to mediation, the State forced protracted litigation as to who should be the mediator. See *id.*, Docs. 363–364, 366, 369–370, 373, 376, 380. All told, in opposing the plaintiffs' efforts to have the foster-care system reformed, the State spent $2.4 million on

outside counsel (who, because they charge the State reduced rates, worked significantly more hours than that figure alone indicates) and tapped its own law department for an additional 5,200 hours of work. 454 F. Supp. 2d, at 1287.

Third, in the face of this opposition, the results obtained by the plaintiffs' attorneys appear to have been exceptional. The 47-page consent decree negotiated over the course of the mediation sets forth 31 specific steps that the State will take in order to address the specific deficiencies of the sort that I described above. See *id.*, at 1289; see also App. 92–207 (consent decree). And it establishes a reporting and oversight mechanism that is backed up by the District Court's enforcement authority. See 454 F. Supp. 2d, at 1289. As a result of the decree, the State agreed to comprehensive reforms of its foster-care system, to the benefit of children in many different communities. And informed observers have described the decree as having brought about significant positive results. See, *e. g.*, Record, Doc. 632, p. 4 (most recent court-appointed overseers' report) ("The State's overall performance . . . continues the trend of steady improvement . . . "); *id.*, at 4–10 (detailing substantial health, safety, and welfare improvements); see also Office of the Child Advocate Ann. Report (2008), Letter from Tom C. Rawlings, Director, Office of Child Advocate, to Sonny Perdue, Governor of Georgia (Jan. 16, 2009), online at http://oca.georgia.gov/vgn/images/portal/cit_1210/48/0/131408008OCA%202008%20Annual%20Report.pdf ("[W]e are generally pleased with the direction of our state's child welfare system . . . "); cf. Weinstein & Weinstein, Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy, 33 U. Mich. J. L. Reform 561, 590–591 (2000) (describing in general the broad social impact of dysfunctional child-welfare systems (quoting National Institutes of Health, Research on Child Neglect (1999), online at http://grants.nih.gov/grants/guide/rfa-files/RFA-OD-99-006.html)).

But see Record, Doc. 632, at 10–13 (noting areas in which Georgia's system still needs improvement).

Fourth and finally, the District Judge, who supervised these proceedings, who saw the plaintiffs amass, process, compile, and convincingly present vast amounts of factual information, who witnessed their defeat of numerous state procedural and substantive motions, and who was in a position to evaluate the ultimate mediation effort, said:

1. The "mediation effort in this case went far beyond anything that this Court has seen in any previous case," 454 F. Supp. 2d, at 1282;
2. "[B]ased on its personal observation of plaintiffs' counsel's performance throughout this litigation, the Court finds that . . . counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench," *id.*, at 1288–1290;
3. The Consent Decree "provided extraordinary benefits to the plaintiff class . . . ." *Id.*, at 1282. "[T]he settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage. . . . After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale," *id.*, at 1289–1290.

Based on these observations and on its assessment of the attorneys' performance during the course of the litigation, the District Court concluded that "the evidence establishes that the quality of service rendered by class counsel . . . was far superior to what consumers of legal services in the legal marketplace . . . could reasonably expect to receive for the rates used in the lodestar calculation." *Id.*, at 1288.

On the basis of what I have read, I believe that assessment was correct. I recognize that the ordinary lodestar calcula-

tion yields a large fee award. But by my assessment, the lodestar calculation in this case translates to an average hourly fee per attorney of $249. See *id.*, at 1287 (lodestar calculation and attorney hours). (The majority's reference to an hourly fee of $866, *ante,* at 557, refers to the rate associated with the *single highest* paid of the 17 attorneys under the *enhanced* fee, not the *average* hourly rate under the *lodestar.* The lay reader should also bear in mind that a lawyer's "fee" is substantially greater than his "profit," given that attorneys must sometimes cover case-specific costs (which in this case exceeded $800,000, see 454 F. Supp. 2d, at 1291) and also must cover routine overhead expenses, which typically consume 40% of their fees, see Altman Weil Publications, Inc., Survey of Law Firm Economics 30 (2007 ed.).)

At $249 per hour, the lodestar would compensate this group of attorneys—whom the District Court described as extraordinary—at a rate *lower* than the *average* rate charged by attorneys practicing law in the State of Georgia, where the average hourly rate is $268. See *id.*, at 89. Accordingly, even the majority would seem to acknowledge that some form of an enhancement is appropriate in this case. See *ante,* at 554–555 ("[A]n enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation"). Indeed, the fact that these exceptional results were achieved in a case where "much of the work," *ante,* at 557, n. 7, was performed by relatively inexperienced attorneys (who, accordingly, would be compensated by the lodestar "below the market average," *ibid.*) is all the more reason to think that their service rendered their outstanding performance worthy of an enhancement. By comparison, the District Court's enhanced award—a special one-time adjustment unique to this exceptional case—would compensate these attorneys, on this one occasion, at an average hourly rate of $435, which is comparable to the rates

charged by the Nation's leading law firms on average on every occasion. See Firm-by-Firm Sampling of Billing Rates Nationwide, National Law Journal, Dec. 11, 2006, p. S2 (listing 13 firms at which average hourly rate is between $400 and $510); Barnett, Certification Drag: The Opinion Puzzle and Other Transactional Curiosities, 33 J. Corp. L. 95, 110, n. 58 (2007) ("These numbers are probably an underestimate given that many of the highest-billing national law firms decline to take part in the National Law Journal Survey"). Thus, it would appear that the enhanced award is wholly consistent with the purpose of § 1988, which was enacted to ensure that "counsel for prevailing parties [are] paid as is traditional with attorneys compensated by a fee-paying client." S. Rep. No. 94–1011, p. 6 (1976); see H. R. Rep. No. 94–1558, p. 9 (1976) ("[C]ivil rights plaintiffs should not be singled out for different and less favorable treatment"); see also *Blum*, 465 U. S., at 893, 897.

In any event, the circumstances I have listed likely make this a "rare" or "exceptional" case warranting an enhanced fee award. And they certainly make clear that it was neither unreasonable nor an abuse of discretion for the District Court to reach that conclusion. Indeed, if the facts and circumstances that I have described are even roughly correct, then it is fair to ask: If this is not an exceptional case, what is?

* * *

My disagreement with the Court is limited. As I stated at the outset, we are in complete agreement with respect to the answer to the question presented: "[A]n increase" to the lodestar "due to superior performance and results" "is permitted in extraordinary circumstances." *Ante*, at 546. Unlike JUSTICE THOMAS, I do not read the Court's opinion to "advance our attorney's fees jurisprudence further along the decisional arc" toward a point where enhancements are "virtually" barred in all cases. *Ante*, at 561 (concurring opinion). Our prior cases make clear that enhancements are

permitted in "'exceptional' cases," *Delaware Valley*, 478 U. S., at 565, where the attorney achieves "exceptional success," *Hensley*, 461 U. S., at 435; see also *Blum*, *supra*, at 896–901. By definition, such exceptional circumstances occur only rarely. See *ante*, p. 560 (KENNEDY, J., concurring). I do not see how the Court could "advance" our fee enhancement jurisprudence so as to further discourage lodestar enhancements without overruling the precedents I have just cited, which the Court has not done. To the contrary, today the Court "reaffirm[s]" those precedents, which allow enhancements for exceptional performance. *Ante*, at 546. And with respect to that central holding we are unanimous.

Nor is my disagreement with the Court absolute with respect to the proper resolution of the case before us, for the Court does not purport to prohibit the District Court from awarding an enhanced fee on remand if that court provides more detailed reasoning supporting its decision. *Ante*, at 557; cf. Tr. of Oral Arg. 47. But the majority and I do disagree in this respect: I would not disturb the judgment below. "A request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U. S., at 437. Nor should it lead to years of protracted appellate review. See *id.*, at 455–456 (Brennan, J., concurring in part and dissenting in part). We did not grant certiorari in this case to consider the fact-intensive dispute over whether this is, in fact, an exceptional case that merits a lodestar enhancement. The District Court has already resolved that question, and the Court of Appeals affirmed its judgment, having found no abuse of discretion. I would have been content to resolve no more than the question presented. But, even were I to follow the Court's inclination to say more, I would hold that the principles upon which we agree—including the applicability of abuse-of-discretion review to a District Court's fee determination—require us to affirm the judgment below.

Syllabus

JERMAN *v.* CARLISLE, McNELLIE, RINI, KRAMER & ULRICH, L. P. A., ET AL.

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

No. 08–1200. Argued January 13, 2010—Decided April 21, 2010

The Fair Debt Collection Practices Act (FDCPA), 15 U. S. C. § 1692 *et seq.*, imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. A debt collector who "fails to comply with any [FDCPA] provision . . . with respect to any person is liable to such person" for "actual damage[s]," costs, "a reasonable attorney's fee as determined by the court," and statutory "additional damages." § 1692k(a). In addition, violations of the FDCPA are deemed unfair or deceptive acts or practices under the Federal Trade Commission Act (FTC Act), § 41 *et seq.*, which is enforced by the Federal Trade Commission (FTC). See § 1692*l*. A debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties enforced by the FTC. §§ 45(m)(1)(A), (C). A debt collector is not liable in any action brought under the FDCPA, however, if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c).

Respondents, a law firm and one of its attorneys (collectively Carlisle), filed a lawsuit in Ohio state court on behalf of a mortgage company to foreclose a mortgage on real property owned by petitioner Jerman. The complaint included a notice that the mortgage debt would be assumed valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt, and, when the mortgage company acknowledged that the debt had in fact been paid, Carlisle withdrew the suit. Jerman then filed this action, contending that by sending the notice requiring her to dispute the debt in writing, Carlisle had violated § 1692g(a) of the FDCPA, which governs the contents of notices to debtors. The District Court, acknowledging a division of authority on the question, held that Carlisle had violated § 1692g(a) but ultimately granted Carlisle summary judgment under § 1692k(c)'s "bona fide error" defense. The Sixth Circuit affirmed, holding that the defense in § 1692k(c) is not limited to clerical or factual errors, but extends to mistakes of law.

Held: The bona fide error defense in § 1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. Pp. 581–605.

(a) A violation resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA cannot be "not intentional" under § 1692k(c). It is a common maxim that "ignorance of the law will not excuse any person, either civilly or criminally." *Barlow* v. *United States*, 7 Pet. 404, 411. When Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here. In particular, the administrative-penalty provisions of the FTC Act, which are expressly incorporated into the FDCPA, apply only when a debt collector acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that the FDCPA prohibited its action. §§ 45(m)(1)(A), (C). Given the absence of similar language in § 1692k(c), it is fair to infer that Congress permitted injured consumers to recover damages for "intentional" conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving the more onerous administrative penalties for debt collectors whose intentional actions reflected knowledge that the conduct was prohibited. Congress also did not confine FDCPA liability to "willful" violations, a term more often understood in the civil context to exclude mistakes of law. See, *e. g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 125–126. Section 1692k(c)'s requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error" also more naturally evokes procedures to avoid mistakes like clerical or factual errors. Pp. 581–586.

(b) Additional support for this reading is found in the statute's context and history. The FDCPA's separate protection from liability for "any act done or omitted in good faith in conformity with any [FTC] advisory opinion," § 1692k(e), is more obviously tailored to the concern at issue (excusing civil liability when the FDCPA's prohibitions are uncertain) than the bona fide error defense. Moreover, in enacting the FDCPA in 1977, Congress copied the pertinent portions of the bona fide error defense from the Truth in Lending Act (TILA), § 1640(c). At that time, the three Federal Courts of Appeals to have considered the question interpreted the TILA provision as referring to clerical errors, and there is no reason to suppose Congress disagreed with those interpretations when it incorporated TILA's language into the FDCPA. Although in 1980 Congress amended the defense in TILA, but not in the FDCPA, to exclude errors of legal judgment, it is not obvious that amendment changed the scope of the TILA defense in a way material here, given the prior uniform judicial interpretation of that provision. It is also unclear why Congress would have intended the FDCPA's de-

Syllabus

fense to be broader than TILA's, and Congress has not expressly *included* mistakes of law in any of the parallel bona fide error defenses elsewhere in the U. S. Code. Carlisle's reading is not supported by *Heintz* v. *Jenkins*, 514 U. S. 291, 292, which had no occasion to address the overall scope of the FDCPA bona fide error defense, and which did not depend on the premise that a misinterpretation of the requirements of the FDCPA would fall under that provision. Pp. 587–596.

(c) Today's decision does not place unmanageable burdens on debt collecting lawyers. The FDCPA contains several provisions expressly guarding against abusive lawsuits, and gives courts discretion in calculating additional damages and attorney's fees. Lawyers have recourse to the bona fide error defense in § 1692k(c) when a violation results from a qualifying factual error. To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is not unique; lawyers have a duty, for instance, to comply with the law and standards of professional conduct. Numerous state consumer protection and debt collection statutes contain bona fide error defenses that are either silent as to, or expressly exclude, legal errors. To the extent lawyers face liability for mistaken interpretations of the FDCPA, Carlisle and its *amici* have not shown that "the result [will be] so absurd as to warrant" disregarding the weight of textual authority. *Heintz*, 514 U. S., at 295. Absent such a showing, arguments that the FDCPA strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress. Pp. 596–605.

538 F. 3d 469, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, THOMAS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 605. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 606. KENNEDY, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 611.

Kevin K. Russell argued the cause for petitioner. With him on the briefs were *Amy Howe*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Stephen R. Felson*, and *Edward Icove*.

William M. Jay argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Stewart*, *Willard K. Tom*, *John F. Daly*, and *Lawrence DeMille-Wagman*.

George S. Coakley argued the cause for respondents. With him on the brief were *Clifford C. Masch*, *Brian D. Sullivan*, *Martin T. Galvin*, and *James O'Connor*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Fair Debt Collection Practices Act (FDCPA or Act) imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. Section 813(c) of the Act, 15 U. S. C. § 1692k(c), provides that a debt collector is not liable in an action brought under the Act if she can show "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." This case pre-

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Andrew M. Cuomo*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Benjamin N. Gutman*, Deputy Solicitor General, and *Cecelia C. Chang*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; and for Public Citizen, Inc., et al. by *Deepak Gupta*.

Briefs of *amici curiae* urging affirmance were filed for ACA International by *Michael A. Klutho* and *Charles E. Lundberg;* for the American Legal and Financial Network by *Andrew Morganstern;* for the California Association of Collectors by *Ronald A. Zumbrun* and *Mark E. Ellis;* for the Commercial Law League of America et al. by *Manuel H. Newburger* and *Barbara M. Barron;* for DRI–The Voice of the Defense Bar by *Linda T. Coberly* and *Gene C. Schaerr;* for the Mississippi Creditors' Attorneys Association by *Lester F. Smith;* for the National Association of Retail Collection Attorneys by *Seth P. Waxman*, *Daniel S. Volchok*, and *Noah A. Levine;* for the Ohio Creditor's Attorneys Association et al. by *Michael D. Slodov* and *Tomio B. Narita;* and for USFN–America's Mortgage Banking Attorneys by *Rick D. DeBlasis* and *Cynthia M. Fischer*.

sents the question whether the "bona fide error" defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. We conclude it does not.

I

A

Congress enacted the FDCPA in 1977, 91 Stat. 874, to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers. 15 U. S. C. § 1692(e). The Act regulates interactions between consumer debtors and "debt collector[s]," defined to include any person who "regularly collects . . . debts owed or due or asserted to be owed or due another." §§ 1692a(5), (6). Among other things, the Act prohibits debt collectors from making false representations as to a debt's character, amount, or legal status, § 1692e(2)(A); communicating with consumers at an "unusual time or place" likely to be inconvenient to the consumer, § 1692c(a)(1); or using obscene or profane language or violence or the threat thereof, §§ 1692d(1), (2). See generally §§ 1692b–1692j; *Heintz* v. *Jenkins*, 514 U. S. 291, 292–293 (1995).

The Act is enforced through administrative action and private lawsuits. With some exceptions not relevant here, violations of the FDCPA are deemed to be unfair or deceptive acts or practices under the Federal Trade Commission Act (FTC Act), 15 U. S. C. § 41 *et seq.*, and are enforced by the Federal Trade Commission (FTC). See § 1692*l*. As a result, a debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties of up to $16,000 per day. §§ 45(m)(1)(A), (C); 74 Fed. Reg. 858 (2009) (amending 16 CFR § 1.98(d)).

The FDCPA also provides that "any debt collector who fails to comply with any provision of th[e] [Act] with respect to any person is liable to such person." 15 U. S. C. § 1692k(a). Successful plaintiffs are entitled to "actual damage[s]," plus costs and "a reasonable attorney's fee as determined by the court." *Ibid.* A court may also award "additional damages," subject to a statutory cap of $1,000 for individual actions, or, for class actions, "the lesser of $500,000 or 1 per centum of the net worth of the debt collector." § 1692k(a)(2). In awarding additional damages, the court must consider "the frequency and persistence of [the debt collector's] noncompliance," "the nature of such noncompliance," and "the extent to which such noncompliance was intentional." § 1692k(b).

The Act contains two exceptions to provisions imposing liability on debt collectors. Section 1692k(c), at issue here, provides that

> "[a] debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

The Act also states that none of its provisions imposing liability shall apply to "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." § 1692k(e).

B

Respondents in this case are a law firm, Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A., and one of its attorneys, Adrienne S. Foster (collectively Carlisle). In April 2006, Carlisle filed a complaint in Ohio state court on behalf of a client, Countrywide Home Loans, Inc. Carlisle sought foreclosure of a mortgage held by Countrywide in real property owned by petitioner Karen L. Jerman. The complaint in-

cluded a "Notice," later served on Jerman, stating that the mortgage debt would be assumed to be valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt, and Carlisle sought verification from Countrywide. When Countrywide acknowledged that Jerman had, in fact, already paid the debt in full, Carlisle withdrew the foreclosure lawsuit.

Jerman then filed her own lawsuit seeking class certification and damages under the FDCPA, contending that Carlisle violated § 1692g by stating that her debt would be assumed valid unless she disputed it in writing.[1] While acknowledging a division of authority on the question, the District Court held that Carlisle had violated § 1692g by requiring Jerman to dispute the debt in writing. 464 F. Supp. 2d 720, 722–725 (ND Ohio 2006).[2] The court ultimately granted summary judgment to Carlisle, however, concluding that § 1692k(c) shielded it from liability because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error. 502 F. Supp. 2d 686, 695–697 (2007). The Court of Appeals for the Sixth Circuit affirmed. 538 F. 3d 469 (2008). Acknowledging that the

[1] Section 1692g(a)(3) requires a debt collector, within five days of an "initial communication" about the collection of a debt, to send the consumer a written notice containing, *inter alia*, "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."

[2] The District Court distinguished, for instance, *Graziano* v. *Harrison*, 950 F. 2d 107, 112 (CA3 1991), which held a consumer's dispute of a debt under § 1692g must be in writing to be effective. Noting that district courts within the Sixth Circuit had reached different results, and distinguishing one unpublished Sixth Circuit decision which Carlisle suggested approved a form with an in-writing requirement, the court adopted the reasoning from *Camacho* v. *Bridgeport Financial, Inc.*, 430 F. 3d 1078, 1080–1082 (CA9 2005), and held that the plain language of § 1692g does not impose an "in writing" requirement on consumers. See 464 F. Supp. 2d, at 725.

Courts of Appeals are divided regarding the scope of the bona fide error defense, and that the "majority view is that the defense is available for clerical and factual errors only," the Sixth Circuit nonetheless held that § 1692k(c) extends to "mistakes of law." *Id.*, at 473–476 (internal quotation marks omitted). The Court of Appeals found "nothing unusual" about attorney debt collectors maintaining "procedures" within the meaning of § 1692k(c) to avoid mistakes of law. *Id.*, at 476. Noting that a parallel bona fide error defense in the Truth in Lending Act (TILA), 15 U. S. C. § 1640(c), expressly excludes legal errors, the court observed that Congress has amended the FDCPA several times since 1977 without excluding mistakes of law from § 1692k(c). 538 F. 3d, at 476.[3]

We granted certiorari to resolve the conflict of authority as to the scope of the FDCPA's bona fide error defense,[4] 557

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[3] Because the question was not raised on appeal, the Court of Appeals did not address whether Carlisle's inclusion of the "in writing" requirement violated § 1692g. 538 F. 3d, at 472, n. 2. We likewise express no view about whether inclusion of an "in writing" requirement in a notice to a consumer violates § 1692g, as that question was not presented in the petition for certiorari. Compare *Graziano*, 950 F. 2d, at 112 (reading § 1692g(a)(3) to require that "any dispute, to be effective, must be in writing"), with *Camacho*, 430 F. 3d, at 1082 (under § 1692g(a)(3), "disputes need not be made in writing").

[4] Compare, *e. g.*, 538 F. 3d, at 476 (case below), with *Baker* v. *G. C. Servs. Corp.*, 677 F. 2d 775, 779 (CA9 1982), and *Hulshizer* v. *Global Credit Servs., Inc.*, 728 F. 2d 1037, 1038 (CA8 1984) *(per curiam)*.

The Courts of Appeals have also expressed different views about whether 15 U. S. C. § 1692k(c) applies to violations of the FDCPA resulting from a misinterpretation of the requirements of state law. Compare *Johnson* v. *Riddle*, 305 F. 3d 1107, 1121 (CA10 2002) (concluding that § 1692k(c) applies where a debt collector's misinterpretation of a Utah dishonored check statute resulted in a violation of § 1692f(1), which prohibits collection of any amount not "permitted by law"), with *Picht* v. *Jon R. Hawks, Ltd.*, 236 F. 3d 446, 451–452 (CA8 2001) (stating that § 1692k(c) does not preclude FDCPA liability resulting from a creditor's mistaken legal interpretation of a Minnesota garnishment statute). The parties disagree about whether § 1692k(c) applies when a violation results from a

U. S. 933 (2009), and now reverse the judgment of the Sixth Circuit.

II

A

The parties disagree about whether a "violation" resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA can ever be "not intentional" under § 1692k(c). Jerman contends that when a debt collector intentionally commits the act giving rise to the violation (here, sending a notice that included the "in writing" language), a misunderstanding about what the Act requires cannot render the violation "not intentional," given the general rule that mistake or ignorance of law is no defense. Carlisle and the dissent, in contrast, argue that nothing in the statutory text excludes legal errors from the category of "bona fide error[s]" covered by § 1692k(c) and note that the Act refers not to an unintentional "act" but rather an unintentional "violation." The latter term, they contend, evinces Congress' intent to impose liability only when a party knows its conduct is unlawful. Carlisle urges us, therefore, to read § 1692k(c) to encompass "all types of error," including mistakes of law. Brief for Respondents 7.

We decline to adopt the expansive reading of § 1692k(c) that Carlisle proposes. We have long recognized the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow* v. *United States*, 7 Pet. 404, 411 (1833) (opinion for the Court by Story, J.); see also *Cheek* v. *United States*, 498 U. S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution

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debt collector's misinterpretation of the legal requirements of state law or federal law other than the FDCPA. Compare Brief for Petitioner 47–49 with Brief for Respondents 60–62. Because this case involves only an alleged misinterpretation of the requirements of the FDCPA, we need not, and do not, reach those other questions.

is deeply rooted in the American legal system").[5] Our law is therefore no stranger to the possibility that an act may be "intentional" for purposes of civil liability, even if the actor

[5] The dissent discounts the relevance of the principle here, on grounds that this case involves the scope of a statutory exception to liability, rather than a provision "delineat[ing] a category of prohibited conduct." *Post*, at 625 (opinion of KENNEDY, J.). That is a distinction without a difference, as our precedents have made clear for more than 175 years. *Barlow* involved a statute providing for forfeiture of any goods entered "by a false denomination" in the office of a customs collector "for the benefit of drawback or bounty upon the exportation"; the statute included, however, an exception under which "said forfeiture shall not be incurred, if it shall be made appear . . . that such false denomination . . . happened by mistake or accident, and not from any intention to defraud the revenue." 7 Pet., at 406; see also Act of Mar. 2, 1799, § 84, 1 Stat. 694. The Court concluded that the shipment at issue, entered as "refined sugars," was mislabeled under the prevailing meaning of that term and thus was subject to forfeiture "unless the [petitioner] c[ould] bring himself within the exceptio[n]." 7 Pet., at 409–410. As there had been no "accident" or "mistake" of fact, the "only mistake, if there ha[d] been any, [wa]s a mistake of law." *Id.*, at 410–411. The Court observed that the shipper's conduct, even if "entirely compatible with good faith, [wa]s not wholly free from the suspicion of an intention to overreach . . . by passing off, as refined sugars, what he well knew were not admitted to be such." *Id.*, at 411. But the Court declined to resolve the case on the ground of the shipper's intent, instead invoking the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Ibid.* Notwithstanding the existence of a statutory exception—which did not expressly exclude legal errors from the category of "mistake[s]" made without "intention to defraud"—the Court saw "not the least reason to suppose that the legislature, in this enactment, had any intention to supersede the common principle." *Ibid.*

The dissent implies *Barlow* is too old to be relevant. *Post*, at 626. But at least in the context of *stare decisis*, this Court has suggested precedents tend to gain, not lose, respect with age. See *Montejo* v. *Louisiana*, 556 U. S. 778, 792–793 (2009). In any event, Justice Story's opinion for a unanimous Court in *Barlow* is hardly a relic. As recently as 1994 this Court cited it for the "venerable principle" that ignorance of the law generally is no defense. *Ratzlaf* v. *United States*, 510 U. S. 135, 149; see also *Cheek* v. *United States*, 498 U. S. 192, 199 (1991) (citing *Barlow* for a similar proposition).

lacked actual knowledge that her conduct violated the law. In *Kolstad* v. *American Dental Assn.*, 527 U. S. 526 (1999), for instance, we addressed a provision of the Civil Rights Act of 1991 authorizing compensatory and punitive damages for "intentional discrimination," 42 U. S. C. § 1981a, but limiting punitive damages to conduct undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," § 1981a(b)(1). We observed that in some circumstances "intentional discrimination" could occur without giving rise to punitive damages liability, such as where an employer is "unaware of the relevant federal prohibition" or acts with the "distinct belief that its discrimination is lawful." 527 U. S., at 536–537. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 110 (5th ed. 1984) ("[I]f one intentionally interferes with the interests of others, he is often subject to liability notwithstanding the invasion was made under an erroneous belief as to some . . . legal matter that would have justified the conduct"); Restatement (Second) of Torts § 164, and Comment *e* (1963–1964) (intentional tort of trespass can be committed despite the actor's mistaken belief that she has a legal right to enter the property).[6]

Likely for this reason, when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here. In particular, the FTC Act's administrative-penalty provisions—which, as noted above, Congress expressly incorporated into the FDCPA—

[6] Different considerations apply, of course, in interpreting criminal statutes. *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57–58, n. 9 (2007). But even in that context, we have not consistently required knowledge that the offending conduct is unlawful. See, *e. g.*, *Ellis* v. *United States*, 206 U. S. 246, 255, 257 (1907) (observing, in the context of a statute imposing liability for "intentiona[l] violat[ions]," that "[i]f a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent").

apply only when a debt collector acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that its action was "prohibited by [the FDCPA]." 15 U. S. C. §§ 45(m)(1)(A), (C). Given the absence of similar language in § 1692k(c), it is a fair inference that Congress chose to permit injured consumers to recover actual damages, costs, fees, and modest statutory damages for "intentional" conduct, including violations resulting from mistaken interpretation of the FDCPA, while reserving the more onerous penalties of the FTC Act for debt collectors whose intentional actions also reflected "knowledge fairly implied on the basis of objective circumstances" that the conduct was prohibited. Cf. 29 U. S. C. § 260 (authorizing courts to reduce liquidated damages under the Portal-to-Portal Act of 1947 if an employer demonstrates that "the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938"); 17 U. S. C. § 1203(c)(5)(A) (provision of Digital Millennium Copyright Act authorizing court to reduce damages where "the violator was not aware and had no reason to believe that its acts constituted a violation").

Congress also did not confine liability under the FDCPA to "willful" violations, a term more often understood in the civil context to excuse mistakes of law. See, *e. g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 125–126 (1985) (civil damages for "willful violations" of Age Discrimination in Employment Act of 1967 require a showing that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited" (internal quotation marks omitted)); cf. *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007) (although "'willfully'" is a "'word of many meanings'" dependent on context, "we have generally taken it [when used as a statutory condition of civil liability] to cover not only knowing violations of a standard, but reckless ones as well" (quoting *Bryan* v. *United States*,

524 U. S. 184, 191 (1998))). For this reason, the dissent missteps in relying on *Thurston* and *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 133 (1988), as both cases involved the statutory phrase "willful violation." *Post*, at 613–614.

The dissent reaches a contrary conclusion based on the interaction of the words "violation" and "not intentional" in § 1692k(c). *Post*, at 613. But even in the criminal context, cf. n. 6, *supra*, reference to a "knowing" or "intentional" "violation" or cognate terms has not necessarily implied a defense for legal errors. See *Bryan*, 524 U. S., at 192 ("'[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law'" (quoting *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 345 (1952) (Jackson, J., dissenting))); *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 559, 563 (1971) (statute imposing criminal liability on those who "'knowingly violat[e]'" regulations governing transportation of corrosive chemicals does not require "proof of [the defendant's] knowledge of the law"); *Ellis* v. *United States*, 206 U. S. 246, 255, 257 (1907) (rejecting argument that criminal penalty applicable to those who "intentionally violate" a statute "requires knowledge of the law").

The dissent advances a novel interpretative rule under which the combination of a "*mens rea* requirement" and the word "'violation'" (as opposed to language specifying "the conduct giving rise to the violation") creates a mistake-of-law defense. *Post*, at 613. Such a rule would be remarkable in its breadth, applicable to the many scores of civil and criminal provisions throughout the U. S. Code that employ such a combination of terms. The dissent's theory draws no distinction between "knowing," "intentional," or "willful" and would abandon the care we have traditionally taken to construe such words in their particular statutory context. See, *e. g.*, *Safeco*, 551 U. S., at 57. More fundamentally, the dissent's categorical rule is at odds with precedents such as *Bryan*, 524 U. S., at 192, and *International Minerals*, 402

U. S., at 559, 563, in which we rejected a mistake-of-law defense when a statute imposed liability for a "knowing violation" or on those who "knowingly violat[e]" the law.[7]

The dissent posits that the word "intentional," in the civil context, requires a higher showing of *mens rea* than "willful" and thus that it should be easier to avoid liability for intentional, rather than willful, violations. *Post*, at 615. Even if the dissent is correct that the phrase "intentional violation," standing alone in a civil liability statute, might be read to excuse mistakes of law, the FDCPA juxtaposes the term "not intentional" "violation" in § 1692k(c) with the more specific language of § 45(m)(1)(A), which refers to "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that particular conduct was unlawful. The dissent's reading gives short shrift to that textual distinction.

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[7] Indeed, in *International Minerals*, the Court faced, and evidently rejected, the distinction the dissent would draw today between the term "'violation'" and a reference to "the conduct giving rise to the violation." *Post*, at 613. As noted, in *International Minerals*, the Court rejected a mistake-of-law defense for a statute that applied to those who "knowingly violat[e]" certain regulations. 402 U. S., at 559, 563. In so doing, however, we expressly acknowledged the contrary view adopted by one lower court opinion that knowledge of the regulations was necessary. *Id.*, at 562 (citing *St. Johnsbury Trucking Co.* v. *United States*, 220 F. 2d 393, 397 (CA1 1955) (Magruder, C. J., concurring)). The dissenting opinion in *International Minerals* quoted extensively portions of the *St. Johnsbury* concurrence that reached its result by contrasting a statute making it an offense "'"knowingly" to sell adulterated milk'" with one that makes it an offense "'knowingly [to] violat[e] a regulation.'" 402 U. S., at 566 (opinion of Stewart, J.) (quoting 220 F. 2d, at 398).

Liparota v. *United States*, 471 U. S. 419 (1985), is also inapposite. Cf. *post*, at 614 (KENNEDY, J., dissenting). Concluding that a mistake-of-law defense is available under a provision that specifies particular conduct undertaken while "'knowing'" that food stamp coupons had been "'used in any manner in violation of [law],'" 471 U. S., at 428, n. 12, says little about the meaning of a "not intentional" "violation" in 15 U. S. C. § 1692k(c). Indeed, the statute in *Liparota* bears a closer resemblance to the administrative-penalty provision in § 45(m)(1)(A). See *supra*, at 583–584.

We draw additional support for the conclusion that bona fide errors in § 1692k(c) do not include mistaken interpretations of the FDCPA, from the requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error." The dictionary defines "procedure" as "a series of steps followed in a regular orderly definite way." Webster's Third New International Dictionary 1807 (1976). In that light, the statutory phrase is more naturally read to apply to processes that have mechanical or other such "regular orderly" steps to avoid mistakes—for instance, the kind of internal controls a debt collector might adopt to ensure its employees do not communicate with consumers at the wrong time of day, § 1692c(a)(1), or make false representations as to the amount of a debt, § 1692e(2). The dissent, like the Court of Appeals, finds nothing unusual in attorney debt collectors' maintaining procedures to avoid legal error. *Post,* at 628; 538 F. 3d, at 476. We do not dispute that some entities may maintain procedures to avoid legal errors. But legal reasoning is not a mechanical or strictly linear process. For this reason, we find force in the suggestion by the Government (as *amicus curiae* supporting Jerman) that the broad statutory requirement of procedures reasonably designed to avoid "any" bona fide error indicates that the relevant procedures are ones that help to avoid errors like clerical or factual mistakes. Such procedures are more likely to avoid error than those applicable to legal reasoning, particularly in the context of a comprehensive and complex federal statute such as the FDCPA that imposes open-ended prohibitions on, *inter alia,* "false, deceptive," § 1692e, or "unfair" practices, § 1692f. See Brief for United States as *Amicus Curiae* 16–18.

Even if the text of § 1692k(c), read in isolation, leaves room for doubt, the context and history of the FDCPA provide further reinforcement for construing that provision not to shield violations resulting from misinterpretations of the requirements of the Act. See *Dada* v. *Mukasey,* 554 U. S. 1, 16 (2008) ("In reading a statute we must not look merely to

a particular clause, but consider in connection with it the whole statute" (internal quotation marks omitted)). As described above, Congress included in the FDCPA not only the bona fide error defense but also a separate protection from liability for "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." § 1692k(e). In our view, the Court of Appeals' reading is at odds with the role Congress evidently contemplated for the FTC in resolving ambiguities in the Act. Debt collectors would rarely need to consult the FTC if § 1692k(c) were read to offer immunity for good-faith reliance on advice from private counsel. Indeed, debt collectors might have an affirmative incentive not to seek an advisory opinion to resolve ambiguity in the law, as receipt of such advice would prevent them from claiming good-faith immunity for violations and would potentially trigger civil penalties for knowing violations under the FTC Act.[8] More importantly, the existence of a separate provision that, by its plain terms, is more obviously tailored to the concern at issue (excusing civil liability when the Act's prohibitions are uncertain) weighs against stretching the language of the bona fide error defense to accommodate Carlisle's expansive reading.[9]

Any remaining doubt about the proper interpretation of § 1692k(c) is dispelled by evidence of the meaning attached

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[8] One of Carlisle's *amici* suggests the FTC safe harbor would provide a more categorical immunity than § 1692k(c), obviating the need, *e. g.*, to maintain "procedures reasonably adapted to avoid any such error." Brief for National Association of Retail Collection Attorneys as *Amicus Curiae* 18–19 (NARCA Brief). Even if that is true, we need not conclude that the FTC safe harbor would be rendered entirely superfluous to reason that the existence of that provision counsels against extending the bona fide error defense to serve an overlapping function.

[9] Carlisle raises concerns about whether, in light of contemporary administrative practice, the FTC safe harbor is a realistic way for debt collectors and their lawyers to seek guidance on the numerous time-sensitive legal issues that arise in litigation. These practical concerns, to which we return below, do not change our understanding of the statutory text itself or the likely intent of the enacting Congress.

to the language Congress copied into the FDCPA's bona fide error defense from a parallel provision in an existing statute. TILA, 82 Stat. 146, was the first of several statutes collectively known as the Consumer Credit Protection Act (CCPA) that now include the FDCPA. As enacted in 1968, § 130(c) of TILA provided an affirmative defense that was in pertinent part identical to the provision Congress later enacted into the FDCPA: "A creditor may not be held liable in any action brought under [TILA] if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 82 Stat. 157 (codified at 15 U. S. C. § 1640(c)).

During the 9-year period between the enactment of TILA and passage of the FDCPA, the three Federal Courts of Appeals to consider the question interpreted TILA's bona fide error defense as referring to clerical errors; no such court interpreted TILA to extend to violations resulting from a mistaken legal interpretation of that Act.[10] We have often

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[10] See *Ives* v. *W. T. Grant Co.*, 522 F. 2d 749, 757–758 (CA2 1975) (concluding that the bona fide error defense in § 1640(c) was unavailable despite creditor's reliance, in selecting language for credit contract forms, on a pamphlet issued by the Federal Reserve Board); *Haynes* v. *Logan Furniture Mart, Inc.*, 503 F. 2d 1161, 1167 (CA7 1974) ("[Section] 1640(c) offers no shelter from liability for the defendant, whose error . . . was judgmental with respect to legal requirements of the Act and not clerical in nature"); *Palmer* v. *Wilson*, 502 F. 2d 860, 861 (CA9 1974) (similar).

Carlisle contends the meaning of TILA's defense was unsettled at the time of the FDCPA's enactment, relying first on several District Court opinions extending the defense to good-faith legal errors. See, *e. g.*, *Welmaker* v. *W. T. Grant Co.*, 365 F. Supp. 531, 544 (ND Ga. 1972). But even assuming Congress would have looked to district court, rather than court of appeals, opinions in discerning the meaning of the statutory language, applicable Circuit precedent had cast some doubt on those decisions by the time the FDCPA was enacted. See, *e. g.*, *Turner* v. *Firestone Tire & Rubber Co.*, 537 F. 2d 1296, 1298 (CA5 1976) *(per curiam)* (referring to § 1640(c) as the "so-called clerical error defense"). Carlisle also relies on the holding in *Thrift Funds of Baton Rouge, Inc.* v. *Jones*, 274 So. 2d 150 (La. 1973). But in that case, the Louisiana Supreme Court concluded only that

observed that when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998); see also *Rowe* v. *New Hampshire Motor Transp. Assn.*, 552 U. S. 364, 370 (2008). While the interpretations of three Federal Courts of Appeals may not have "settled" the meaning of TILA's bona fide error defense, there is no reason to suppose that Congress disagreed with those interpretations when it enacted the FDCPA. Congress copied verbatim the pertinent portions of TILA's bona fide error defense into the FDCPA. Compare 15 U. S. C. § 1640(c) (1976 ed.) with § 813(c), 91 Stat. 881. This close textual correspondence supports an inference that Congress understood the statutory formula it chose for the FDCPA consistent with Federal Court of Appeals interpretations of TILA.[11]

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a lender's mistaken interpretation of *state* usury law did not "amoun[t] to an intentional violation of [TILA's] disclosure requirements." *Id.*, at 161. The Louisiana court had no occasion to address the question analogous to the one we consider today: whether TILA's bona fide error defense extended to violations resulting from mistaken interpretation of TILA itself. See n. 4, *supra;* see also *Starks* v. *Orleans Motors, Inc.*, 372 F. Supp. 928, 931 (ED La.) (distinguishing *Thrift Funds* on this basis), aff'd, 500 F. 2d 1182 (CA5 1974). These precedents therefore do not convince us that Congress would have ascribed a different meaning to the statutory language it chose for the FDCPA. Compare *post*, at 607 (SCALIA, J., concurring in part and concurring in judgment), with *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 384–386, and n. 21 (1983) (concluding that Congress had "ratified" the "well-established judicial interpretation" of a statute by leaving it intact during a comprehensive revision, notwithstanding "[t]wo early District Court decisions," not subsequently followed, that had adopted a contrary view).

[11] That only three Courts of Appeals had occasion to address the question by the time the FDCPA was enacted does not render such an inference unreasonable. Contra, *post*, at 607 (opinion of SCALIA, J.). Whether or not we would take that view when such an inference serves as a court's

Carlisle and the dissent urge reliance, consistent with the approach taken by the Court of Appeals, on a 1980 amendment to TILA that added the following sentence to that statute's bona fide error defense: "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and program[m]ing, and printing errors, except that an error of legal judgment with respect to a person's obligations under [TILA] is not a bona fide error." See Truth in Lending Simplification and Reform Act, § 615, 94 Stat. 181. The absence of a corresponding amendment to the FDCPA, Carlisle reasons, is evidence of Congress' intent to give a more expansive scope to the FDCPA defense. For several reasons, we decline to give the 1980 TILA amendment such interpretative weight. For one, it is not obvious that the amendment changed the scope of TILA's bona fide error defense in a way material to our analysis, given the uniform interpretations of three Courts of Appeals holding that the TILA defense does not extend to mistakes of law.[12]

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sole interpretative guide, here our conclusion also relies on common principles of statutory interpretation, as well as the statute's text and structure. Moreover, the inference is supported by the fact that TILA and the FDCPA were enacted as complementary titles of the CCPA, a comprehensive consumer protection statute. While not necessary to our conclusion, evidence from the legislative record demonstrates that some Members of Congress understood the relationship between the FDCPA and existing provisions of the CCPA. See, *e. g.*, 123 Cong. Rec. 10242 (1977) (remarks of Rep. Annunzio) (civil penalty provisions in House version of bill were "consistent with those in the [CCPA]"); Fair Debt Collection Practices Act: Hearings on S. 656 et al. before the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess., 51, 707 (1977) (statement of Rep. Wylie) (describing "[c]ivil liability provisions" in the House bill as "the standard provisions that attach to all the titles of the [CCPA]").

[12] Although again not necessary to our conclusion, evidence from the legislative record suggests some Members of Congress understood the amendment to "clarif[y]" the meaning of TILA's bona fide error defense "to make clear that it applies to mechanical and computer errors, provided

(Contrary to the dissent's suggestion, *post*, at 631, this reading does not render the 1980 amendment surplusage. Congress may simply have intended to codify existing judicial interpretations to remove any potential for doubt in jurisdictions where courts had not yet addressed the issue.) It is also unclear why Congress would have intended the FDCPA's defense to be broader than the one in TILA, which presents at least as significant a set of concerns about imposing liability for uncertain legal obligations. See, *e. g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980) (TILA is "'highly technical'").

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they are not the result of erroneous legal judgments as to the act's requirements." S. Rep. No. 96–73, pp. 7–8 (1979); see also Lockhart, 153 A. L. R. Fed. 211–212, § 2[a] (1999) (amendment "was intended merely to clarify what was then the prevailing view, that the bona fide error defense applies to clerical errors, not including errors of legal judgment" (relying on S. Rep. No. 96–368, p. 32 (1979))).

The concurring and dissenting opinions perceive an inconsistency between these references to clerical errors, as well as similar references in the pre-FDCPA precedents interpreting TILA, n. 10, *supra*, and reading the FDCPA's bona fide error defense to include factual mistakes. *Post*, at 608–609, and n. 2 (opinion of SCALIA, J.); *post*, at 630 (opinion of KENNEDY, J.). The quoted legislative history sources, however, while stating expressly that the TILA defense excludes *legal* errors, do not discuss a distinction between clerical and factual errors. Similarly, the cited cases interpreting TILA do not address a distinction between factual and clerical errors; rather, the courts were presented with claims that the defense applied to mistakes of law or other nonfactual errors that the courts found not to be bona fide. See *Ives*, 522 F. 2d, at 756–757; *Haynes*, 503 F. 2d, at 1166–1167; *Palmer*, 502 F. 2d, at 861. While factual mistakes might, in some circumstances, constitute bona fide errors and give rise to violations that are "not intentional" within the meaning of § 1692k(c), we need not and do not decide today the precise distinction between clerical and factual errors, or what kinds of factual mistakes qualify under the FDCPA's bona fide error defense. Cf. generally R. Hobbs et al., National Consumer Law Center, Fair Debt Collection § 7.2 (6th ed. 2008 and Supp. 2009) (surveying case law on scope of § 1692k(c)).

by the fact that Congress has not expressly *included* mistakes of law in any of the numerous bona fide error defenses, worded in pertinent part identically to § 1692k(c), elsewhere in the U. S. Code. Compare, *e. g.*, 12 U. S. C. § 4010(c)(2) (bona fide error defense in Expedited Funds Availability Act expressly excluding "an error of legal judgment with respect to [obligations under that Act]") with 15 U. S. C. §§ 1693m(c), 1693h(c) (bona fide error provisions in the Electronic Fund Transfer Act that are silent as to errors of legal judgment).[13] Although Carlisle points out that Congress has amended the FDCPA on several occasions without expressly restricting the scope of § 1692k(c), that does not suggest Congress viewed the statute as having the expansive reading Carlisle advances, particularly as not until recently had a Court of Appeals interpreted the bona fide error defense to include a violation of the FDCPA resulting from a mistake of law. See *Johnson* v. *Riddle*, 305 F. 3d 1107, 1121–1124, and nn. 14–15 (CA10 2002).

Carlisle's reliance on *Heintz*, 514 U. S. 291, is also unavailing. We held in that case that the FDCPA's definition of "debt collector" includes lawyers who regularly, through litigation, attempt to collect consumer debts. *Id.*, at 292. We

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[13] The Government observes that several federal agencies have construed similar bona fide error defenses in statutes they administer to exclude errors of law. See Brief for United States as *Amicus Curiae* 28–30. The Secretary of Housing and Urban Development, for instance, has promulgated regulations specifying that the bona fide error defense in the Real Estate Settlement Procedures Act of 1974, 12 U. S. C. § 2607(d)(3), does not apply to "[a]n error of legal judgment," 24 CFR § 3500.15(b)(1)(ii) (2009). While administrative interpretations of other statutes do not control our reading of the FDCPA, we find it telling that no agency has adopted the view of the Court of Appeals. Of course, nothing in our opinion today addresses the validity of such regulations or the authority of agencies interpreting bona fide error provisions in other statutes to adopt a different reading. See *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982–983 (2005).

addressed a concern raised by the petitioner (as here, a lawyer collecting a debt on behalf of a client) that our reading would automatically render liable "any litigating lawyer who brought, and then lost, a claim against a debtor," on the ground that § 1692e(5) prohibits a debt collector from making any "'threat to take action that cannot legally be taken.'" *Id.*, at 295. We expressed skepticism that § 1692e(5) itself demanded such a result. But even assuming the correctness of petitioner's reading of § 1692e(5), we suggested that the availability of the bona fide error defense meant that the prospect of liability for litigating lawyers was not "so absurd" as to warrant implying a categorical exemption unsupported by the statutory text. *Ibid.* We had no occasion in *Heintz* to address the overall scope of the bona fide error defense. Our discussion of § 1692e(5) did not depend on the premise that a misinterpretation of the requirements of the Act would fall under the bona fide error defense. In the mine-run lawsuit, a lawyer is at least as likely to be unsuccessful because of factual deficiencies as opposed to legal error. Lawyers can, of course, invoke § 1692k(c) for violations resulting from qualifying factual errors.

Carlisle's remaining arguments do not change our view of § 1692k(c). Carlisle perceives an inconsistency between our reading of the term "intentional" in that provision and the instruction in § 1692k(b) that a court look to whether "noncompliance was intentional" in assessing statutory additional damages. But assuming § 1692k(b) encompasses errors of law, we see no conflict, only congruence, in reading the Act to permit a court to adjust statutory damages for a good-faith misinterpretation of law, even where a debt collector is not entitled to the categorical protection of the bona fide error defense. Carlisle is also concerned that under our reading, § 1692k(c) would be unavailable to a debt collector who violates a provision of the FDCPA applying to acts taken with particular intent because in such instances the relevant act

would not be unintentional. See, *e. g.*, § 1692d(5) (prohibiting a debt collector from "[c]ausing a telephone to ring . . . continuously with intent to annoy, abuse, or harass"). Including mistakes as to the scope of such a prohibition, Carlisle urges, would ensure that § 1692k(c) applied throughout the FDCPA. We see no reason, however, why the bona fide error defense must cover every provision of the Act.

The parties and *amici* make arguments concerning the legislative history that we address for the sake of completeness. Carlisle points to a sentence in a Senate Committee Report stating that "[a] debt collector has no liability . . . if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. Rep. No. 95–382, p. 5 (1977); see also *post*, at 609–611 (opinion of SCALIA, J.) (discussing report). But by its own terms, the quoted sentence does not unambiguously support Carlisle's reading. Even if a bona fide mistake "with regard to the act's coverage" could be read in isolation to contemplate a mistake of law, that reading does not exclude mistakes of fact. A mistake "with regard to the act's coverage" may derive wholly from a debt collector's factually mistaken belief, for example, that a particular debt arose out of a nonconsumer transaction and was therefore not "covered" by the Act. There is no reason to read this passing statement in the Senate Report as contemplating an exemption for legal error that is the product of an attorney's erroneous interpretation of the FDCPA—particularly when attorneys were excluded from the Act's definition of "debt collector" until 1986. 100 Stat. 768. Moreover, the reference to "any manner" of violation is expressly qualified by the requirements that the violation be "unintentional" and occur despite maintenance of appropriate procedures. In any event, we need not choose between these possible readings of the Senate Report, as the legislative record taken as a whole does not lend

strong support to Carlisle's view.[14] We therefore decline to give controlling weight to this isolated passage.

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Carlisle, its *amici*, and the dissent raise the additional concern that our reading will have unworkable practical consequences for debt collecting lawyers. See, *e. g.*, Brief for Respondents 40–41, 45–48; NARCA Brief 4–16; *post*, at 615–624. Carlisle claims the FDCPA's private enforcement provisions have fostered a " 'cottage industry' " of professional plaintiffs

[14] For instance, an amendment was proposed and rejected during the Senate Banking Committee's consideration of the FDCPA that would have required proof that a debt collector's violation was "knowin[g]." Senator Riegle, one of the Act's primary sponsors, opposed the change, explaining that the bill reflected the view that "certain things ought not to happen, period. . . . [W]hether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." See Senate Committee on Banking, Housing and Urban Affairs, Markup Session: S. 1130—Debt Collection Legislation 60 (July 26, 1977) (hereinafter Markup); see also *ibid.* ("We have left a way for these disputes to be adj[u]dicated if they are brought, where somebody can say, I didn't know that, or my computer malfunctioned, something happened, I didn't intend for the effect to be as it was"). To similar effect, a House Report on an earlier version of the bill explained the need for new legislation governing use of the mails for debt collection on grounds that existing statutes "frequently require[d]" a showing of "specific intent[,] which is difficult to prove." H. R. Rep. No. 95–131, p. 3 (1977). Elsewhere, to be sure, the legislative record contains statements more supportive of Carlisle's interpretation. In particular, a concern was raised in the July 26 markup session that the TILA bona fide error defense had been interpreted "as only protecting against a mathematical error," and that the FDCPA defense should "go beyond" TILA to "allow the courts discretion to dismiss a violation where it was a technical error." Markup 20. In response, a staffer explained that the FDCPA defense would "apply to any violation of the act which was unintentional," and answered affirmatively when the chairman asked: "So it's not simply a mathematical error but any bona fide error without intent?" *Id.*, at 21. Whatever the precise balance of these statements may be, we can conclude that this equivocal evidence from legislative history does not displace the clear textual and contextual authority discussed above.

who sue debt collectors for trivial violations of the Act. See Brief for Respondents 40–41. If debt collecting attorneys can be held personally liable for their reasonable misinterpretations of the requirements of the Act, Carlisle and its *amici* foresee a flood of lawsuits against creditors' lawyers by plaintiffs (and their attorneys) seeking damages and attorney's fees. The threat of such liability, in the dissent's view, creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client: An attorney uncertain about what the FDCPA requires must choose between, on the one hand, exposing herself to liability and, on the other, resolving the legal ambiguity against her client's interest or advising the client to settle—even where there is substantial legal authority for a position favoring the client. *Post*, at 621–624.[15]

We do not believe our holding today portends such grave consequences. For one, the FDCPA contains several provisions that expressly guard against abusive lawsuits, thereby mitigating the financial risk to creditors' attorneys. When an alleged violation is trivial, the "actual damage[s]" sustained, § 1692k(a)(1), will likely be *de minimis* or even zero.

[15] The dissent also cites several other consumer protection statutes, such as TILA and the Fair Credit Reporting Act, 15 U. S. C. § 1681 *et seq.*, which in its view create "incentives to file lawsuits even where no actual harm has occurred" and are illustrative of what the dissent perceives to be a "troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation." *Post*, at 616–617. The dissent's concern is primarily with Congress' policy choice, embodied in statutory text, to authorize private rights of action and recovery of attorney's fees, costs, and in some cases, both actual and statutory damages. As noted, in one of the statutes the dissent cites, Congress explicitly barred reliance on a mistake-of-law defense notwithstanding the "highly technical" nature of the scheme. See 15 U. S. C. § 1640(c) (TILA); *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980). Similarly, the plain text of the FDCPA authorizes a private plaintiff to recover not only "actual damage[s]" for harm suffered but also "such additional damages as the court may allow," § 1692k(a).

The Act sets a cap on "additional" damages, § 1692k(a)(2), and vests courts with discretion to adjust such damages where a violation is based on a good-faith error, § 1692k(b). One *amicus* suggests that attorney's fees may shape financial incentives even where actual and statutory damages are modest. NARCA Brief 11. The statute does contemplate an award of costs and "a reasonable attorney's fee as determined by the court" in the case of "any successful action to enforce the foregoing liability." § 1692k(a)(3). But courts have discretion in calculating reasonable attorney's fees under this statute,[16] and § 1692k(a)(3) authorizes courts to

[16] The Courts of Appeals generally review a District Court's calculation of an attorney's fee award under § 1692k for abuse of discretion. See, *e. g.*, *Carroll* v. *Wolpoff & Abramson*, 53 F. 3d 626, 628–629 (CA4 1995); *Emanuel* v. *American Credit Exch.*, 870 F. 2d 805, 809 (CA2 1989). Many District Courts apply a lodestar method, permitting downward adjustments in appropriate circumstances. See, *e. g.*, *Schlacher* v. *Law Offices of Phillip J. Rotche & Assoc., P. C.*, 574 F. 3d 852 (CA7 2009) (relying on *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983)); *Ferland* v. *Conrad Credit Corp.*, 244 F. 3d 1145, 1148–1151, and n. 4 (CA9 2001) *(per curiam);* see generally Hobbs, Fair Debt Collection § 6.8.6. In *Schlacher*, for instance, the court affirmed a downward adjustment for the "unnecessary use of multiple attorneys . . . in a straightforward, short-lived [FDCPA] case." 574 F. 3d, at 854–855. In *Carroll*, the court found no abuse of discretion in a District Court's award of a $500 attorney's fee, rather than the lodestar amount, where the lawsuit had recovered only $50 in damages for "at most a technical violation" of the FDCPA. 53 F. 3d, at 629–631.

Lower courts have taken different views about when, and whether, § 1692k requires an award of attorney's fees. Compare *Tolentino* v. *Friedman*, 46 F. 3d 645 (CA7 1995) (award of fees to a successful plaintiff "mandatory"), and *Emanuel*, 870 F. 2d, at 808–809 (same, even where the plaintiff suffered no actual damages), with *Graziano*, 950 F. 2d, at 114, and n. 13 (attorney's fees may be denied for plaintiff's "bad faith conduct"), and *Johnson* v. *Eaton*, 80 F. 3d 148, 150–152 (CA5 1996) ("attorney's fees . . . are only available [under § 1692k] where the plaintiff has succeeded in establishing that the defendant is liable for actual and/or additional damages"; this reading "will deter suits brought only as a means of generating attorney's fees"). We need not resolve these issues today to express doubt that our reading of § 1692k(c) will impose unmanageable burdens on debt collecting lawyers.

award attorney's fees to the defendant if a plaintiff's suit "was brought in bad faith and for the purpose of harassment."

Lawyers also have recourse to the affirmative defense in § 1692k(c). Not every uncertainty presented in litigation stems from interpretation of the requirements of the Act itself; lawyers may invoke the bona fide error defense, for instance, where a violation results from a qualifying factual error. Jerman and the Government suggest that lawyers can entirely avoid the risk of misinterpreting the Act by obtaining an advisory opinion from the FTC under § 1692k(e). Carlisle fairly observes that the FTC has not frequently issued such opinions, and that the average processing time may present practical difficulties. Indeed, the Government informed us at oral argument that the FTC has issued only four opinions in the past decade (in response to seven requests), and the FTC's response time has typically been three or four months. Tr. of Oral Arg. 27–28, 30. Without disregarding the possibility that the FTC advisory opinion process might be useful in some cases, evidence of present administrative practice makes us reluctant to place significant weight on § 1692k(e) as a practical remedy for the concerns Carlisle has identified.

We are unpersuaded by what seems an implicit premise of Carlisle's arguments: that the bona fide error defense is a debt collector's sole recourse to avoid potential liability. We addressed a similar argument in *Heintz*, in which the petitioner urged that certain of the Act's substantive provisions would generate "'anomalies'" if the term "debt collector" was read to include litigating lawyers. 514 U. S., at 295. Among other things, the petitioner in *Heintz* contended that § 1692c(c)'s bar on further communication with a consumer who notifies a debt collector that she is refusing to pay the debt would prohibit a lawyer from filing a lawsuit to collect the debt. *Id.*, at 296–297. We agreed it would be "odd" if the Act interfered in this way with "an ordinary debt-

collecting lawsuit" but suggested § 1692c(c) did not demand such a reading in light of several exceptions in the text of that provision itself. *Ibid.* As in *Heintz*, we need not authoritatively interpret the Act's conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys.

To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is hardly unique in our law. "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." *Nix* v. *Whiteside*, 475 U. S. 157, 168 (1986). Lawyers face sanctions, among other things, for suits presented "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. Rules Civ. Proc. 11(b), (c). Model rules of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests. See, *e. g.*, ABA Model Rules of Professional Conduct 3.1 (2009) (requiring nonfrivolous basis in law and fact for claims asserted); 4.1 (truthfulness to third parties). In some circumstances, lawyers may face personal liability for conduct undertaken during representation of a client. See, *e. g.*, *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 191 (1994) ("Any person or entity, including a lawyer, . . . who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under [Securities and Exchange Commission Rule] 10b–5").

Moreover, a lawyer's interest in avoiding FDCPA liability may not always be adverse to her client. Some courts have held clients vicariously liable for their lawyers' violations of the FDCPA. See, *e. g.*, *Fox* v. *Citicorp Credit Servs., Inc.*, 15 F. 3d 1507, 1516 (CA9 1994); see also *First Interstate Bank*

of Fort Collins, N. A. v. *Soucie*, 924 P. 2d 1200, 1202 (Colo. App. 1996).

The suggestion that our reading of § 1692k(c) will create unworkable consequences is also undermined by the existence of numerous state consumer protection and debt collection statutes that contain bona fide error defenses that are either silent as to, or expressly exclude, legal errors.[17] Several States have enacted debt collection statutes that contain neither an exemption for attorney debt collectors nor any bona fide error defense at all. See, *e. g.*, Mass. Gen. Laws, ch. 93, § 49 (West 2008); Md. Com. Law Code Ann. § 14–203 (Lexis 2005); Ore. Rev. Stat. § 646.641 (2007); Wis. Stat. § 427.105 (2007–2008). More generally, a group of 21 States as *amici* supporting Jerman inform us they are aware of "no [judicial] decisions interpreting a parallel state bona fide error provision [in a civil regulatory statute] to immunize a defendant's mistake of law," except in a minority of statutes that expressly provide to the contrary.[18] See Brief for State of New York et al. as *Amici Curiae* 11, and n. 6. Neither Carlisle and its *amici* nor the dissent demonstrates that lawyers have suffered drastic consequences under these state regimes.

In the dissent's view, these policy concerns are evidence that "Congress could not have intended" the reading we adopt today. *Post*, at 615. But the dissent's reading raises concerns of its own. The dissent focuses on the facts of this case, in which an attorney debt collector, in the dissent's

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[17] See Brief for Ohio Creditor's Attorneys Association et al. as *Amici Curiae* 4–6, and nn. 7–8 (identifying "134 state consumer protection and debt collection statutes," 42 of which expressly exclude legal errors from their defenses for bona fide errors).

[18] See, *e. g.*, Kan. Stat. Ann. § 16a–5–201(7) (2007) (provision of Kansas Consumer Credit Code providing a defense for a "bona fide error of law or fact"); Ind. Code § 24–9–5–5 (West 2004) (defense for creditor's "bona fide error of law or fact" in Indiana Home Loan Practices Act).

view, "acted reasonably at every step" and committed a "technical violation" resulting in no "actual harm" to the debtor. *Post*, at 622, 617, 618. But the dissent's legal theory does not limit the defense to attorney debt collectors or "technical" violations.[19] Under that approach, it appears, nonlawyer debt collectors could obtain blanket immunity for mistaken interpretations of the FDCPA simply by seeking the advice of legal counsel. Moreover, many debt collectors are compensated with a percentage of money recovered, and so will have a financial incentive to press the boundaries of the Act's prohibitions on collection techniques. It is far from obvious why immunizing debt collectors who adopt aggressive but mistaken interpretations of the law would be consistent with the statute's broadly worded prohibitions on debt collector misconduct. Jerman and her *amici* express further concern that the dissent's reading would give a competitive advantage to debt collectors who press the boundaries of lawful conduct. They foresee a "race to the bottom" driving ethical collectors out of business. Brief for Petitioner 32; Brief for Public Citizen, Inc., et al. as *Amici Curiae* 16–18. It is difficult to square such a result with Congress' express purpose "to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," § 1692(e).

The dissent's reading also invites litigation about a debt collector's subjective intent to violate the FDCPA and the adequacy of procedures maintained to avoid legal error.

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[19] The dissent also downplays the predicate fact that respondents in this case brought a foreclosure lawsuit against Jerman for a debt she had already repaid. Neither the lower courts nor this Court has been asked to consider, and thus we express no view about, whether Carlisle could be subject to liability under the FDCPA for that uncontested error—regardless of how reasonably Carlisle may have acted after the mistake was pointed out by Jerman's (privately retained) lawyer.

Cf. *Barlow*, 7 Pet., at 411 (maxim that ignorance of the law will not excuse civil or criminal liability "results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party"). Courts that read § 1692k(c) to permit a mistake-of-law defense have adopted varying formulations of what legal procedures are "reasonably adapted to avoid any [legal] error."[20] Among other uncertainties, the dissent does not explain whether it would read § 1692k(c) to impose a heightened standard for the procedures attorney debt collectors must maintain, as compared to nonattorney debt collectors. The increased cost to prospective plaintiffs in time, fees, and uncertainty of outcome may chill private suits under the statutory right of action, undermining the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement. Cf. FTC, Collecting Consumer Debts: The Challenges of Change 67 (2009) ("Because the [FTC] receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations"). The state *amici* predict that, on the dissent's reading, consumers will have little incentive to bring enforcement actions "where the law [i]s at all unsettled, because in such circumstances a debt collector could easily claim bona fide error of law"; in the States' view, the resulting "enforcement gap" would be "extensive" at both the federal and state levels. See Brief for State of

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[20] Compare *Hartman* v. *Great Seneca Financial Corp.*, 569 F. 3d 606, 614–615 (CA6 2009) (suggesting that reasonable procedures might include "perform[ing] ongoing FDCPA training, procur[ing] the most recent case law, or hav[ing] an individual responsible for continuing compliance with the FDCPA"), with *Johnson* v. *Riddle*, 443 F. 3d 723, 730–731 (CA10 2006) (suggesting that researching case law and filing a test case might be sufficient, but remanding for a jury determination of whether the "limited [legal] analysis" undertaken was sufficient and whether the test case was in fact a "sham").

New York et al. as *Amici Curiae* 7–10. In short, the policy concerns identified by the dissent tell only half the story.[21]

In sum, we do not foresee that our decision today will place unmanageable burdens on lawyers practicing in the debt collection industry. To the extent debt collecting lawyers face liability for mistaken interpretations of the requirements of the FDCPA, Carlisle, its *amici*, and the dissent have not shown that "the result [will be] so absurd as to warrant" disregarding the weight of textual authority discussed above. *Heintz*, 514 U. S., at 295. Absent such a showing, arguments that the Act strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress. To the extent Congress is persuaded that the policy concerns identified by the dissent require a recalibration of the FDCPA's liability scheme, it is, of course, free to amend the statute accordingly.[22] Congress has wide latitude, for instance, to revise § 1692k to excuse some or all mistakes of law or grant broader discretion to district courts to adjust a plaintiff's recovery. This Court may not, however, read more into § 1692k(c) than the statutory language naturally supports. We therefore hold that the bona fide error defense in § 1692k(c) does not apply to a violation of

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[21] The dissent adds in passing that today's decision "creates serious concerns . . . for First Amendment rights." *Post*, at 623 (citing *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 545 (2001)). That claim was neither raised nor passed upon below, and was mentioned neither in the certiorari papers nor the parties' merits briefing to this Court. We decline to express any view on it. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

[22] The FDCPA has been amended some eight times since its enactment in 1977; the most recent amendment addressed a concern not unrelated to the question we consider today, specifying that a pleading in a civil action is not an "initial communication" triggering obligations under § 1692g requiring a written notice to the consumer. Financial Services Regulatory Relief Act of 2006, § 802(a), 120 Stat. 2006 (codified at 15 U. S. C. § 1692g(d)).

the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute.

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For the reasons discussed above, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring.

As respondents point out, the Court's interpretation of the Fair Debt Collection Practices Act may create a dilemma for lawyers who regularly engage in debt collection, including through litigation. See Brief for Respondents 44–48; *Heintz* v. *Jenkins*, 514 U. S. 291 (1995). Can those lawyers act in the best interests of their clients if they face personal liability when they rely on good-faith interpretations of the Act that are later rejected by a court? Or will that threat of personal liability lead them to do less than their best for those clients?

As the majority points out, however, the statute offers a way out of—though not a panacea for—this dilemma. *Ante*, at 588, 599. Faced with legal uncertainty, a lawyer can turn to the Federal Trade Commission (FTC or Commission) for an advisory opinion. 16 CFR §§ 1.1 to 1.4 (2009). And once he receives that opinion and acts upon it the dilemma disappears: If he fails to follow the opinion, he has not acted in good faith and can fairly be held liable. If he follows the opinion, the statute frees him from any such liability. 15 U. S. C. § 1692k(e) (debt collectors immune from liability for "any act done or omitted in . . . conformity with any advisory opinion of the Commission"). See also R. Hobbs et al., National Consumer Law Center, Fair Debt Collection §§ 6.12.2, 7.3 (6th ed. 2008).

The FTC, of course, may refuse to issue such an opinion. See, *e. g.*, 16 CFR § 1.1 (providing that the Commission will issue advisory opinions "where practicable" and only when "[t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent" or "is of significant public interest"). Apparently, within the past decade, the FTC has received only seven requests and issued four opinions. See Tr. of Oral Arg. 27–28; see also FTC, Commission FDCPA Advisory Opinions, online at http://www.ftc.gov/os/statutes/fdcpajump.shtm (as visited Apr. 19, 2010, and available in Clerk of Court's case file). Yet, should the dilemma I have described above prove serious, I would expect the FTC to receive more requests and to respond to them, thereby reducing the scope of the problem to the point where other available tools, *e. g.*, damages caps and vicarious liability, will prove adequate. See *ante*, at 597–601. On this understanding, I agree with the Court and join its opinion.

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

I join the Court's opinion except for its reliance upon two legal fictions. A portion of the Court's reasoning consists of this: The language in the Fair Debt Collection Practices Act (FDCPA or Act) tracks language in the Truth in Lending Act (TILA); and in the nine years between the enactment of TILA and the enactment of the FDCPA, three Courts of Appeals had "interpreted TILA's bona fide error defense as referring to clerical errors." *Ante*, at 589. Relying on our statement in *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998), that Congress's repetition, in a new statute, of statutory language with a "'settled'" judicial interpretation indicates "'the intent to incorporate its . . . judicial interpretations as well,'" the Court concludes that these three Court of Appeals cases "suppor[t] an inference that Congress understood the statutory formula it chose for the FDCPA consistent

with Federal Court of Appeals interpretations of TILA." *Ante*, at 590.

Let me assume (though I do not believe it) that what counts is what Congress "intended," even if that intent finds no expression in the enacted text. When a large majority of the Circuits, over a lengthy period of time, have uniformly reached a certain conclusion as to the meaning of a particular statutory text, it may be reasonable to assume that Congress was aware of those holdings, took them to be correct, and intended the same meaning in adopting that text.[1] It seems to me unreasonable, however, to assume that, when Congress has a bill before it that contains language used in an earlier statute, it is aware of, and approves as correct, a mere three Court of Appeals decisions interpreting that earlier statute over the previous nine years. Can one really believe that a majority in both Houses of Congress knew of those three cases, and accepted them as correct (even when, as was the case here, some District Court opinions and a State Supreme Court opinion had concluded, to the contrary, that the defense covered legal errors, see *ante*, at 589–590, n. 10)? This is a legal fiction, which has nothing to be said for it except that it can sometimes make our job easier. The Court acknowledges that "the interpretations of three Federal Courts of Appeals may not have 'settled' the meaning of TILA's bona fide error defense," but says "there is no reason to suppose that Congress disagreed with those interpretations." *Ante*, at 590. Perhaps not; but no reason to suppose that it knew of and agreed with them either—which is presumably the proposition for which the Court cites them.

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[1] Of course where so many federal courts have read the language that way, the text was probably clear enough that resort to unexpressed congressional intent would be unnecessary. Or indeed it could be said that such uniform and longstanding judicial interpretation had established the public meaning of the text, whether the Members of Congress were aware of the cases or not. That would be the understanding of the text by reasonable people familiar with its legal context.

Even assuming, moreover, that Congress knew and approved of those cases, they would not support the Court's conclusion today. All three of them said that TILA's bona fide error defense covered only *clerical* errors. See *Ives* v. *W. T. Grant Co.*, 522 F. 2d 749, 758 (CA2 1975) ("only available for clerical errors"); *Haynes* v. *Logan Furniture Mart, Inc.*, 503 F. 2d 1161, 1167 (CA7 1974) ("basically only clerical errors"); *Palmer* v. *Wilson*, 502 F. 2d 860, 861 (CA9 1974) ("[C]lerical errors . . . are the only violations this section was designed to excuse"). Yet the Court specifically interprets the identical language in the FDCPA as providing a defense not only for clerical errors, but also for *factual* errors. See *ante*, at 594, 599; see also *ante*, at 595 (suggesting the same). If the Court really finds the three Courts of Appeals' interpretations of TILA indicative of congressional intent in the FDCPA, it should restrict its decision accordingly. As for me, I support the Court's inclusion of factual errors, because there is nothing in the text of the FDCPA limiting the excusable "not intentional" violations to those based on clerical errors, and since there is a long tradition in the common law and in our construction of federal statutes distinguishing errors of fact from errors of law.

The Court's opinion also makes fulsome use of that other legal fiction, legislative history, ranging from a single Representative's floor remarks on the House bill that became the FDCPA, *ante*, at 590–591, n. 11, to a single Representative's remarks in a Senate Subcommittee hearing on the House bill and three Senate bills, *ibid.*, to two 1979 Senate Committee Reports dealing not with the FDCPA but with the 1980 amendments to TILA, *ante*, at 591–592, n. 12, to remarks in a Committee markup of the Senate bill on the FDCPA, *ante*, at 596, n. 14, to a House Report dealing with an earlier version of the FDCPA, *ibid.* Is the conscientious attorney really expected to dig out such mini-nuggets of "congressional intent" from floor remarks, committee hearings, committee markups, and committee reports covering many dif-

ferent bills over many years? When the Court addresses such far-afield legislative history merely "for the sake of completeness," *ante*, at 595, it encourages and indeed prescribes such wasteful over-lawyering.

As it happens, moreover, one of the supposedly most "authoritative" snippets of legislative history, a Senate Committee Report dealing with the meaning of TILA, states very clearly that the 1980 amendment to TILA's bona fide error defense "clarified" the defense "to make clear that it applies to mechanical and computer errors," S. Rep. No. 96–73, pp. 7–8 (1979). Likewise, the 1999 American Law Report the Court cites, *ante*, at 591–592, n. 12, which relies on another Senate Committee Report, describes the amendment as clarifying the "prevailing view" that the defense "applies to clerical errors," Lockhart, 153 A. L. R. Fed. 211–212, § 2[a].[2] Once again, the legal fiction contradicts the Court's conclusion that the language in the FDCPA, identical to the original TILA defense, applies to mistakes of fact.

But if legislative history is to be used, it should be used impartially. (Legislative history, after all, almost always has something for everyone!) The Court dismisses with a wave of the hand what seems to me the most persuasive legislative history (if legislative history could ever be persuasive) in the case. The respondents point to the Senate Committee Report on the FDCPA, which says that "[a] debt collector has no liability . . . if he violates the act in any manner, *including with regard to the act's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. Rep. No. 95–382, p. 5 (1977) (emphasis added). The Court claims that a mistake about "the act's coverage" in this passage might

[2] The page cited in the Senate Committee Report does not actually support the American Law Report's statement. It makes no mention of clarification or judicial interpretations; it merely states that the amendment is intended to "provide protection where errors are clerical or mechanical in nature," S. Rep. No. 96–368, p. 32 (1979).

refer to factual mistakes, such as a debt collector's mistaken belief "that a particular debt arose out of a nonconsumer transaction and was therefore not 'covered' by the Act," *ante*, at 595. The Court's explanation seems to me inadequate. No lawyer—indeed, no one speaking accurately—would equate a mistake regarding the Act's coverage with a mistake regarding whether a particular fact situation falls within the Act's coverage. What the Act covers ("the act's coverage") is one thing; whether a particular case falls *within* the Act's coverage is something else.

Even if (contrary to my perception) the phrase *could* be used to refer to *both* these things, by what principle does the Court reject the more plausible meaning? The fact that "attorneys were excluded from the Act's definition of 'debt collector' until 1986," *ibid.*, does not, as the Court contends, support its conclusion that errors of law are not covered. Attorneys are not the only ones who would have been able to claim a legal-error defense; nonattorneys make legal mistakes too. They also sometimes receive and rely upon erroneous legal advice from attorneys. Indeed, if anyone could satisfy the defense's requirement of maintaining "procedures reasonably adapted to avoid," 15 U. S. C. § 1692k(c), a legal error, it would be a nonattorney debt collector who follows the procedure of directing all legal questions to his attorney.

The Court also points to "equivocal" evidence from the Senate Committee's final markup session, *ante*, at 596, n. 14, but it minimizes a decidedly unhelpful discussion of the scope of the defense during the session. In response to concern that the defense would be construed, like the TILA defense, as "only protecting against a mathematical error," a staff member explained that, because of differences in the nature of the statutes, the FDCPA defense was broader than the TILA defense and "would apply to *any* violation of the act which was unintentional." See Senate Committee on Banking, Housing and Urban Affairs, Markup Session: S. 1130—Debt Collection Legislation 20–21 (July 26, 1977)

(emphasis added). The chairman then asked: "So it's not simply a mathematical error but *any* bona fide error without intent?" *Id.*, at 21 (emphasis added). To which the staff member responded: "That's correct." *Ibid.* The repeated use of "any"—"any violation" and "any bona fide error"—supports the natural reading of the Committee Report's statement regarding "the act's coverage" as including legal errors about the scope of the Act, rather than just factual errors.

The Court ultimately dismisses the Senate Committee Report on the ground that "the legislative record taken as a whole does not lend strong support to Carlisle's view." *Ante*, at 595–596. I think it more reasonable to give zero weight to the other snippets of legislative history that the Court relies upon, for the reason that the Senate Committee Report on the very bill that became the FDCPA flatly contradicts them. It is almost invariably the case that our opinions benefit not at all from the makeweight use of legislative history. But today's opinion probably suffers from it. Better to spare us the results of legislative-history research, however painfully and exhaustively conducted it might have been.

The Court's textual analysis stands on its own, without need of (or indeed any assistance from) the two fictions I have discussed. Accordingly, I concur in the judgment of the Court.

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, dissenting.

The statute under consideration is the Fair Debt Collection Practices Act (FDCPA or Act), 15 U. S. C. § 1692 *et seq.* The statute excepts from liability a debt collector's "bona fide error[s]," provided that they were "not intentional" and reasonable procedures have been maintained to avoid them. § 1692k(c). The Court today interprets this exception to exclude legal errors. In doing so, it adopts a questionable

interpretation and rejects a straightforward, quite reasonable interpretation of the statute's plain terms. Its decision aligns the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards.

When the law is used to punish good-faith mistakes; when adopting reasonable safeguards is not enough to avoid liability; when the costs of discovery and litigation are used to force settlement even absent fault or injury; when class-action suits transform technical legal violations into windfalls for plaintiffs or their attorneys, the Court, by failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system. The interpretation of the FDCPA the Court today endorses will entrench, not eliminate, some of the most troubling aspects of our legal system. Convinced that Congress did not intend this result, I submit this respectful dissent.

I

A

The FDCPA addresses "abusive debt collection practices," § 1692(e), by regulating interactions between commercial debt collectors and consumers. See *ante*, at 577. The statute permits private suits against debt collectors who violate its provisions. § 1692k(a). An exception to liability is provided by the so-called bona fide error defense:

> "A debt collector may not be held liable in any action . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c).

This language does not exclude mistakes of law and is most naturally read to include them. Certainly a mistaken belief about the law is, if held in good faith, a "bona fide error" as that phrase is normally understood. See Black's Law Dictionary 582 (8th ed. 2004) (defining "error" as "a belief that what is false is true or that what is true is false," def. 1); *ibid.* ("[a] mistake of law or of fact in a tribunal's judgment, opinion, or order," def. 2); *ibid.* (listing categories of legal errors).

The choice of words provides further reinforcement for this view. The bona fide error exception in § 1692k(c) applies if "the violation was not intentional and resulted from a bona fide error." The term "violation" specifically denotes a legal infraction. See *id.*, at 1600 ("An infraction or breach of the law; a transgression," def. 1). The statutory term "violation" thus stands in direct contrast to other provisions of the FDCPA that describe conduct itself. This applies both to specific terms, *e. g.*, § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt"), and to more general ones, *e. g.*, § 1692k(e) (referring to "any act done or omitted in good faith"). By linking the *mens rea* requirement ("not intentional") with the word "violation"—rather than with the conduct giving rise to the violation—the Act by its terms indicates that the bona fide error exception applies to legal errors as well as to factual ones.

The Court's precedents accord with this interpretation. Federal statutes that link the term "violation" with a *mens rea* requirement have been interpreted to excuse good-faith legal mistakes. See, *e. g.*, *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 129, 133 (1988) (the phrase "'arising out of a willful violation'" in the Fair Labor Standards Act applies where an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"); *Trans World Airlines, Inc.* v. *Thurston*, 469

U. S. 111, 125, 126 (1985) (damages provision under the Age Discrimination in Employment Act of 1967, which applies "only in cases of willful violations," creates liability where an employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (internal quotation marks omitted)); cf. *Liparota* v. *United States*, 471 U. S. 419, 428 (1985) (prohibition on use of food stamps "'knowing [them] to have been received . . . in violation of'" federal law "undeniably requires a knowledge of illegality" (emphasis deleted)). The FDCPA's use of "violation" thus distinguishes it from most of the authorities relied upon by the Court to demonstrate that mistake-of-law defenses are disfavored. See, *e. g.*, *ante*, at 581–583 (citing *Kolstad* v. *American Dental Assn.*, 527 U. S. 526 (1999)).

The Court's response is that there is something distinctive about the word "willful" that suggests an excuse for mistakes of law. This may well be true for criminal statutes, in which the terms "'knowing,' 'intentional,' [and] 'willful'" have been distinguished in this regard. *Ante*, at 585 (citing *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007)). But this distinction is specific to the criminal context:

> "It is different in the criminal law. When the term 'willful' or 'willfully' has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations. This reading of the term, however, is tailored to the criminal law, where it is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, or an additional '"bad purpose,"' or specific intent to violate a known legal duty created by highly technical statutes." *Id.*, at 57–58, n. 9 (citations omitted).

For this reason, the Court's citation to criminal cases, which are themselves inconsistent, see *Ratzlaf* v. *United States*, 510 U. S. 135 (1994), is unavailing. See *ante*, at 585–586, and n. 7.

In the civil context, by contrast, the word "willful" has been used to impose a *mens rea* threshold for liability that is lower, not higher, than an intentionality requirement. See *Safeco*, *supra*, at 57 ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well"). Avoiding liability under a statute aimed at intentional violations should therefore be easier, not harder, than avoiding liability under a statute aimed at willful violations. And certainly there is nothing in *Thurston* or *McLaughlin*—both civil cases—suggesting that they would have come out differently had the relevant statutes used "intentional violation" rather than "willful violation."

B

These considerations suffice to show that § 1692k(c) is most reasonably read to include mistakes of law. Even if this were merely a permissible reading, however, it should be adopted to avoid the adverse consequences that must flow from the Court's contrary decision. The Court's reading leads to results Congress could not have intended.

1

The FDCPA is but one of many federal laws that Congress has enacted to protect consumers. A number of these statutes authorize the filing of private suits against those who use unfair or improper practices. See, *e. g.*, 15 U. S. C. § 1692k (FDCPA); § 1640 (Truth in Lending Act); § 1681n (Fair Credit Reporting Act); 49 U. S. C. § 32710 (federal Odometer Disclosure Act); 11 U. S. C. § 526(c)(2) (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). Several of these provisions permit a successful plaintiff to recover—in addition to actual damages—statutory damages, attorney's fees and costs, and in some cases punitive damages. *E. g.*, 15 U. S. C. § 1640(a)(2) (statutory damages); § 1640(a)(3) (attorney's fees and costs); § 1681n(a)(1)(B) (statu-

tory and punitive damages); § 1681n(a)(1)(B)(3) (costs and attorney's fees); 49 U. S. C. § 32710(a) ("3 times the actual damages or $1,500, whichever is greater"); § 32710(b) (costs and attorney's fees); 11 U. S. C. § 526(c)(3)(A) (costs and attorney's fees). Some also explicitly permit class-action suits. *E. g.*, 15 U. S. C. § 1640(a)(2)(B); § 1692k(a)(2)(B).

A collateral effect of these statutes may be to create incentives to file lawsuits even where no actual harm has occurred. This happens when the plaintiff can recover statutory damages for the violation and his or her attorney will receive fees if the suit is successful, no matter how slight the injury. A favorable verdict after trial is not necessarily the goal; often the plaintiff will be just as happy with a settlement, as will his or her attorney (who will receive fees regardless). The defendant, meanwhile, may conclude a quick settlement is preferable to the costs of discovery and a protracted trial. And if the suit attains class-action status, the financial stakes rise in magnitude. See, *e. g.*, § 1640(a)(2)(B) (class-action recovery of up to "the lesser of $500,000 or 1 per centum of the net worth of the [defendant]"); § 1692k(a)(2)(B) (same).

The present case offers an object lesson. Respondents filed a complaint in state court on behalf of a client that mistakenly believed Jerman owed money to it. Jerman's attorney then informed respondents that the debt had been paid in full. Respondents confirmed this fact with the client and withdrew the lawsuit.

This might have been the end of the story. But because respondents had informed Jerman that she was required to dispute the debt in writing, she filed a class-action complaint. It did not matter that Jerman had claimed no harm as a result of respondents' actions. Jerman sued for damages, attorney's fees, and costs—including class damages of "$500,000 or 1% of defendants' net worth whichever is less." Amended Complaint in No. 1:06–CV–01397 (ND Ohio), p. 4. In addition to merits-related discovery, Jerman sought information from respondents concerning the income and net

worth of each partner in the firm. At some point, Jerman proposed to settle with respondents for $15,000 in damages and $7,500 in attorney's fees. Amended Joint App. in No. 07–3964 (CA6), pp. 256–262. The case illustrates how a technical violation of a complex federal statute can give rise to costly litigation with incentives to settle simply to avoid attorney's fees.

Today's holding gives new impetus to this already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit. See *Federal Home Loan Mortgage Corporation* v. *Lamar*, 503 F. 3d 504, 513 (CA6 2007) (referring to the "cottage industry" of litigation that has arisen out of the FDCPA (internal quotation marks omitted)). It is clear that Congress, too, was troubled by this dynamic. That is precisely why it enacted a bona fide error defense. The Court's ruling, however, endorses and drives forward this dynamic, for today's holding leaves attorneys and their clients vulnerable to civil liability for adopting good-faith legal positions later determined to be mistaken, even if reasonable efforts were made to avoid mistakes.

The Court seeks to brush aside these concerns by noting that trivial violations will give rise to little in the way of actual damages and that trial courts "have discretion in calculating reasonable attorney's fees under [the] statute." *Ante*, at 598. It is not clear, however, that a court is permitted to adjust a fee award based on its assessment of the suit's utility. Cf. *Perdue* v. *Kenny A.*, *ante*, at 554 (noting a " 'strong presumption' " of reasonableness that attaches to a lodestar calculation of attorney's fees). Though the Court, properly, does not address the question here, it acknowledges that some courts have deemed fee awards to victorious plaintiffs to be " 'mandatory,' " even if the plaintiff suffered no damage. *Ante*, at 598, n. 16.

The Court's second response is that the FDCPA guards against abusive suits and that suits brought "'in bad faith and for the purpose of harassment'" can lead to a fee award for the defendant. *Ante*, at 599 (quoting § 1692k(a)(3)). Yet these safeguards cannot deter suits based on technical—but harmless—violations of the statute. If the plaintiff obtains a favorable judgment or a settlement, then by definition the suit will not have been brought in bad faith. See *Emanuel* v. *American Credit Exch.*, 870 F. 2d 805, 809 (CA2 1989) (FDCPA defendant's "claim for malicious prosecution cannot succeed unless the action subject of the claim is unsuccessful").

Again the present case is instructive. Jerman brought suit without pointing to any actual harm that resulted from respondents' actions. At the time her complaint was filed, it was an open question in the Sixth Circuit whether a debt collector could demand that a debt be disputed in writing, and the district courts in the Circuit had reached different answers. *Ante*, at 579, n. 2. The trial court in this case happened to side with Jerman on the issue, 464 F. Supp. 2d 720, 722–725 (ND Ohio 2006), but it seems unlikely that the court would have labeled her suit "abusive" or "in bad faith" even if it had gone the other way.

There is no good basis for optimism, then, when one contemplates the practical consequences of today's decision. Given the complexity of the FDCPA regime, see 16 CFR pt. 901 (2009) (FDCPA regulations), technical violations are likely to be common. Indeed, the Court acknowledges that they are inevitable. See *ante*, at 587. As long as legal mistakes occur, plaintiffs and their attorneys will have an incentive to bring suits for these infractions. It seems unlikely that Congress sought to create a system that encourages costly and time-consuming litigation over harmless violations committed in good faith despite reasonable safeguards.

When construing a federal statute, courts should be mindful of the effect of the interpretation on congressional pur-

poses explicit in the statutory text. The FDCPA states an objective that today's decision frustrates. The statutory purpose was to "eliminate abusive debt collection practices" and to ensure that debt collectors who refrain from using those practices "are not competitively disadvantaged." 15 U. S. C. § 1692(e) ("Purposes"). The practices Congress addressed involved misconduct that is deliberate, see § 1692(a) ("abusive, deceptive, and unfair debt collection practices"); § 1692(c) ("misrepresentation or other abusive debt collection practices"), or unreasonable, see § 1692c(a)(1) (prohibiting debt collectors from communicating with debtors at times "which should be known" to be inconvenient); § 1692e(8) (prohibiting the communication of credit card information "which should be known to be false"). That explains the statutory objective not to disadvantage debt collectors who "refrain" from abusive practices—that is to say, debt collectors who do not intentionally or unreasonably adopt them. It further explains why Congress included a good-faith error exception, which exempts violations that are not intentional or unreasonable.

In referring to "abusive debt collection practices," however, surely Congress did not contemplate attorneys who act based on reasonable, albeit ultimately mistaken, legal interpretations. A debt collector does not gain a competitive advantage by making good-faith legal errors any more than by making good-faith factual errors. This is expressly so if the debt collector has implemented "procedures reasonably adapted to avoid" them. By reading § 1692k(c) to exclude good-faith mistakes of law, the Court fails to align its interpretation with the statutory objectives.

The Court urges, nevertheless, that there are policy concerns on the other side. The Court frets about debt collectors who "press the boundaries of the Act's prohibitions" and about a potential "'race to the bottom.'" *Ante*, at 602 (quoting Brief for Petitioner 32). For instance, in its view, interpreting § 1692k(c) to encompass legal mistakes might

mean that "nonlawyer debt collectors could obtain blanket immunity for mistaken interpretations of the FDCPA simply by seeking the advice of legal counsel." *Ante*, at 602. It must be remembered, however, that § 1692k(c) may only be invoked where the debt collector's error is "bona fide" and where "reasonable procedures" have been adopted to avoid errors. There is no valid or persuasive reason to assume that Congress would want to impose liability on a debt collector who relies in good faith on the reasonable advice of counsel. If anything, we should expect Congress to think that such behavior should be encouraged, not discouraged.

The Court also suggests that reading § 1692k(c) to include legal errors would encourage litigation over a number of issues: what subjective intent is necessary for liability; what procedures are necessary to avoid legal mistakes; what standard applies to procedures adopted by attorney debt collectors as compared to nonattorney debt collectors. Yet these questions are no different from ones already raised by the statute. Whether the debt collector is an attorney or not, his or her subjective intent must be assessed before liability can be determined. Procedures to avoid mistakes—whether legal or otherwise—must be "reasonable," which is always a context-specific inquiry. The Court provides no reason to think that legal errors raise concerns that differ in these respects from those raised by nonlegal errors.

2

There is a further and most serious reason to interpret § 1692k(c) to include good-faith legal mistakes. In *Heintz* v. *Jenkins*, 514 U. S. 291 (1995), the Court held that attorneys engaged in debt-collection litigation may be "debt collectors" for purposes of the FDCPA. In reaching this conclusion the Court confronted the allegation that its interpretation would produce the anomalous result that attorneys could be liable for bringing legal claims against debtors if those claims ultimately proved unsuccessful. *Id.*, at 295. The Court re-

jected this argument. In doing so it said that § 1692k(c) provides debt collectors with a defense for their bona fide errors. *Id.*, at 295.

Today the Court relies on *Heintz* to allay concerns about the practical implications of its decision. *Ante*, at 599–600. Yet the Court reads § 1692k(c) to exclude mistakes of law, thereby producing the very result that *Heintz* said would not come about. Attorneys may now be held liable for taking reasonable legal positions in good faith if those positions are ultimately rejected.

Attorneys are dutybound to represent their clients with diligence, creativity, and painstaking care, all within the confines of the law. When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished. Surely this includes offering interpretations of a statute that are permissible, even if not yet settled. The FDCPA is a complex statute, and its provisions are subject to different interpretations. See, *e. g.*, *ante*, at 580–581, n. 4 (identifying splits of authority on two different FDCPA issues); Brief for National Association of Retail Collection Attorneys as *Amicus Curiae* 5–6 (identifying another split); see also *ante*, at 587. Attorneys will often find themselves confronted with a statutory provision that is susceptible to different but still reasonable interpretations.

An attorney's obligation in the face of uncertainty is to give the client his or her best professional assessment of the law's mandate. Under the Court's interpretation of the FDCPA, however, even that might leave the attorney vulnerable to suit. For if the attorney proceeds based on an interpretation later rejected by the courts, today's decision deems that to be actionable as an intentional "violation," with personal financial liability soon to follow. Indeed, even where a particular practice is compelled by existing precedent, the attorney may be sued if that precedent is later overturned.

These adverse consequences are evident in the instant case. When respondents filed a foreclosure complaint against Jerman on behalf of their client, they had no reason to doubt that the debt was valid. They had every reason, furthermore, to believe that they were on solid legal ground in asking her to dispute the amount owed in writing. See, *e. g.*, *Graziano* v. *Harrison*, 950 F. 2d 107, 112 (CA3 1991) (written objection is necessary for coherent statutory scheme and protects the debtor by "creat[ing] a lasting record of the fact that the debt has been disputed"). When Jerman disputed the debt, respondents verified that the debt had been satisfied and withdrew the lawsuit. Respondents acted reasonably at every step, and yet may still find themselves liable for a harmless violation.

After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk. It is most disturbing that this Court now adopts a statutory interpretation that will interject an attorney's personal financial interests into the professional and ethical dynamics of the attorney-client relationship. These consequences demonstrate how untenable the Court's statutory interpretation is and counsel in favor of a different reading. See *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, *ante*, at 246, n. 5 (rejecting a reading of federal law that "would seriously undermine the attorney-client relationship").

The Court's response is that this possibility is nothing new, because attorneys are already dutybound to comply with the law and with standards of professional conduct. Attorneys face sanctions for harassing behavior and frivolous litigation, and in some cases misconduct may give rise to personal liability. *Ante*, at 600–601.

This response only underscores the problem with the Court's approach. By reading § 1692k(c) to exclude mistakes of law, the Court ensures that attorneys will face liability even when they have done nothing wrong—indeed, even when they have acted in accordance with their professional responsibilities. Here respondents' law firm did not harass Jerman; it did not file a frivolous suit against her; it did not intentionally mislead her; it caused her no damages or injury. The firm acted upon a reasonable legal interpretation that the District Court later thought to be mistaken. The District Court's position, as all concede, was in conflict with other published, reasoned opinions. *Ante*, at 579, n. 2. (And in the instant case, neither the Court of Appeals nor this Court has decided the issue. See *ante*, at 580, n. 3.) If the law firm can be punished for making a good-faith legal error, then to be safe an attorney must always stick to the most debtor-friendly interpretation of the statute, lest automatic liability follow if some later decision adopts a different rule. This dynamic creates serious concerns, not only for the attorney-client relationship but also for First Amendment rights. Cf. *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 545 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"). We need not decide that these concerns rise to the level of an independent constitutional violation, see *ante*, at 604, n. 21, to recognize that they counsel against a problematic interpretation of the statute. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

JUSTICE BREYER—although not the Court—argues that an attorney faced with legal uncertainty only needs to turn

to the Federal Trade Commission (FTC) for an advisory opinion. An attorney's actions in conformity with the opinion will be shielded from liability. *Ante*, at 605 (concurring opinion) (citing 15 U. S. C. § 1692k(e)). This argument misconceives the practical realities of litigation. Filings and motions are made under pressing time constraints; arguments must be offered quickly in reply; and strategic decisions must be taken in the face of incomplete information. Lawyers in practice would not consider this alternative at all realistic, particularly where the defense is needed most.

And even were there time to generate a formal request to the FTC and wait an average of three or four months for a response (assuming the FTC responds at all), the argument assumes that an ambiguity in the statute is obvious, not latent, that the problem is at once apparent, and that a conscious decision to invoke FTC procedures can be made. But the problem in many instances is that interpretive alternatives are not at once apparent. All this may explain why, in the past decade, the FTC has issued only four opinions in response to just seven requests. See Tr. of Oral Arg. 27–28, 30. The FTC advisory process does not remedy the difficulties that the Court's opinion will cause.

Even if an FTC opinion is obtained, moreover, the ethical dilemma of counsel is not resolved. If the FTC adopts a position unfavorable to the client, the attorney may still believe the FTC is mistaken. Yet under today's decision, the attorney who in good faith continues to assert a reasonable position to the contrary does so at risk of personal liability. This alters the ethical balance central to the adversary system; and it is, again, a reason for the Court to adopt a different, but still reasonable, interpretation to avoid systemic disruption.

II

The Court does not assert that its interpretation is clearly commanded by the text. Instead, its decision relies on an

amalgam of arguments that, taken together, are said to establish the superiority of its preferred reading. This does not withstand scrutiny.

First, the Court relies on the maxim that "'ignorance of the law will not excuse any person, either civilly or criminally.'" *Ante*, at 581 (quoting *Barlow* v. *United States*, 7 Pet. 404, 411 (1833)). There is no doubt that this principle "is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U. S. 192, 199 (1991). Yet it is unhelpful to the Court's position. The maxim the Court cites is based on the premise "that the law is definite and knowable," so that all must be deemed to know its mandate. *Ibid.* See also O. Holmes, The Common Law 48 (1881) ("[T]o admit the excuse [of ignorance] at all would be to encourage ignorance where the law-maker has determined to make men know and obey"). In other words, citizens cannot avoid compliance with the law simply by demonstrating a failure to learn it.

The most straightforward application of this principle is to statutory provisions that delineate a category of prohibited conduct. These statutes will not be read to excuse legal mistakes absent some indication that the legislature meant to do so. See, *e. g.*, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 70, 85–86 (1908) (rejecting the defendant's attempt to read a mistake-of-law defense into a criminal statute forbidding shippers to "obtain or dispose of property at less than the regular rate established"); *ante*, at 583 (discussing a federal statute imposing liability for "'intentional discrimination'").

In the present case, however, the Court is not asked whether a mistake of law should excuse respondents from a general prohibition that would otherwise cover their conduct. Rather, the issue is the scope of an express exception to a general prohibition. There is good reason to think the distinction matters. It is one thing to presume that Congress does not intend to create an exception to a general rule through silence; it is quite another to presume that an ex-

plicit statutory exception should be confined despite the existence of other sensible interpretations. Cf. *Kosak* v. *United States*, 465 U. S. 848, 853–854, n. 9 (1984) (although the Federal Tort Claims Act waives sovereign immunity, "the proper objective of a court attempting to construe [an exception to the Act] is to identify those circumstances which are within the words and reason of the exception—no less and no more" (internal quotation marks omitted)). This is all the more true where the other possible interpretations are more consistent with the purposes of the regulatory scheme. By its terms, § 1692k(c) encompasses—without limitation—all violations that are "not intentional and resul[t] from a bona fide error." The Court provides no reason to read this language narrowly.

The Court responds that "our precedents have made clear for more than 175 years" that the presumption against mistake-of-law defenses applies even to explicit statutory exceptions. *Ante*, at 582, n. 5. By this the Court means that one case applied the presumption to an exception more than 175 years ago. In *Barlow*, the Court declined to excuse an alleged mistake of law despite a statutory provision that excepted "false denomination[s] . . . [that] happened by mistake or accident, and not from any intention to defraud the revenue." 7 Pet., at 406. In construing this language, the *Barlow* Court noted that it demonstrated congressional intent to exclude mistakes of law:

> "The very association of mistake and accident, in this [connection], furnishes a strong ground to presume that the legislature had the same classes of cases in view . . . . Mistakes in the construction of the law, seem as little intended to be excepted by the proviso, as accidents in the construction of the law." *Id.*, at 411–412.

Unlike the provision at issue in *Barlow*, § 1692k(c) gives no indication that its broad reference to "bona fide error[s]" was meant to exclude legal mistakes.

Even if statutory exceptions should normally be construed to exclude mistakes of law, moreover, that guideline would only apply absent intent to depart from the general rule. There is no doubt that Congress may create a mistake-of-law defense; the question is whether it has done so here. See *Ratzlaf*, 510 U. S., at 149. As explained above, see Part I–A, *supra*, Congress has made its choice plain by using the word "violation" in § 1692k(c) to indicate that mistakes of law are to be included.

Second, the Court attempts to draw a contrast between § 1692k(c) and the administrative penalties in the Federal Trade Commission Act (FTC Act), 38 Stat. 717, 15 U. S. C. § 41 *et seq.* Under the FTC Act, a debt collector may face civil penalties of up to $16,000 per day for acting with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that [an] act is" prohibited under the FDCPA. §§ 45(m)(1)(A), (C); 74 Fed. Reg. 858 (2009) (amending 16 CFR § 1.98(d) (2009)). The Court reasons that the FTC provision is meant to provide relatively harsh penalties for intentional violations. By contrast, the argument continues, the penalties in the FDCPA itself must cover—and hence § 1692k(c) must not excuse—unintentional violations. *Ante*, at 583–584.

The argument rests on a mistaken premise—namely, that § 1692k(c) must immunize all legal errors or none. This misreads the statute. As the text states, it applies only to "bona fide" errors committed despite "the maintenance of procedures reasonably adapted to avoid" these mistakes. So under a sensible reading of the statute, (1) intentional violations are punishable under the heightened penalties of the FTC Act; (2) unintentional violations are generally subject to punishment under the FDCPA; and (3) a defendant may escape liability altogether by proving that a violation was based on a bona fide error and that reasonable error-prevention procedures were in place. There is nothing incongruous in this scheme. Indeed, for the reasons described

in Part I, *supra*, it is far less peculiar than the Court's reading, which would subject attorneys to liability for good-faith legal advocacy, even advocacy based on an accurate assessment of then-existing case law.

Third, in construing § 1692k(c) to exclude legal errors, the Court points to the requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error." The Court asserts that this phrase most naturally evokes procedures to avoid clerical or factual mistakes. There is nothing natural in reading this phrase contrary to its plain terms, which do not distinguish between different categories of mistakes. Nor is there anything unusual about procedures adopted to avoid legal mistakes. The present case is again instructive. According to the District Court, respondents designated a lead FDCPA compliance attorney, who regularly attended conferences and seminars; subscribed to relevant periodicals; distributed leading FDCPA cases to all attorneys; trained new attorneys on their statutory obligations; and held regular firmwide meetings on FDCPA issues. See 538 F. 3d 469, 477 (CA6 2008). These procedures are not only "reasonably adapted to avoid [legal] error[s]," but also accord with the FDCPA's purposes.

The Court argues, nonetheless, that the statute contemplates only clerical or factual errors, for these are the type of errors that can mostly naturally be addressed through "'a series of steps followed in a regular orderly definite way.'" *Ante*, at 587 (quoting Webster's Third New International Dictionary 1807 (1976)). As made clear by the steps that respondents have taken to ensure FDCPA compliance, this is simply not true. The Court also speculates that procedures to avoid clerical or factual errors will be easier to implement than procedures to avoid legal errors. Even if this were not pure conjecture, it has nothing to do with what the statute requires. The statute does not talk about procedures that eliminate all—or even most—errors. It merely requires procedures "reasonably adapted to avoid any such error."

The statute adopts the sensible approach of requiring reasonable safeguards if liability is to be avoided. This approach, not the Court's interpretation, reflects the reality of debt-collection practices.

Fourth, the Court argues that construing § 1692k(c) to encompass a mistake-of-law defense "is at odds with" the role contemplated for the FTC. *Ante*, at 588. This is so, it contends, because the FTC is authorized to issue advisory opinions, and the statute shields from liability "any act done or omitted in good faith in conformity" with such opinions. § 1692k(e). But why, asks the Court, would a debt collector seek an opinion from the FTC if immunity under § 1692k(c) could be obtained simply by relying in good faith on advice from private counsel? Going further, the Court suggests that debt collectors might "have an affirmative incentive not to seek an advisory opinion to resolve ambiguity in the law, as receipt of such advice would prevent them from claiming good-faith immunity for violations." *Ante*, at 588.

There is little substance to this line of reasoning. As the Court itself acknowledges, debt collectors would have an incentive to invoke the FTC safe harbor even if § 1692k(c) is construed to include a mistake-of-law defense, because the safe harbor provides a "more categorical immunity." *Ante*, at 588, n. 8. Additionally, if a debt collector avoids seeking an advisory opinion from the FTC out of concern that the answer will be unfavorable, that seems quite at odds with saying that his or her ignorance is "bona fide."

It should be noted further that the Court's concern about encouraging ignorance could apply just as well to § 45(m)(1)(A). That provision subjects a debt collector to harsh penalties for violating an FTC rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." No one contends that this will encourage debt collectors to avoid learning the FTC's rules.

Yet there is no doubt that § 45(m)(1)(A) permits a mistake-of-law defense.

All this assumes, of course, that obtaining an FTC advisory opinion will be a reasonably practical possibility. For the reasons stated above, see Part I–B–2, *supra*, this is to be doubted. Even the Court recognizes the limited role that the FTC has played. *Ante*, at 599 ("[E]vidence of present administrative practice makes us reluctant to place significant weight on § 1692k(e) as a practical remedy").

Fifth, the Court asserts that "[a]ny remaining doubt" about its preferred interpretation is dispelled by the FDCPA's statutory history. *Ante*, at 588. The Court points to the fact that § 1692k(c) mirrors a bona fide error defense provision in the earlier enacted Truth in Lending Act (TILA), arguing that Congress sought to incorporate into the FDCPA the view of the Courts of Appeals that the TILA defense applied only to clerical errors. *Ante*, at 588–590. As JUSTICE SCALIA points out, the Court's claims of judicial uniformity are overstated. See *ante*, at 607 (opinion concurring in part and concurring in judgment). They rest on three Court of Appeals decisions, which are contradicted by several District Court opinions and a State Supreme Court opinion—hardly a consistent legal backdrop against which to divine legislative intent. The Court also ignores the fact that those three Courts of Appeals had construed the TILA provision to apply only to clerical errors. See *Ives* v. *W. T. Grant Co.*, 522 F. 2d 749, 758 (CA2 1975); *Haynes* v. *Logan Furniture Mart, Inc.*, 503 F. 2d 1161, 1167 (CA7 1974); *Palmer* v. *Wilson*, 502 F. 2d 860, 861 (CA9 1974). The Court therefore cannot explain why it reads § 1692k(c) more broadly to encompass factual mistakes as well.

It is of even greater significance that in 1980 Congress amended the TILA's bona fide error exception explicitly to exclude "an error of legal judgment with respect to a person's obligations under [the TILA]." See Truth in Lending Simplification and Reform Act, § 615(a), 94 Stat. 181. This

amendment would have been unnecessary if Congress had understood the pre-1980 language to exclude legal errors. The natural inference is that the preamendment TILA language—the same language later incorporated nearly verbatim into § 1692k(c)—was understood to cover those errors.

The Court's responses to this point are perplexing. The Court first says that the 1980 amendment did not "obvious[ly]" change the scope of the TILA's bona fide error defense, given the "uniform interpretatio[n]" that the defense had been given in the Courts of Appeals. *Ante*, at 591. The Court thus prefers to make an entire statutory amendment surplusage rather than abandon its dubious assumption that Congress meant to ratify a nascent Court of Appeals consensus. Cf. *Corley* v. *United States*, 556 U. S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted)). (Without any evidence, the Court speculates that perhaps the amendment was intended to codify existing judicial interpretations that excluded legal errors. *Ante*, at 592. If those judicial interpretations were truly as uniform as the Court suggests—and the presumption against mistake-of-law defenses as ironclad—there would have been no need for such a recodification.)

The Court is hesitant as well to give the 1980 amendment weight because Congress "has not expressly *included* mistakes of law in any of the numerous bona fide error defenses, worded in pertinent part identically to § 1692k(c), elsewhere in the U. S. Code." *Ante*, at 593 (emphasis in original). In other words, the Court refuses to read § 1692k(c) to cover mistakes of law because other bona fide error statutes do not expressly refer to such mistakes. But the reverse should be true: If other bona fide error provisions included mistake-of-law language but § 1692k(c) did not, we might think that the omission in § 1692k(c) signaled Congress' intent to exclude

mistakes of law. The absence of mistake-of-law language in § 1692k(c) is consequently less noteworthy because other statutes also omit such language.

The Court emphasizes that some bona fide error defenses, like the one in the current version of the TILA, expressly exclude legal errors from their scope. *Ante*, at 592–593 (citing 12 U. S. C. § 4010(c)(2)). Yet this also can prove the opposite of what the Court says it does: If a bona fide error defense were generally assumed not to include legal mistakes (as the Court argues), there would be no need to expressly exclude them. It is only if the defense would otherwise include such errors that exclusionary language becomes necessary. By writing explicit exclusionary language into the TILA (and some other federal provisions), Congress has indicated that those provisions would otherwise cover good-faith legal errors.

* * *

For these reasons, § 1692k(c) is best read to encompass mistakes of law. I would affirm the judgment of the Court of Appeals.

Syllabus

MERCK & CO., INC., ET AL. *v.* REYNOLDS ET AL.

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

No. 08–905. Argued November 30, 2009—Decided April 27, 2010

On November 6, 2003, respondent investors filed a securities fraud action under § 10(b) of the Securities Exchange Act of 1934, alleging that petitioner Merck & Co. knowingly misrepresented the heart-attack risks associated with its drug Vioxx. A securities fraud complaint is timely if filed no more than "2 years after the discovery of the facts constituting the violation" or 5 years after the violation. 28 U. S. C. § 1658(b). The District Court dismissed the complaint as untimely because the plaintiffs should have been alerted to the *possibility* of Merck's misrepresentations prior to November 2001, more than two years before the complaint was filed, and they had failed to undertake a reasonably diligent investigation at that time. Among the relevant circumstances were (1) a March 2000 "VIGOR" study comparing Vioxx with the painkiller naproxen and showing adverse cardiovascular results for Vioxx, which Merck suggested might be due to the absence of a benefit conferred by naproxen rather than a harm caused by Vioxx (the naproxen hypothesis); (2) an FDA warning letter, released to the public on September 21, 2001, saying that Merck's Vioxx marketing with regard to the cardiovascular results was "false, lacking in fair balance, or otherwise misleading"; and (3) pleadings filed in products-liability actions in September and October 2001 alleging that Merck had concealed information about Vioxx and intentionally downplayed its risks. The Third Circuit reversed, holding that the pre-November 2001 events did not suggest that Merck acted with scienter, an element of a § 10(b) violation, and consequently did not commence the running of the limitations period.

Held:

1. The limitations period in § 1658(b)(1) begins to run once the plaintiff actually discovered or a reasonably diligent plaintiff would have "discover[ed] the facts constituting the violation"—whichever comes first. In the statute of limitations context, "discovery" is often used as a term of art in connection with the "discovery rule," a doctrine that delays accrual of a cause of action until the plaintiff has "discovered" it. The rule arose in fraud cases but has been applied by state and federal courts in other types of claims, and legislatures have sometimes codified this rule. When "discovery" is written directly into a statute, courts have typically interpreted the word to refer not only to actual discovery,

but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know. Congress intended courts to interpret the word "discovery" in § 1658(b)(1) similarly. That statute was enacted after this Court determined a governing limitations period for private § 10(b) actions, *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, concluding that such actions "must be commenced within one year *after the discovery of the facts constituting the violation* . . . ," *id.*, at 364 (emphasis added). Since then, Courts of Appeals deciding the matter have held that "discovery" occurs both when a plaintiff *actually* discovers the facts and when a hypothetical reasonably diligent plaintiff would have discovered them. In 2002, Congress repeated *Lampf*'s critical language in enacting the present limitations statute. Normally, when Congress enacts statutes, it is aware of relevant judicial precedent. See, *e. g.*, *Edelman* v. *Lynchburg College*, 535 U. S. 106, 116–117, and n. 13. Given the history and precedent surrounding the use of "discovery" in the limitations context generally as well as in this provision, the reasons for making this assumption are particularly strong here. Merck's claims are evaluated accordingly. Pp. 644–648.

2. In determining the time at which "discovery" occurs, terms such as "inquiry notice" and "storm warnings" may be useful insofar as they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation," including scienter—irrespective of whether the actual plaintiff undertook a reasonably diligent investigation. Pp. 648–653.

(a) Contrary to Merck's argument, facts showing scienter are among those that "constitut[e] the violation." Scienter is assuredly a "fact." In a § 10(b) action, it refers to "a mental state embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12, and "constitut[es]" an important and necessary element of a § 10(b) "violation." See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U. S. 308, 319. Because the scienter element of § 10(b) fraud cases has special heightened pleading requirements, see 15 U. S. C. § 78u–4(b)(2), unless a § 10(b) complaint sets forth facts showing that it is "at least as likely as" not that the defendant acted with the relevant intent, the claim will fail. *Tellabs*, *supra*, at 328 (emphasis deleted). It would frustrate the very purpose of the discovery rule codified in § 1658(b)(1) if the limitations period began to run regardless of whether a plaintiff had "discover[ed]" any facts suggesting scienter. Pp. 648–649.

(b) The Court also rejects Merck's argument that, even if "discovery" requires facts related to scienter, facts that tend to show a materially false or misleading statement (or material omission) are ordinarily

sufficient to show scienter. Where § 10(b) is at issue, the relation of factual falsity and state of mind is more context specific. For instance, an incorrect prediction about a firm's future earnings, by itself, does not automatically show whether the speaker deliberately lied or made an innocent error. Hence, "discovery" of additional scienter-related facts may be required. The statute's inclusion of an unqualified bar on actions instituted "5 years after such violation," § 1658(b)(2), should diminish Merck's fear that this requirement will give life to stale claims or subject defendants to liability for acts taken long ago. Pp. 649–650.

(c) And the Court cannot accept Merck's argument that the limitations period begins at "inquiry notice," meaning the point where the facts would lead a reasonably diligent plaintiff to investigate further, because that point is not necessarily the point at which the plaintiff would already have "discover[ed]" facts showing scienter or other "facts constituting the violation." The statute says that the plaintiff's claim accrues only after the "discovery" of those latter facts. It contains no indication that the limitations period can sometimes begin *before* "discovery" can take place. Merck also argues that determining when a hypothetical reasonably diligent plaintiff would have "discover[ed]" the necessary facts is too complicated for judges to undertake. But courts applying the traditional discovery rule have long had to ask what a reasonably diligent plaintiff would have known and done in myriad circumstances and already undertake this kind of inquiry in securities fraud cases. Pp. 650–653.

3. Prior to November 6, 2001, the plaintiffs did not discover, and Merck has not shown that a reasonably diligent plaintiff would have discovered, "the facts constituting the violation." The FDA's September 2001 warning letter shows little or nothing about the here-relevant scienter, *i. e.*, whether Merck advanced the naproxen hypothesis with fraudulent intent. The FDA itself described the hypothesis as a "possible explanation" for the VIGOR results, faulting Merck only for failing sufficiently to publicize the less favorable alternative, that Vioxx might be harmful. The products-liability complaints' general statements about Merck's state of mind show little more. Thus, neither these circumstances nor any of the other pre-November 2001 circumstances reveal "facts" indicating the relevant scienter. Pp. 653–654.

543 F. 3d 150, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, ALITO, and SOTOMAYOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 655. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 655.

Counsel

Kannon K. Shanmugam argued the cause for petitioners. With him on the briefs were *Richard A. Olderman*, *Thomas J. Roberts*, *Samuel Bryant Davidoff*, *Christopher R. Hart*, *William R. Stein*, *Eric S. Parnes*, *Evan R. Chesler*, *Robert H. Baron*, *Karin A. DeMasi*, *Martin L. Perschetz*, *Sung-Hee Suh*, and *William H. Gussman, Jr.*

David C. Frederick argued the cause for respondents. With him on the brief were *Max W. Berger*, *William C. Fredericks*, *Elliott J. Weiss*, *Bruce D. Bernstein*, *Boaz A. Weinstein*, *Adam H. Wierzbowski*, *David A. P. Brower*, *Richard H. Weiss*, and *Roland W. Riggs.*

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Solicitor General Kagan*, *Douglas Hallward-Driemeier*, *Mark D. Cahn*, *Michael A. Conley*, and *Mark Pennington.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Deanne E. Maynard*, *Brian R. Matsui*, *Robin S. Conrad*, and *Amar D. Sarwal;* for DRI–The Voice of the Defense Bar by *Kevin C. Newsom* and *F. M. Haston III;* for the Pharmaceutical and Research Manufacturers of America by *Carter G. Phillips* and *Jonathan F. Cohn;* for the Securities Industry and Financial Markets Association by *Richard D. Bernstein*, *Michael R. Young*, *Mary Eaton*, and *Kevin M. Carroll;* and for the Washington Legal Foundation by *Steven G. Bradbury*, *Steven A. Engel*, *Steven B. Fierson*, *Michael L. Kichline*, *Daniel J. Popeo*, *Richard Samp*, and *Andrew J. Levander.*

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Richard Cordray*, Attorney General of Ohio, *Benjamin C. Mizer*, Solicitor General, *Albert G. Lin*, General Counsel, *Emily S. Schlesinger*, Deputy Solicitor, and *Jason P. Small* and *Alyson Terrell*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Edmund G. Brown, Jr.*, of California, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Mark Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *Janet Mills* of Maine, *Douglas F. Gansler* of Maryland, *Mike Cox* of Michigan, *Steve Bullock* of Montana, *Michael E. Delaney* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *John R. Kroger* of Oregon, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster*

JUSTICE BREYER delivered the opinion of the Court.

This case concerns the timeliness of a complaint filed in a private securities fraud action. The complaint was timely if filed no more than two years after the plaintiffs "discover[ed] the facts constituting the violation." 28 U. S. C. § 1658(b)(1). Construing this limitations statute for the first time, we hold that a cause of action accrues (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, "the facts constituting the violation"—whichever comes first. We also hold that the "facts constituting the violation" include the fact of scienter, "a mental state embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976). Applying this standard, we affirm the Court of Appeals' determination that the complaint filed here was timely.

I

The action before us involves a claim by a group of investors (the plaintiffs, respondents here) that Merck & Co. and others (petitioners here, hereinafter Merck) knowingly mis-

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of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, *Mark Shurtleff* of Utah, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; for the Connecticut Retirement Plans and Trust Funds et al. by *Jay W. Eisenhofer, Geoffrey C. Jarvis, John C. Kairis, James R. Banko, Michele S. Carino, Luke Bierman,* and *Robert L. Pratter;* for Change to Win et al. by *Eric Alan Isaacson, Joseph D. Daley,* and *Patrick J. Szymanski;* for the Faculty at Law and Business Schools by *Lisa L. Casey, J. Robert Brown, Jr.*, and *Lyman Johnson;* for the National Association of Shareholder and Consumer Attorneys by *Frederic S. Fox, Donald R. Hall, Aviah Cohen Pierson,* and *Kevin P. Roddy;* and for the National Coordinating Committee for Multiemployer Plans by *Donald J. Capuano* and *Sally M. Tedrow.*

Briefs of *amici curiae* were filed for AARP et al. by *Stanley D. Bernstein, Jay E. Sushelsky,* and *Michael Schuster;* for the Council of Institutional Investors by *Gregory S. Coleman, Christian J. Ward,* and *Marc S. Tabolsky;* and for Dr. Harlan M. Krumholz et al. by *James A. Feldman* and *W. Mark Lanier.*

represented the risks of heart attacks accompanying the use of Merck's painkilling drug, Vioxx (leading to economic losses when the risks later became apparent). The plaintiffs brought an action for securities fraud under § 10(b) of the Securities Exchange Act of 1934. See 48 Stat. 891, as amended, 15 U. S. C. § 78j(b); SEC Rule 10b–5, 17 CFR § 240.10b–5(b) (2009); *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342 (2005).

The applicable statute of limitations provides that a "private right of action" that, like the present action, "involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of—

> "(1) 2 years after the discovery of the facts constituting the violation; or
>
> "(2) 5 years after such violation." 28 U. S. C. § 1658(b).

The complaint in this case was filed on November 6, 2003, and no one doubts that it was filed within five years of the alleged violation. Therefore, the critical date for timeliness purposes is November 6, 2001—two years before this complaint was filed. Merck claims that before this date the plaintiffs had (or should have) discovered the "facts constituting the violation." If so, by the time the plaintiffs filed their complaint, the 2-year statutory period in § 1658(b)(1) had run. The plaintiffs reply that they had not, and could not have, discovered by the critical date those "facts," particularly not the facts related to scienter, and that their complaint was therefore timely.

A

We first set out the relevant pre-November 2001 facts, as we have gleaned them from the briefs, the record, and the opinions below.

1. 1990's. In the mid-1990's, Merck developed Vioxx. In 1999, the Food and Drug Administration (FDA) approved it

for prescription use. Vioxx suppresses pain by inhibiting the body's production of an enzyme called COX–2 (cyclooxygenase-2). COX–2 is associated with pain and inflammation. Unlike some other anti-inflammatory drugs in its class like aspirin, ibuprofen, and naproxen, Vioxx does not inhibit production of a second enzyme called COX–1 (cyclooxygenase-1). COX–1 plays a part in the functioning of the gastrointestinal tract and also in platelet aggregation (associated with blood clots). App. 50–51.

2. March 2000. Merck announced the results of a study, called the "VIGOR" study. *Id.*, at 291–294. The study compared Vioxx with another painkiller, naproxen. The study showed that persons taking Vioxx suffered fewer gastrointestinal side effects (as Merck had hoped). But the study also revealed that approximately 4 out of every 1,000 participants who took Vioxx suffered heart attacks, compared to only 1 per 1,000 participants who took naproxen. *Id.*, at 296, 306; see Bombardier et al., Comparison of Upper Gastrointestinal Toxicity of Rofecoxib and Naproxen in Patients With Rheumatoid Arthritis, 343 New England J. Medicine 1520, 1523, 1526–1527 (2000).

Merck's press release acknowledged VIGOR's adverse cardiovascular data. But Merck said that these data were "consistent with naproxen's ability to block platelet aggregation." App. 291. Merck noted that, since "Vioxx, like all COX–2 selective medicines, does not block platelet aggregation[, it] would not be expected to have similar effects." *Ibid.* And Merck added that "safety data from all other completed and ongoing clinical trials . . . showed no indication of a difference in the incidence of thromboembolic events between Vioxx" and either a placebo or comparable drugs. *Id.*, at 293 (emphasis deleted).

This theory—that VIGOR's troubling cardiovascular findings might be due to the absence of a benefit conferred by naproxen rather than due to a harm caused by Vioxx—later became known as the "naproxen hypothesis." In advancing

that hypothesis, Merck acknowledged that the naproxen benefit "had not been observed previously." *Id.*, at 291. Journalists and stock market analysts reported all of the above—the positive gastrointestinal results, the troubling cardiovascular finding, the naproxen hypothesis, and the fact that the naproxen hypothesis was unproved. See *id.*, at 355–391, 508–557.

3. February 2001 to August 2001. Public debate about the naproxen hypothesis continued. In February 2001, the FDA's Arthritis Advisory Committee convened to consider Merck's request that the Vioxx label be changed to reflect VIGOR's positive gastrointestinal findings. The VIGOR cardiovascular findings were also discussed. *Id.*, at 392–395, 558–577. In May 2001, a group of plaintiffs filed a products-liability lawsuit against Merck, claiming that "Merck's own research" had demonstrated that "users of Vioxx were four times as likely to suffer heart attacks as compared to other less expensive medications." *Id.*, at 869. In August 2001, the Journal of the American Medical Association wrote that the available data raised a "cautionary flag" and strongly urged that "a trial specifically assessing cardiovascular risk" be done. *Id.*, at 331–332; Mukherjee, Nissen, & Topol, Risk of Cardiovascular Events Associated with Selective COX–2 Inhibitors, 286 JAMA 954 (2001). At about the same time, Bloomberg News quoted a Merck scientist who claimed that Merck had "additional data" that were "very, very reassuring," and Merck issued a press release stating that it stood "behind the overall and cardiovascular safety profile . . . of Vioxx." App. 434, 120 (emphasis deleted; internal quotation marks omitted).

4. September and October 2001. The FDA sent Merck a warning letter released to the public on September 21, 2001. It said that, in respect to cardiovascular risks, Merck's Vioxx marketing was "false, lacking in fair balance, or otherwise misleading." *Id.*, at 339. At the same time, the FDA acknowledged that the naproxen hypothesis was a "possi-

ble explanation" of the VIGOR results. *Id.*, at 340. But it found that Merck's "promotional campaign selectively present[ed]" that hypothesis without adequately acknowledging "another reasonable explanation," namely, "that Vioxx may have pro-thrombotic [*i. e.*, adverse cardiovascular] properties." *Ibid.* The FDA ordered Merck to send healthcare providers a corrective letter. *Id.*, at 353.

After the FDA letter was released, more products-liability lawsuits were filed. See *id.*, at 885–956. Merck's share price fell by 6.6% over several days. See *id.*, at 832. By October 1, the price rebounded. See *ibid.* On October 9, 2001, the New York Times said that Merck had reexamined its own data and "found no evidence that Vioxx increased the risk of heart attacks." *Id.*, at 504. It quoted the president of Merck Research Laboratories as positing "'two possible interpretations'": "'Naproxen lowers the heart attack rate, or Vioxx raises it.'" *Ibid.* Stock analysts, while reporting the warning letter, also noted that the FDA had not denied that the naproxen hypothesis remained an unproven but possible explanation. See *id.*, at 614, 626, 628.

B

We next set forth three important events that occurred *after* the critical date.

1. October 2003. The Wall Street Journal published the results of a Merck-funded Vioxx study conducted at Boston's Brigham and Women's Hospital. After examining the medical records of more than 50,000 Medicare patients, researchers found that those given Vioxx for 30 to 90 days were 37% more likely to have suffered a heart attack than those given either a different painkiller or no painkiller at all. *Id.*, at 164–165. (That is to say, if patients given a different painkiller or given no painkiller at all suffered 10 heart attacks, then the same number of patients given Vioxx would suffer 13 or 14 heart attacks.) Merck defended Vioxx and pointed to the study's limitations. *Id.*, at 165–167.

2. September 30, 2004. Merck withdrew Vioxx from the market. It said that a new study had found "an increased risk of confirmed cardiovascular events beginning after 18 months of continuous therapy." *Id.*, at 182 (internal quotation marks omitted). A Merck representative publicly described the results as "totally unexpected." *Id.*, at 186 (emphasis deleted). Merck's shares fell by 27% the same day. *Id.*, at 185, 856.

3. November 1, 2004. The Wall Street Journal published an article stating that "internal Merck e-mails and marketing materials as well as interviews with outside scientists show that the company fought forcefully for years to keep safety concerns from destroying the drug's commercial prospects." *Id.*, at 189–190. The article said that an early e-mail from Merck's head of research had said that the VIGOR "results showed that the cardiovascular events 'are clearly there,'" that it was "'a shame but . . . a low incidence,'" and that it "'is mechanism based as we worried it was.'" *Id.*, at 192. It also said that Merck had given its salespeople instructions to "'DODGE'" questions about Vioxx's cardiovascular effects. *Id.*, at 193.

C

The plaintiffs filed their complaint on November 6, 2003. As subsequently amended, the complaint alleged that Merck had defrauded investors by promoting the naproxen hypothesis, knowing the hypothesis was false. It said, for example, that Merck "knew, at least as early as 1996, of the serious safety issues with Vioxx," and that a "1998 internal Merck clinical trial . . . revealed that . . . serious cardiovascular events . . . occurred six times more frequently in patients given Vioxx than in patients given a different arthritis drug or placebo." *Id.*, at 56, 58–59 (emphasis and capitalization deleted).

Merck, believing that the plaintiffs knew or should have known the "facts constituting the violation" at least two years earlier, moved to dismiss the complaint, saying it was

filed too late. The District Court granted the motion. The court held that the (March 2001) VIGOR study, the (September 2001) FDA warning letter, and Merck's (October 2001) response should have alerted the plaintiffs to a "*possibility* that Merck had knowingly misrepresented material facts" no later than October 9, 2001, thus placing the plaintiffs on "inquiry notice" to look further. *In re Merck & Co. Securities, Derivative & "ERISA" Litigation*, 483 F. Supp. 2d 407, 423 (NJ 2007) (emphasis added). Finding that the plaintiffs had failed to "show that they exercised reasonable due diligence but nevertheless were unable to discover their injuries," the court took October 9, 2001, as the date that the limitations period began to run and therefore found the complaint untimely. *Id.*, at 424.

The Court of Appeals for the Third Circuit reversed. A majority held that the pre-November 2001 events, while constituting "storm warning[s]," did not suggest much by way of scienter, and consequently did not put the plaintiffs on "inquiry notice," requiring them to investigate further. *In re Merck & Co. Securities, Derivative & "ERISA" Litigation*, 543 F. 3d 150, 172 (2008). A dissenting judge considered the pre-November 2001 events sufficient to start the 2-year clock running. *Id.*, at 173 (opinion of Roth, J.).

Merck sought review in this Court, pointing to disagreements among the Courts of Appeals. Compare *Theoharous* v. *Fong*, 256 F. 3d 1219, 1228 (CA11 2001) (limitations period begins to run when information puts plaintiffs on "inquiry notice" of the need for investigation), with *Shah* v. *Meeker*, 435 F. 3d 244, 249 (CA2 2006) (same; but if plaintiff *does* investigate, period runs "from the date such inquiry should have revealed the fraud" (internal quotation marks omitted)), and *New England Health Care Employees Pension Fund* v. *Ernst & Young, LLP*, 336 F. 3d 495, 501 (CA6 2003) (limitations period *always* begins to run only when a reasonably diligent plaintiff, after being put on "inquiry notice,"

should have discovered facts constituting violation (internal quotation marks omitted)). We granted Merck's petition.

II

Before turning to Merck's arguments, we consider a more basic matter. The parties and the Solicitor General agree that § 1658(b)(1)'s word "discovery" refers not only to a plaintiff's *actual* discovery of certain facts, but also to the facts that a reasonably diligent plaintiff would have discovered. We agree. But because the statute's language does not make this interpretation obvious, and because we cannot answer the question presented without considering whether the parties are right about this matter, we set forth the reasons for our agreement in some detail.

We recognize that one might read the statutory words "after the discovery of the facts constituting the violation" as referring to the time a plaintiff *actually* discovered the relevant facts. But in the statute of limitations context, the word "discovery" is often used as a term of art in connection with the "discovery rule," a doctrine that delays accrual of a cause of action until the plaintiff has "discovered" it. The rule arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a "complete and present cause of action," *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997) (citing *Clark* v. *Iowa City*, 20 Wall. 583, 589 (1875); internal quotation marks omitted). This Court long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded. Otherwise, "the law which was designed to prevent fraud" could become "the means by which it is made successful and secure." *Bailey* v. *Glover*, 21 Wall. 342, 349 (1875). Accordingly, "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of

the statute does not begin to run until the fraud is *discovered.*" *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946) (internal quotation marks omitted; emphasis added). And for more than a century, courts have understood that "[f]raud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered." 2 H. Wood, Limitation of Actions § 276b(11), p. 1402 (4th ed. 1916); see *id.*, at 1401–1403, and nn. 74–84 (collecting cases and statutes); see, *e. g., Holmberg, supra,* at 397; *Kirby* v. *Lake Shore & Michigan Southern R. Co.*, 120 U. S. 130, 138 (1887) (The rule "regard[s] the cause of action as having accrued at the time the fraud was or should have been discovered").

More recently, both state and federal courts have applied forms of the "discovery rule" to claims other than fraud. See 2 C. Corman, Limitation of Actions §§ 11.1.2.1, 11.1.2.3, pp. 136–142, and nn. 6–13, 18–23 (1991 and 1993 Supp.) (hereinafter Corman) (collecting cases); see, *e. g., United States* v. *Kubrick,* 444 U. S. 111 (1979). Legislatures have codified the discovery rule in various contexts. 2 Corman § 11.2, at 170–171, and nn. 1–9 (collecting statutes); see, *e. g.*, 28 U. S. C. § 2409a(g) (actions to quiet title against the United States). In doing so, legislators have written the word "discovery" directly into the statute. And when they have done so, state and federal courts have typically interpreted the word to refer not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know. See, *e. g., Peacock* v. *Barnes,* 142 N. C. 215, 217–220, 55 S. E. 99, 100 (1906); *Davis* v. *Hibernia Sav. & Loan Soc.*, 21 Cal. App. 444, 448, 132 P. 462, 464 (1913); *Roether* v. *National Union Fire Ins. Co.*, 51 N. D. 634, 640–642, 200 N. W. 818, 821 (1924); *Goldenberg* v. *Bache & Co.,* 270 F. 2d 675, 681 (CA5 1959); *Mobley* v. *Hall*, 202 Mont. 227, 232, 657 P. 2d 604, 606 (1983); *Tregenza* v. *Great American Communications Co.*, 12 F. 3d 717, 721–722 (CA7 1993); *J. Geils Band Employee Benefit Plan* v. *Smith Barney Shearson, Inc.*, 76 F. 3d 1245, 1254 (CA1 1996).

Thus, treatise writers now describe "the discovery rule" as allowing a claim "to accrue when the litigant first knows *or with due diligence should know* facts that will form the basis for an action." 2 Corman § 11.1.1, at 134 (emphasis added); see also *ibid.*, n. 1 (collecting cases); 37 Am. Jur. 2d, Fraud and Deceit § 347, p. 354 (2001 and Supp. 2009) (noting that the various formulations of "discovery" all provide that "in addition to actual knowledge of the fraud, once a reasonably diligent party is in a position that they should have sufficient knowledge or information to have actually discovered the fraud, they are charged with discovery"); *id.*, at 354–355, and nn. 2–11 (collecting cases).

Like the parties, we believe that Congress intended courts to interpret the word "discovery" in § 1658(b)(1) similarly. Before Congress enacted that statute, this Court, having found in the federal securities laws the existence of an implied private § 10(b) action, determined its governing limitations period by looking to other limitations periods in the federal securities laws. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991). Noting the existence of various formulations "differ[ing] slightly in terminology," the Court chose the language in 15 U. S. C. § 78i(e), the statutory provision that governs securities price manipulation claims. 501 U. S., at 364, n. 9. And in doing so, the Court said that private § 10(b) actions "must be commenced within one year *after the discovery of the facts constituting the violation* and within three years after such violation." *Id.*, at 364 (emphasis added). (The Court listed among the various formulations the one in 15 U. S. C. § 77m, on which the concurrence relies. See *post*, at 656–658 (SCALIA, J., concurring in part and concurring in judgment); *Lampf, supra*, at 360, and n. 7 (quoting § 77m).)

Subsequently, every Court of Appeals to decide the matter held that "discovery of the facts constituting the violation" occurs not only once a plaintiff *actually* discovers the facts, but also when a hypothetical reasonably diligent plaintiff

would have discovered them. See, *e. g.*, *Law* v. *Medco Research, Inc.*, 113 F. 3d 781, 785–786 (CA7 1997); *Dodds* v. *Cigna Securities, Inc.*, 12 F. 3d 346, 350, 353 (CA2 1993); see *In re NAHC, Inc. Securities Litigation*, 306 F. 3d 1314, 1325, n. 4 (CA3 2002) (collecting cases). Some of those courts noted that other limitations provisions in the federal securities laws explicitly provide that the period begins to run "'after the discovery of the untrue statement . . . *or after such discovery should have been made by [the] exercise of reasonable diligence*,'" whereas the formulation adopted by the Court in *Lampf* from 15 U. S. C. § 78i(e) does not. *Tregenza*, *supra*, at 721 (quoting § 77m; emphasis added in *Tregenza*); see *Lampf*, *supra*, at 364, n. 9. But, courts reasoned, because the term "discovery" in respect to statutes of limitations for fraud has long been understood to include discoveries a reasonably diligent plaintiff would make, the omission of an explicit provision to that effect did not matter. *Tregenza*, *supra*, at 721; accord, *New England Health Care*, 336 F. 3d, at 499–500.

In 2002, when Congress enacted the present limitations statute, it repeated *Lampf*'s critical language. The statute says that an action based on fraud "may be brought not later than the earlier of . . . 2 years *after the discovery of the facts constituting the violation*" (or "5 years after such violation"). § 804 of the Sarbanes-Oxley Act, 116 Stat. 801, codified at 28 U. S. C. § 1658(b) (emphasis added). (This statutory provision does *not* make the linguistic distinction that the concurrence finds in a *different* statute, § 77m, and upon which its argument rests. Cf. 29 U. S. C. § 1113(2) (statute in which Congress provided that an action be brought "three years after the earliest date on which the plaintiff had *actual knowledge* of the breach or violation" (emphasis added)).) Not surprisingly, the Courts of Appeals unanimously have continued to interpret the word "discovery" in this statute as including not only facts a particular plaintiff knows, but also the facts any reasonably diligent plaintiff would know.

See, *e. g.*, *Staehr* v. *Hartford Financial Servs. Group, Inc.*, 547 F. 3d 406, 411 (CA2 2008); *Sudo Properties, Inc.* v. *Terrebonne Parish Consolidated Govt.*, 503 F. 3d 371, 376 (CA5 2007).

We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent. See, *e. g.*, *Edelman* v. *Lynchburg College*, 535 U. S. 106, 116–117, and n. 13 (2002); *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159 (1993). Given the history and precedent surrounding the use of the word "discovery" in the limitations context generally as well as in this provision in particular, the reasons for making this assumption are particularly strong here. We consequently hold that "discovery" as used in this statute encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known. And we evaluate Merck's claims accordingly.

III

We turn now to Merck's arguments in favor of holding that petitioners' claims accrued before November 6, 2001. First, Merck argues that the statute does not require "discovery" of scienter-related "facts." See Brief for Petitioners 19–28. We cannot agree, however, that facts about scienter are unnecessary.

The statute says that the limitations period does not begin to run until "discovery of the *facts constituting the violation.*" 28 U. S. C. § 1658(b)(1) (emphasis added). Scienter is assuredly a "fact." In a § 10(b) action, scienter refers to "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U. S., at 194, n. 12. And the "'state of a man's mind is as much a fact as the state of his digestion.'" *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 716 (1983) (quoting *Edgington* v. *Fitzmaurice*, [1885] 29 Ch. Div. 459, 483).

And this "fact" of scienter "constitut[es]" an important and necessary element of a § 10(b) "violation." A plaintiff cannot

recover without proving that a defendant made a material misstatement *with an intent to deceive*—not merely innocently or negligently. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U. S. 308, 319 (2007); *Ernst & Ernst*, *supra*. Indeed, Congress has enacted special heightened pleading requirements for the scienter element of § 10(b) fraud cases. See 15 U. S. C. § 78u–4(b)(2) (requiring plaintiffs to "state with particularity *facts* giving rise to a strong inference that the defendant acted with the required state of mind" (emphasis added)). As a result, unless a § 10(b) plaintiff can set forth facts in the complaint showing that it is "at least as likely as" not that the defendant acted with the relevant knowledge or intent, the claim will fail. *Tellabs*, *supra*, at 328 (emphasis deleted). It would therefore frustrate the very purpose of the discovery rule in this provision—which, after all, specifically applies only in cases "involv[ing] a claim of fraud, deceit, manipulation, or contrivance," § 1658(b)—if the limitations period began to run regardless of whether a plaintiff had discovered any facts suggesting scienter. So long as a defendant concealed for two years that he made a misstatement with an intent to deceive, the limitations period would expire before the plaintiff had actually "discover[ed]" the fraud.

We consequently hold that facts showing scienter are among those that "constitut[e] the violation." In so holding, we say nothing about other facts necessary to support a private § 10(b) action. Cf. Brief for United States as *Amicus Curiae* 12, n. 1 (suggesting that facts concerning a plaintiff's reliance, loss, and loss causation are not among those that constitute "the violation" and therefore need not be "discover[ed]" for a claim to accrue).

Second, Merck argues that, even if "discovery" requires facts related to scienter, facts that tend to show a materially false or misleading statement (or material omission) are ordinarily sufficient to show scienter as well. See Brief for Petitioners 22, 28–29. But we do not see how that is so. We

recognize that certain statements are such that, to show them false is normally to show scienter as well. It is unlikely, for example, that someone would falsely say "I am not married" without being aware of the fact that his statement is false. Where § 10(b) is at issue, however, the relation of factual falsity and state of mind is more context specific. An incorrect prediction about a firm's future earnings, by itself, does not automatically tell us whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error. Hence, the statute may require "discovery" of scienter-related facts beyond the facts that show a statement (or omission) to be materially false or misleading. Merck fears that this requirement will give life to stale claims or subject defendants to liability for acts taken long ago. But Congress' inclusion in the statute of an unqualified bar on actions instituted "5 years after such violation," § 1658(b)(2), giving defendants total repose after five years, should diminish that fear. Cf. *Lampf*, 501 U. S., at 363 (holding comparable bar not subject to equitable tolling).

Third, Merck says that the limitations period began to run prior to November 2001 because by that point the plaintiffs were on "inquiry notice." Merck uses the term "inquiry notice" to refer to the point "at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry." Brief for Petitioners 20. And some, but not all, Courts of Appeals have used the term in roughly similar ways. See, *e. g.*, *Franze* v. *Equitable Assurance*, 296 F. 3d 1250, 1254 (CA11 2002) ("[I]nquiry notice [is] 'the term used for knowledge of facts that would lead a reasonable person to begin investigating the possibility that his legal rights had been infringed' "). Cf. *Dodds*, 12 F. 3d, at 350 ("duty of inquiry" arises once "circumstances would suggest to an investor of ordinary intelligence the probability that she had been defrauded"); *Fujisawa Pharmaceutical Co.* v. *Kapoor*, 115

F. 3d 1332, 1335–1336 (CA7 1997) ("The facts constituting [inquiry] notice must be sufficien[t] . . . to incite the victim to investigate" and "to enable him to tie up any loose ends and complete the investigation in time to file a timely suit"); *Great Rivers Cooperative of Southeastern Iowa* v. *Farmland Industries, Inc.*, 120 F. 3d 893, 896 (CA8 1997) ("Inquiry notice exists when the victim is aware of facts that would lead a reasonable person to investigate *and* consequently acquire actual knowledge of the defendant's misrepresentations" (emphasis added)).

If the term "inquiry notice" refers to the point where the facts would lead a reasonably diligent plaintiff to investigate further, that point is not necessarily the point at which the plaintiff would already have discovered facts showing scienter or other "facts constituting the violation." But the statute says that the plaintiff's claim accrues only after the "discovery" of those latter facts. Nothing in the text suggests that the limitations period can sometimes begin *before* "discovery" can take place. Merck points out that, as we have discussed, see *supra*, at 644–645, the court-created "discovery rule" exception to ordinary statutes of limitations is not generally available to plaintiffs who fail to pursue their claims with reasonable diligence. But we are dealing here with a statute, not a court-created exception to a statute. Because the statute contains no indication that the limitations period should occur at some earlier moment before "discovery," when a plaintiff would have *begun* investigating, we cannot accept Merck's argument.

As a fallback, Merck argues that even if the limitations period does generally begin at "discovery," it should nonetheless run from the point of "inquiry notice" in one particular situation, namely, where the actual plaintiff fails to undertake an investigation once placed on "inquiry notice." In such circumstances, Merck contends, the actual plaintiff is not diligent, and the law should not "effectively excuse a

plaintiff's failure to conduct a further investigation" by placing that nondiligent plaintiff and a reasonably diligent plaintiff "in the same position." Brief for Petitioners 48.

We cannot accept this argument for essentially the same reason we reject "inquiry notice" as the standard generally: We cannot reconcile it with the statute, which simply provides that "discovery" is the event that triggers the 2-year limitations period—for all plaintiffs. Cf. *United States* v. *Mack*, 295 U. S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law"). Furthermore, the statute does *not* place all plaintiffs "in the same position" no matter whether they investigate when investigation is warranted. The limitations period puts plaintiffs who fail to investigate once on "inquiry notice" at a disadvantage because it lapses two years after a reasonably diligent plaintiff would have discovered the necessary facts. A plaintiff who fails entirely to investigate or delays investigating may well not have discovered those facts by that time or, at least, may not have found sufficient facts by that time to be able to file a § 10(b) complaint that satisfies the applicable heightened pleading standards. Cf. *Young* v. *Lepone*, 305 F. 3d 1, 9 (CA1 2002) ("[A] reasonably diligent investigation . . . may consume as little as a few days or as much as a few years to get to the bottom of the matter").

Merck further contends that its proposed "inquiry notice" standard is superior, because determining when a hypothetical reasonably diligent plaintiff would have "discover[ed]" the necessary facts is too complicated for judges to undertake. But courts applying the traditional discovery rule have long had to ask what a reasonably diligent plaintiff would have known and done in myriad circumstances. And courts in at least five Circuits already ask this kind of question in securities fraud cases. See, *e. g.*, *Rothman* v. *Gregor*, 220 F. 3d 81, 97 (CA2 2000); *New England Health Care*, 336 F. 3d, at 501; *Young, supra,* at 9–10; *Sterlin* v. *Biomune Systems*, 154 F. 3d 1191, 1201 (CA10 1998); *Marks* v. *CDW Com-*

puter Centers, Inc., 122 F. 3d 363, 367–368 (CA7 1997). Merck has not shown this precedent to be unworkable. We consequently find that the "discovery" of facts that put a plaintiff on "inquiry notice" does not automatically begin the running of the limitations period.

We conclude that the limitations period in § 1658(b)(1) begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have "discover[ed] the facts constituting the violation"—whichever comes first. In determining the time at which "discovery" of those "facts" occurred, terms such as "inquiry notice" and "storm warnings" may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation," including scienter—irrespective of whether the actual plaintiff undertook a reasonably diligent investigation.

IV

Finally, Merck argues that, even if all its other legal arguments fail, the record still shows that, before November 6, 2001, the plaintiffs had discovered or should have discovered "the facts constituting the violation." In respect to scienter Merck primarily relies upon (1) the FDA's September 2001 warning letter, which said that Merck had "'minimized'" the VIGOR study's "'potentially serious cardiovascular findings'" and (2) pleadings filed in products-liability actions in September and October 2001 alleging that Merck had "'omitted, suppressed, or concealed material facts concerning the dangers and risks associated with Vioxx'" and "'*purposefully* downplayed and/or understated the serious nature of the risks associated with Vioxx.'" Brief for Petitioners 36–37 (quoting App. 340, 893).

The FDA's warning letter, however, shows little or nothing about the here-relevant scienter, *i. e.*, whether Merck

advanced the naproxen hypothesis with fraudulent intent. See Part I–A*(4)*, *supra*. The FDA itself described the pro-Vioxx naproxen hypothesis as a "possible explanation" for the VIGOR results, faulting Merck only for failing sufficiently to publicize the alternative less favorable to Merck, that Vioxx might be harmful. App. 340.

The products-liability complaints' statements about Merck's knowledge show little more. See Part I–A*(3)*, *supra*. Merck does not claim that these complaints contained any specific information suggesting the fraud alleged here, *i. e.*, that Merck knew the naproxen hypothesis was false even as it promoted it. And, without providing any reason to believe that the plaintiffs had special access to information about Merck's state of mind, the complaints alleged only in general terms that Merck had concealed information about Vioxx and "purposefully downplayed and/or understated" the risks associated with Vioxx—the same charge made in the FDA warning letter. App. 893.

In our view, neither these two circumstances nor any of the other pre-November 2001 circumstances that we have set forth in Part I–A, *supra*, whether viewed separately or together, reveal "facts" indicating scienter. Regardless of which, if any, of the events following November 6, 2001, constituted "discovery," we need only conclude that prior to November 6, 2001, the plaintiffs did not discover, and Merck has not shown that a reasonably diligent plaintiff would have discovered, "the facts constituting the violation." In light of our interpretation of the statute, our holdings in respect to scienter, and our application of those holdings to the circumstances of this case, we must, and we do, reach that conclusion. Thus, the plaintiffs' suit is timely. We need not—and do not—pass upon the Court of Appeals' suggestion that the November 2003 Brigham and Women's study might have triggered the statute of limitations. The judgment of the Court of Appeals is

Affirmed.

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

In my opinion the Court's explanation of why the complaint was timely filed is convincing and correct. *Ante*, at 648–654. In this case there is no difference between the time when the plaintiffs actually discovered the factual basis for their claim and the time when reasonably diligent plaintiffs should have discovered those facts. For that reason, much of the discussion in Part II of the Court's opinion, see *ante*, at 644–648, is not necessary to support the Court's judgment. Until a case arises in which the difference between an actual discovery rule and a constructive discovery rule would affect the outcome, I would reserve decision on the merits of JUSTICE SCALIA's argument, *post*, this page (opinion concurring in part and concurring in judgment). With this reservation, I join the Court's excellent opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

Private suits under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), must be brought within "(1) 2 years after the discovery of the facts constituting the violation" or "(2) 5 years after such violation," whichever comes first. 28 U. S. C. § 1658(b)(1). I agree with the Court that scienter is among the "facts constituting the violation" that a plaintiff must "discove[r]" for the limitations period to begin. *Ante*, at 648–649 (internal quotation marks omitted). I also agree that respondents' suit is timely, but for a reason different from the Court's: Merck has not shown that respondents actually "discover[ed]" scienter more than two years before bringing suit.

In ordinary usage, "discovery" occurs when one actually learns something new. See Webster's New International Dictionary of the English Language 745 (2d ed. 1957) (defining "discovery" as "[f]inding out or ascertaining something previously unknown or unrecognized"). As the Court

notes, however, *ante,* at 644–646, in the context of statutes of limitations "discovery" has long carried an additional meaning: It also occurs when a plaintiff, exercising reasonable diligence, *should have* discovered the facts giving rise to his claim. See, *e. g.*, *Wood* v. *Carpenter*, 101 U. S. 135, 140–142 (1879); 2 H. Wood, Limitations of Actions § 276b(11)–(13), pp. 1401–1408 (4th ed. 1916); Dawson, Undiscovered Fraud and Statutes of Limitation, 31 Mich. L. Rev. 591, 619, and n. 77 (1933). Read in isolation, "discovery" in § 1658(b)(1) might mean constructive discovery.

In context, however, I do not believe it can. Section 13 of the Securities Act of 1933, 48 Stat. 84, explicitly established a constructive-discovery rule for claims under §§ 11 and 12 of that Act:

> "No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . ." 15 U. S. C. § 77m.

"[D]iscovery" in § 77m obviously cannot mean constructive discovery, since that would render superfluous the phrase "or after such discovery should have been made by the exercise of reasonable diligence." *Ibid.* With § 77m already on the books, Congress added limitations periods in the 1934 Act, 15 U. S. C. §§ 78i(e), 78r(c), that did not contain similar qualifying language; instead, each established a time bar that runs from "discovery" *simpliciter.* When Congress enacted 28 U. S. C. § 1658(b)(1) in 2002, establishing a limitations period for private actions for "fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws," specifically including the 1933 and 1934 Acts, see 15 U. S. C. § 78c(a)(47), it likewise included no constructive-discovery caveat. To interpret § 1658(b)(1) as imposing a constructive-discovery standard,

one must therefore assume, contrary to common sense, that the same word means two very different things in the same statutory context of limitations periods for securities-fraud actions under the 1933 and 1934 Acts.

True, the sensible presumption that a word means the same thing when it appears more than once in the same statutory context—or even in the very same statute—is rebuttable. See *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 595–596 (2004). Context may make clear that in one instance the word carries one meaning, and in a second instance another. See, *e. g.*, *id.*, at 596–597. But nothing in the context of § 77m or § 1658(b)(1) suggests that is the case. Both provisions impose limitations periods for federal-law claims based on various false statements or omissions involving securities. The former applies to false statements or omissions in registration statements, § 77k, and offers to sell securities, § 77*l*(a)(2); the broad language of the latter ("claim[s] of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws") covers other "manipulative or deceptive device[s] or contrivance[s]" made "in connection with the purchase or sale" of a security in violation of Securities and Exchange Commission regulations, § 78j(b), including SEC Rule 10b–5, 17 CFR § 240.10b–5(b) (2009). There is good reason, moreover, for providing an actual-discovery rule for private § 10(b) claims but providing (explicitly) a constructive-discovery rule for claims governed by § 77m: The elements of § 10(b) claims, which include scienter, are likely more difficult to discover than the elements of claims under § 77k or § 77*l*(a)(2), which do not, see *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 382 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 208–209 (1976); *In re Morgan Stanley Information Fund Securities Litigation*, 592 F. 3d 347, 359 (CA2 2010). And a constructive-discovery standard may be easier to apply to the claims covered by § 77m. Determining when the plaintiff should have uncovered an untrue assertion in a

registration statement or prospectus is much simpler than assessing when a plaintiff should have learned that the defendant deliberately misled him using a deceptive device covered by § 10(b).[1]

Unable to identify anything in the statutory context that warrants giving "discovery" two meanings, the Court relies on the historical treatment of "discovery" in limitations periods (particularly for fraud claims) as incorporating a constructive-discovery rule. *Ante*, at 644–646, 648. But that history proves only that "discovery" *can* carry that technical meaning, and that without § 77m it would be reasonable (other things equal) to read it that way here. It does not show what "discovery" means in § 1658(b)(1) *in light of* § 77m's codification of a constructive-discovery rule. In my view, the meaning of "discovery" in the broader context of limitations provisions is overcome by its meaning in the more specific context of the federal securities laws.

The Court's other reason for rejecting the more natural reading of § 1658(b)(1) rests on a consensus among the Courts of Appeals before the provision's enactment. *Ante*, at 646–648. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), the Court notes, we explicitly adopted the terms of § 78i(e)—which like § 1658(b)(1) refers only to discovery with no mention of reasonable diligence—

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[1] The Court appears to believe that § 77m's distinction between actual and constructive discovery has no bearing on § 1658(b)(1)'s meaning because the latter does not itself draw the same distinction. *Ante*, at 647. The point, however, is that both provisions use the same word ("discovery") with no contextual clue that it carries different meanings; and its use in § 77m makes clear that the meaning is actual discovery.

The Court suggests that usages of the same word in other statutes are irrelevant, *ibid.*, but of course it does not believe that. Its entire argument rests on the meaning courts have ascribed to "discovery" in other limitations provisions (some enacted decades ago by state legislatures), *ante*, at 644–646. Yet while the Court considers that broader context, it provides no explanation for ignoring the more specific context of securities-fraud claims under the 1933 and 1934 Acts.

as the limitations period for the private § 10(b) cause of action we created. *Id.*, at 364, and n. 9.[2] Since every Circuit to address the issue between *Lampf* and § 1658(b)(1)'s enactment 11 years later had held constructive discovery applicable to § 10(b) claims—and since Congress copied § 78i(e)'s key text into § 1658(b)(1) with no indication it intended to adopt a contrary rule—the Court assumes Congress meant to codify (or at least not to disturb) that consensus. *Ante*, at 646–648.

Even assuming that Congress intended to incorporate the Circuits' views—which requires the further unrealistic assumption that a majority of each House knew of and agreed with the Courts of Appeals' opinions—that would be entirely irrelevant. Congress's collective intent (if such a thing even exists) cannot trump the text it enacts, and in any event we have no reliable way to ascertain that intent apart from reading the text. See *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, *ante*, p. 302 (SCALIA, J., concurring in part and concurring in judgment).

The only way in which the Circuits' pre-2002 decisions might bear on § 1658(b)(1)'s meaning is if all (or nearly all) of the Circuits had interpreted "discovery" in § 78i(e) to mean constructive discovery. If that were true, one could say that those decisions had established the public meaning of the term in this context—whether Congress knew of (or agreed with) that meaning or not. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, *ante*, at 607, n. 1 (SCALIA, J., concurring in part and concurring in judgment).

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[2] The Court notes that *Lampf* chose § 78i(e)'s limitations period as the time bar for § 10(b) claims, even though it was aware of § 77m, 501 U. S., at 360, and n. 7, 364, and n. 9; see *ante*, at 646. But I fail to see how that provides any support for the Court's interpretation. To the contrary, the fact that in enacting § 1658(b)(1) Congress did *not* copy § 77m's constructive-discovery proviso—but decreed instead that "discovery" alone starts the clock (as it had done in § 78i(e), which we borrowed in *Lampf*)—is what makes equating § 77m and § 1658(b)(1) so implausible.

But as *amici* note, that is not so. See Brief for Faculty at Law and Business Schools as *Amici Curiae* 23–29 (hereinafter Faculty Brief). *Some* Circuit cases cited by the Court and *amici* can conceivably be read as interpreting the language *Lampf* adopted from § 78i(e) as imposing some form of constructive discovery. See *Theoharous* v. *Fong*, 256 F. 3d 1219, 1228 (CA11 2001); *Menowitz* v. *Brown*, 991 F. 2d 36, 41 (CA2 1993) *(per curiam); Howard* v. *Haddad*, 962 F. 2d 328, 329–330 (CA4 1992); *Anixter* v. *Home-Stake Production Co.*, 947 F. 2d 897, 898–899 (CA10 1991), vacated on other grounds, 503 U. S. 978 (1992). Others, however, cannot be so construed. Two were not interpreting § 78i(e) at all, but looked directly to § 77m, despite *Lampf*'s explicit selection of § 78i(e)'s terms. *Great Rivers Cooperative of Southeastern Iowa* v. *Farmland Industries, Inc.*, 120 F. 3d 893, 896 (CA8 1997); *Topalian* v. *Ehrman*, 954 F. 2d 1125, 1135 (CA5 1992). Another court candidly acknowledged that § 78i(e)'s text—unlike § 77m's—forecloses constructive discovery, but it nonetheless held that courts remain "free to apply to [§ 78i(e)] the judge-made doctrine of inquiry notice" as a "modest and traditional . . . exercise of judicial creativity," since "Congress could not have known when it enacted [§ 78i(e)] that this section would someday provide the statute of limitations for a wide range of securities frauds." *Tregenza* v. *Great American Communications Co.*, 12 F. 3d 717, 721–722 (CA7 1993) (Posner, J.).

The rest of the Circuits apparently had not decided the issue before § 1658(b)(1)'s enactment. See *Betz* v. *Trainer Wortham & Co.*, 519 F. 3d 863, 874 (CA9 2008); *New England Health Care Employees Pension Fund* v. *Ernst & Young, LLP*, 336 F. 3d 495, 500–501, and n. 3 (CA6 2003); *In re NAHC, Inc. Securities Litigation*, 306 F. 3d 1314, 1325 (CA3 2002); see also *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 129 F. 3d 222, 224 (CA1 1997) (applying pre-*Lampf* rule under 15 U. S. C. § 78aa–1). And of those that were undecided, two had cast doubt on a

constructive-discovery view in dicta—of which the omniscient Congress of the Court's imagining should also have been aware. See *Berry* v. *Valence Technology, Inc.*, 175 F. 3d 699, 703–705 (CA9 1999); *Gruber* v. *Price Waterhouse*, 911 F. 2d 960, 964, n. 4 (CA3 1990).

This motley assortment of approaches comes nowhere near establishing that the word "discovery" in § 78i(e) meant constructive rather than actual discovery despite § 77m. Absent any textual or contextual reason to read "discovery" differently in § 1658(b)(1) and § 77m, I would hold that only actual discovery suffices to start the limitations period for § 10(b) claims. Since Merck points to no evidence showing respondents actually discovered scienter more than two years before bringing this suit, I agree with the Court that the suit was not time barred.

Respondents suggested at oral argument, Tr. of Oral Arg. 29, and their *amici* imply, see Faculty Brief 33–34, that in fraud-on-the-market cases there is little if any difference between actual and constructive discovery because of the presumption of reliance applicable in such cases, see *Basic Inc.* v. *Levinson*, 485 U. S. 224, 247 (1988). It seems to me *Basic* has no bearing on the question discussed here. A presumption of reliance upon market-price signals is not a presumption of knowledge of all public information, much less knowledge of nonpublic information that a reasonably diligent investor would have independently uncovered. In any event, whether or not a constructive-discovery standard will in many cases yield the same result, actual discovery is what § 1658(b)(1) requires to start the limitations period.

Syllabus

STOLT-NIELSEN S. A. ET AL. *v.* ANIMALFEEDS INTERNATIONAL CORP.

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

No. 08–1198. Argued December 9, 2009—Decided April 27, 2010

Petitioner shipping companies serve much of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers, such as respondent (AnimalFeeds), who wish to ship liquids in small quantities. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. The charter party that AnimalFeeds uses contains an arbitration clause. AnimalFeeds brought a class-action antitrust suit against petitioners for price fixing, and that suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit subsequently reversed a lower court ruling that the charterers' claims were not subject to arbitration. As a consequence, the parties in this case agree that they must arbitrate their antitrust dispute. AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services. The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by rules (Class Rules) developed by the American Arbitration Association following *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444. One Class Rule requires an arbitrator to determine whether an arbitration clause permits class arbitration. The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was "silent" on the class arbitration issue. The panel determined that the arbitration clause allowed for class arbitration, but the District Court vacated the award. It concluded that the arbitrators' award was made in "manifest disregard" of the law, for had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of federal maritime law requiring contracts to be interpreted in light of custom and usage. The Second Circuit reversed, holding that because petitioners had cited no authority applying a maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of maritime law; and that the arbitrators had not manifestly disregarded New York law, which had not established a rule against class arbitration.

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Held: Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* Pp. 671–687.

(a) The arbitration panel exceeded its powers by imposing its own policy choice instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law. Pp. 671–677.

(1) An arbitration decision may be vacated under FAA § 10(a)(4) on the ground that the arbitrator exceeded his powers, "only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice,'" *Major League Baseball Players Assn.* v. *Garvey,* 532 U. S. 504, 509 *(per curiam),* for an arbitrator's task is to interpret and enforce a contract, not to make public policy. Pp. 671–672.

(2) The arbitration panel appears to have rested its decision on AnimalFeeds' public policy argument for permitting class arbitration under the charter party's arbitration clause. However, because the parties agreed that their agreement was "silent" on the class arbitration issue, the arbitrators' proper task was to identify the rule of law governing in that situation. Instead, the panel based its decision on post-*Bazzle* arbitral decisions without mentioning whether they were based on a rule derived from the FAA or on maritime or New York law. Rather than inquiring whether those bodies of law contained a "default rule" permitting an arbitration clause to allow class arbitration absent express consent, the panel proceeded as if it had a common-law court's authority to develop what it viewed as the best rule for such a situation. Finding no reason to depart from its perception of a post-*Bazzle* consensus among arbitrators that class arbitration was beneficial in numerous settings, the panel simply imposed its own conception of sound policy and permitted class arbitration. The panel's few references to intent do not show that the panel did anything other than impose its own policy preference. Thus, under FAA § 10(b), this Court must either "direct a rehearing by the arbitrators" or decide the question originally referred to the panel. Because there can be only one possible outcome on the facts here, there is no need to direct a rehearing by the arbitrators. Pp. 672–677.

(b) *Bazzle* did not control resolution of the question whether the instant charter party permits arbitration to proceed on behalf of this class. Pp. 677–681.

(1) No single rationale commanded a majority in *Bazzle,* which concerned contracts between a commercial lender and its customers that had an arbitration clause that did not expressly mention class arbitration. The plurality decided only the question whether the court or arbitrator should decide whether the contracts were "silent" on the class arbitration issue, concluding that it was the arbitrator. JUSTICE STE-

VENS' opinion bypassed that question, resting instead on his resolution of the questions of what standard the appropriate decisionmaker should apply in determining whether a contract allows class arbitration, and whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand. Pp. 677–679.

(2) The *Bazzle* opinions appear to have baffled these parties at their arbitration proceeding. For one thing, the parties appear to have believed that *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration, a question addressed only by the plurality. That question need not be revisited here because the parties expressly assigned that issue to the arbitration panel, and no party argues that this assignment was impermissible. Both the parties and the arbitration panel also seem to have misunderstood *Bazzle* as establishing the standard to be applied in deciding whether class arbitration is permitted. However, *Bazzle* left that question open. Pp. 680–681.

(c) Imposing class arbitration here is inconsistent with the FAA. Pp. 681–687.

(1) The FAA imposes rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479. The FAA requires that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. § 2, and permits a party to an arbitration agreement to petition a federal district court for an order directing that arbitration proceed "in the manner provided for in such agreement," § 4. Thus, this Court has said that the FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U. S., at 479. Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the [parties'] contractual rights and expectations." *Ibid.* The parties' "intentions control," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626, and the parties are "generally free to structure their arbitration agreements as they see fit," *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57. They may agree to limit the issues arbitrated and may agree on rules under which an arbitration will proceed. They may also specify *with whom* they choose to arbitrate their disputes. See *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 289. Pp. 681–684.

(2) It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached

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"no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84. But an implicit agreement to authorize class-action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class-action arbitration are too great for such a presumption. Pp. 684–687.

548 F. 3d 85, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS and BREYER, JJ., joined, *post*, p. 688. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Seth P. Waxman argued the cause for petitioners. With him on the briefs were *Edward C. DuMont*, *Steven F. Cherry*, *Christopher E. Babbitt*, *Daniel S. Volchok*, *Christopher M. Curran*, *J. Mark Gidley*, *Peter J. Carney*, *Eric Grannon*, *Charles C. Moore*, *Richard J. Rappaport*, *Amy B. Manning*, *Tammy L. Adkins*, *Angelo M. Russo*, *Richard C. Siefert*, *Richard Gluck*, and *Paul S. Hoff*.

Cornelia T. L. Pillard argued the cause for respondent. With her on the brief were *Bernard Persky*, *J. Douglas Richards*, *Benjamin D. Brown*, *Christopher J. Cormier*, *Michael J. Freed*, *Steven A. Kanner*, *Michael D. Hausfeld*, *Hilary K. Ratway*, *Solomon B. Cera*, *W. Joseph Bruckner*, and *Aaron F. Biber*.*

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*Briefs of *amici curiae* urging reversal were filed for the Association of Ship Brokers & Agents et al. by *William J. Honan*, *Samuel Spital*, and *Patrick V. Martin;* for the Chamber of Commerce of the United States of America by *Carter G. Phillips*, *Paul J. Zidlicky*, *Robin S. Conrad*, and *Amar D. Sarwal;* for CTIA–The Wireless Association by *Evan M. Tager* and *Michael F. Altschul;* for DRI–The Voice of the Defense Bar by *Jerrold J. Ganzfried* and *Jennifer R. Bagosy;* and for the Equal Employment Advisory Council by *Rae T. Vann* and *Judith A. Lampley*.

Briefs of *amici curiae* urging affirmance were filed for the American Antitrust Institute et al. by *Dan E. Gustafson*, *Albert A. Foer*, and *Richard M. Brunell;* for the American Association for Justice et al. by *Jeffrey*

JUSTICE ALITO delivered the opinion of the Court.

We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.*

I

A

Petitioners are shipping companies that serve a large share of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities. One of those customers is AnimalFeeds International Corp. (hereinafter AnimalFeeds), which supplies raw ingredients, such as fish oil, to animal-feed producers around the world. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party.[1] Numerous charter parties are in regular use, and the charter party that AnimalFeeds uses is known as the "Vegoilvoy" charter party. Petitioners assert, without contradiction, that charterers

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R. White, *Julie Nepveu*, and *Michael Schuster;* for Dub Herring Ford Lincoln-Mercury, Inc., by *Richard D. Faulkner*, *James D. Blume*, and *Shelly L. Skeen;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Sarah Crawford*, *Adam Klein*, *Lewis M. Steel*, *Vincent A. Eng*, and *Dina Lassow;* for the Pacific Legal Foundation by *Deborah J. La Fetra* and *Timothy Sandefur;* and for Public Justice, P. C., et al. by *F. Paul Bland, Jr.*, *Seth E. Mermin*, *Arthur H. Bryant*, and *Michael J. Quirk.*

Briefs of *amici curiae* were filed for the American Arbitration Association by *Eric P. Tuchmann*, *William K. Slate II*, *Patricia A. Millett*, and *Michael C. Small;* and for Public Citizen, Inc., by *Scott L. Nelson* and *Deepak Gupta.*

[1] "[C]harter parties are commonly drafted using highly standardized forms specific to the particular trades and business needs of the parties." Comment, A Comparative Analysis of Charter Party Agreements "*Subject to*" Respective American and British Laws and Decisions . . . It's All in the Details, 26 Tulane Mar. L. J. 291, 294 (2001–2002); see also 2 T. Schoenbaum, Admiralty and Maritime Law § 11–1, p. 200 (3d ed. 2001).

like AnimalFeeds, or their agents—not the shipowners—typically select the particular charter party that governs their shipments. Accord, Trowbridge, Admiralty Law Institute: Symposium on Charter Parties: The History, Development, and Characteristics of the Charter Concept, 49 Tulane L. Rev. 743, 753 (1975) ("Voyage charter parties are highly standardized, with many commodities and charterers having their own specialized forms").

Adopted in 1950, the Vegoilvoy charter party contains the following arbitration clause:

> "Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i. e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator." App. to Pet. for Cert. 69a.

In 2003, a Department of Justice criminal investigation revealed that petitioners were engaging in an illegal price-fixing conspiracy. When AnimalFeeds learned of this, it brought a putative class action against petitioners in the District Court for the Eastern District of Pennsylvania, asserting antitrust claims for supracompetitive prices that petitioners allegedly charged their customers over a period of several years.

Other charterers brought similar suits. In one of these, the District Court for the District of Connecticut held that the charterers' claims were not subject to arbitration under the applicable arbitration clause, but the Second Circuit reversed. See *JLM Industries, Inc.* v. *Stolt-Nielsen S. A.*, 387

F. 3d 163, 183 (2004). While that appeal was pending, the Judicial Panel on Multidistrict Litigation ordered the consolidation of then-pending actions against petitioners, including AnimalFeeds' action, in the District of Connecticut. See *In re Parcel Tanker Shipping Servs. Antitrust Litigation*, 296 F. Supp. 2d 1370, 1371, and n. 1 (2003). The parties agree that as a consequence of these judgments and orders, AnimalFeeds and petitioners must arbitrate their antitrust dispute.

B

In 2005, AnimalFeeds served petitioners with a demand for class arbitration, designating New York City as the place of arbitration and seeking to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1998, to November 30, 2002." 548 F. 3d 85, 87 (CA2 2008) (internal quotation marks omitted). The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators who were to "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)." App. to Pet. for Cert. 59a. These rules (hereinafter Class Rules) were developed by the American Arbitration Association (AAA) after our decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444 (2003), and Class Rule 3, in accordance with the plurality opinion in that case, requires an arbitrator, as a threshold matter, to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." App. 56a.

The parties selected a panel of arbitrators and stipulated that the arbitration clause was "silent" with respect to class arbitration. Counsel for AnimalFeeds explained to the arbitration panel that the term "silent" did not simply mean that

the clause made no express reference to class arbitration. Rather, he said, "[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Id.*, at 77a.

After hearing argument and evidence, including testimony from petitioners' experts regarding arbitration customs and usage in the maritime trade, the arbitrators concluded that the arbitration clause allowed for class arbitration. They found persuasive the fact that other arbitrators ruling after *Bazzle* had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration," but the panel acknowledged that none of these decisions was "exactly comparable" to the present dispute. See App. to Pet. for Cert. 49a–50a. Petitioners' expert evidence did not show an "inten[t] to preclude class arbitration," the arbitrators reasoned, and petitioners' argument would leave "no basis for a class action absent express agreement among all parties and the putative class members." *Id.*, at 51a.

The arbitrators stayed the proceeding to allow the parties to seek judicial review, and petitioners filed an application to vacate the arbitrators' award in the District Court for the Southern District of New York. See 9 U. S. C. § 10(a)(4) (authorizing a district court to "make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators exceeded their powers"); Petition To Vacate Arbitration Award, No. 1:06–CV–00420–JSR (SDNY), App. in No. 06–3474–cv (CA2), p. A–17, ¶ 16 (citing § 10(a)(4) as a ground for vacatur of the award); see also *id.*, at A–15 to A–16, ¶ 9 (invoking the District Court's jurisdiction under 9 U. S. C. § 203 and 28 U. S. C. §§ 1331 and 1333). The District Court vacated the award, concluding that the arbitrators' decision was made in "manifest disregard" of the law insofar as the arbitrators failed to conduct a choice-of-law analysis. 435 F. Supp. 2d 382, 384–385 (SDNY 2006). See *Wilko* v. *Swan*, 346 U. S. 427, 436–437 (1953) ("[T]he interpretations of the law by the arbitra-

tors in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation"); see also Petition To Vacate Arbitration Award, *supra*, at A–17, ¶ 17 (alleging that the arbitration panel "manifestly disregarded the law"). Had such an analysis been conducted, the District Court held, the arbitrators would have applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage. 435 F. Supp. 2d, at 385–386.

AnimalFeeds appealed to the Court of Appeals, which reversed. See 9 U. S. C. § 16(a)(1)(E) ("An appeal may be taken from . . . an order . . . vacating an award"). As an initial matter, the Court of Appeals held that the "manifest disregard" standard survived our decision in *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576 (2008), as a "judicial gloss" on the enumerated grounds for vacatur of arbitration awards under 9 U. S. C. § 10. 548 F. 3d, at 94. Nonetheless, the Court of Appeals concluded that, because petitioners had cited no authority applying a federal maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of federal maritime law. *Id.*, at 97–98. Nor had the arbitrators manifestly disregarded New York law, the Court of Appeals continued, since nothing in New York case law established a rule against class arbitration. *Id.*, at 98–99.

We granted certiorari. 557 U. S. 903 (2009).[2]

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[2] Invoking an argument not pressed in or considered by the courts below, the dissent concludes that the question presented is not ripe for our review. See *post*, at 688, 689–692 (opinion of GINSBURG, J.). In so doing, the dissent offers no clear justification for now embracing an argument "we necessarily considered and rejected" in granting certiorari. *United States* v. *Williams*, 504 U. S. 36, 40 (1992). Ripeness reflects constitutional considerations that implicate "Article III limitations on judicial power," as well as "prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 57, n. 18 (1993). In evaluating a claim to determine whether it is ripe for judicial review, we consider both "the fitness of the issues for judicial decision" and "the

II

A

Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error. See *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000); *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 38 (1987). "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 509 (2001) *(per curiam)* (quoting *Steelworkers* v. *Enterprise Wheel & Car*

hardship to the parties of withholding court consideration." *National Park Hospitality Assn.* v. *Department of Interior*, 538 U. S. 803, 808 (2003). To the extent the dissent believes that the question on which we granted certiorari is constitutionally unripe for review, we disagree. The arbitration panel's award means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis. See Class Rule 4(a) (cited in App. 57a); Brief for AAA as *Amicus Curiae* 17. Should petitioners refuse to proceed with what they maintain is essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under 9 U. S. C. § 4. Cf. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect"). We think it is clear on these facts that petitioners have demonstrated sufficient hardship, and that their question is fit for our review at this time. To the extent the dissent believes that the question is prudentially unripe, we reject that argument as waived, *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002), and we see no reason to disregard the waiver. We express no view as to whether, in a similar case, a federal court may consider a question of prudential ripeness on its own motion. See *National Park Hospitality Assn.*, *supra*, at 808 ("[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion").

Corp., 363 U. S. 593, 597 (1960)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.[3]

B

1

In its memorandum of law filed in the arbitration proceedings, AnimalFeeds made three arguments in support of construing the arbitration clause to permit class arbitration:

> "The parties' arbitration clause should be construed to allow class arbitration because (a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle; (b) the clause should be construed to permit class arbitration as a matter of public policy;* and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration." App. in No. 06–3474–cv (CA2), at A–308 to A–309 (emphasis added).

The arbitrators expressly rejected AnimalFeeds' first argument, see App. to Pet. for Cert. 49a, and said nothing about the third. Instead, the panel appears to have rested

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[3] We do not decide whether "'manifest disregard'" survives our decision in *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U. S. C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.

its decision on AnimalFeeds' public policy argument. Because the parties agreed their agreement was "silent" in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation. Had they engaged in that undertaking, they presumably would have looked either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i. e.*, either federal maritime law or New York law. But the panel did not consider whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to determine what rule would govern under either maritime or New York law in the case of a "silent" contract. Instead, the panel based its decision on post-*Bazzle* arbitral decisions that "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration." App. to Pet. for Cert. 49a–50a. The panel did not mention whether any of these decisions were based on a rule derived from the FAA or on maritime or New York law.[4]

Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it

[4] The panel's reliance on these arbitral awards confirms that the panel's decision was not based on a determination regarding the parties' intent. All of the arbitral awards were made under the AAA's Class Rules, which were adopted in 2003, and thus none was available when the parties here entered into the Vegoilvoy charter party during the class period ranging from 1998 to 2002. See 548 F. 3d 85, 87 (CA2 2008) (defining the class period). Indeed, at the hearing before the panel, counsel for AnimalFeeds conceded that "[w]hen you talk about expectations, virtually every one of the arbitration clauses that were the subject of the 25 AAA decisions were drafted before *[Bazzle]*. So therefore, if you are going to talk about the parties' intentions, pre-*[Bazzle]* class arbitrations were not common, post *[Bazzle]* they are common." App. 87a. Moreover, in its award, the panel appeared to acknowledge that none of the cited arbitration awards involved a contract between sophisticated business entities. See App. to Pet. for Cert. 50a.

had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case. App. to Pet. for Cert. 49a–50a. The panel was not persuaded by "court cases denying consolidation of arbitrations,"[5] by undisputed evidence that the Vegoilvoy charter party had "never been the basis of a class action," or by expert opinion that "sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration."[6]

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[5] See *Government of United Kingdom* v. *Boeing Co.*, 998 F. 2d 68, 71, 74 (CA2 1993); see also *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F. 3d 264, 268 (CA2 1999); *Champ* v. *Siegel Trading Co.*, 55 F. 3d 269, 275 (CA7 1995). Unlike the subsequent arbitration awards that the arbitrators cited, these decisions were available to the parties when they entered into their contracts.

[6] Petitioners produced expert evidence from experienced maritime arbitrators demonstrating that it is customary in the shipping business for parties to resolve their disputes through bilateral arbitration. See, *e. g.*, App. 126a (expert declaration of John Kimball) ("In the 30 years I have been practicing as a maritime lawyer, I have never encountered an arbitration clause in a charter party that could be construed as allowing class action arbitration"); *id.*, at 139a (expert declaration of Bruce Harris) ("I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has even been raised"). These experts amplified their written statements in their live testimony, as well. See, *e. g.*, *id.*, at 112a, 113a (Mr. Kimball) (opining that the prospect of a class action in a maritime arbitration would be "quite foreign" to overseas shipping executives and charterers); *id.*, at 111a–112a (Mr. Harris) (opining that in the view of the London Corps of International Arbitration, class arbitration is "inconceivable").

Under both New York law and general maritime law, evidence of "custom and usage" is relevant to determining the parties' intent when an express agreement is ambiguous. See *Excess Ins. Co.* v. *Factory Mut. Ins. Co.*, 3 N. Y. 3d 577, 590–591, 822 N. E. 2d 768, 777 (2004) ("Our prece-

Id., at 50a–51a. Accordingly, finding no convincing ground for departing from the post-*Bazzle* arbitral consensus, the panel held that class arbitration was permitted in this case. App. to Pet. for Cert. 52a. The conclusion is inescapable that the panel simply imposed its own conception of sound policy.[7]

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dent establishes that where there is ambiguity in a reinsurance certificate, the surrounding circumstances, including industry custom and practice, should be taken into consideration"); *Lopez* v. *Consolidated Edison Co. of N. Y.*, 40 N. Y. 2d 605, 609, 357 N. E. 2d 951, 954–955 (1976) (where contract terms were ambiguous, parol evidence of custom and practice was properly admitted to show parties' intent); *407 East 61st Garage, Inc.* v. *Savoy Fifth Avenue Corp.*, 23 N. Y. 2d 275, 281, 244 N. E. 2d 37, 41 (1968) (contract was "not so free from ambiguity to preclude extrinsic evidence" of industry "custom and usage" that would "establish the correct interpretation or understanding of the agreement as to its term"). See also *Great Circle Lines, Ltd.* v. *Matheson & Co.*, 681 F. 2d 121, 125 (CA2 1982) ("Certain long-standing customs of the shipping industry are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract"); *Samsun Corp.* v. *Khozestan Mashine Kar Co.*, 926 F. Supp. 436, 439 (SDNY 1996) ("[W]here as here the contract is one of charter party, established practices and customs of the shipping industry inform the court's analysis of what the parties agreed to"); Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L. Rev. 529, 536 (1924) (noting that "maritime law is a body of sea customs" and the "custom of the sea . . . includes a customary interpretation of contract language").

[7] The dissent calls this conclusion "hardly fair," noting that the word "'policy' is not so much as mentioned in the arbitrators' award." *Post*, at 694. But just as merely saying something is so does not make it so, cf. *United States* v. *Morrison*, 529 U. S. 598, 614 (2000), the arbitrators need not have said they were relying on policy to make it so. At the hearing before the arbitration panel, one of the arbitrators recognized that the body of post-*Bazzle* arbitration awards on which AnimalFeeds relied involved "essentially consumer non-value cases." App. 82a. In response, counsel for AnimalFeeds defended the applicability of those awards by asserting that the "vast majority" of the claimants against petitioners "have negative value claims . . . meaning it costs more to litigate than you would get if you won." *Id.*, at 82a–83a. The panel credited this body of awards in concluding that petitioners had not demonstrated the parties'

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It is true that the panel opinion makes a few references to intent, but none of these shows that the panel did anything other than impose its own policy preference. The opinion states that, under *Bazzle*, "arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action," and the panel added that "[t]his is also consistent with New York law." App. to Pet. for Cert. 49a. But the panel had no occasion to "ascertain the parties' intention" in the present case because the parties were in complete agreement regarding their intent. In the very next sentence after the one quoted above, the panel acknowledged that the parties in this case agreed that the Vegoilvoy charter party was "silent on whether [it] permit[ted] or preclude[d] class arbitration," but that the charter party was "not ambiguous so as to call for parol evidence." *Ibid.* This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.

The panel also commented on the breadth of the language in the Vegoilvoy charter party, see *id.*, at 50a, but since the only task that was left for the panel, in light of the parties' stipulation, was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration, the particular wording of the charter party was quite beside the point.

In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York

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intent to preclude class arbitration, and further observed that if petitioners' anticonsolidation precedents controlled, then "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members." App. to Pet. for Cert. 50a, 51a.

law, the arbitration panel imposed its own policy choice and thus exceeded its powers. As a result, under § 10(b) of the FAA, we must either "direct a rehearing by the arbitrators" or decide the question that was originally referred to the panel. Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.

III

A

The arbitration panel thought that *Bazzle* "controlled" the "resolution" of the question whether the Vegoilvoy charter party "permit[s] this arbitration to proceed on behalf of a class," App. to Pet. for Cert. 48a–49a, but that understanding was incorrect.

Bazzle concerned contracts between a commercial lender (Green Tree) and its customers. These contracts contained an arbitration clause but did not expressly mention class arbitration. Nevertheless, an arbitrator conducted class arbitration proceedings and entered awards for the customers.

The South Carolina Supreme Court affirmed the awards. *Bazzle* v. *Green Tree Financial Corp.*, 351 S. C. 244, 569 S. E. 2d 349 (2002). After discussing both Seventh Circuit precedent holding that a court lacks authority to order classwide arbitration under § 4 of the FAA, see *Champ* v. *Siegel Trading Co.*, 55 F. 3d 269 (1995), and conflicting California precedent, see *Keating* v. *Superior Court of Alameda Cty.*, 31 Cal. 3d 584, 645 P. 2d 1192 (1982), the State Supreme Court elected to follow the California approach, which it characterized as permitting a trial court to "order class-wide arbitration under adhesive but enforceable franchise contracts," 351 S. C., at 259, 266, 569 S. E. 2d, at 357, 360. Under this approach, the South Carolina court observed, a trial judge must "[b]alanc[e] the potential inequities and inefficiencies"

of requiring each aggrieved party to proceed on an individual basis against "resulting prejudice to the drafting party" and should take into account factors such as "efficiency" and "equity." *Id.*, at 260, and n. 15, 569 S. E. 2d, at 357, and n. 15.

Applying these standards to the case before it, the South Carolina Supreme Court found that the arbitration clause in the Green Tree contracts was "silent regarding class-wide arbitration." *Id.*, at 263, 569 S. E. 2d, at 359 (emphasis deleted). The court described its holding as follows:

> "[W]e . . . hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice. If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement." *Id.*, at 266, 569 S. E. 2d, at 360 (footnote omitted).

When *Bazzle* reached this Court, no single rationale commanded a majority. The opinions of the Justices who joined the judgment—that is, the plurality opinion and JUSTICE STEVENS' opinion—collectively addressed three separate questions. The first was which decisionmaker (court or arbitrator) should decide whether the contracts in question were "silent" on the issue of class arbitration. The second was what standard the appropriate decisionmaker should apply in determining whether a contract allows class arbitration. (For example, does the FAA entirely preclude class arbitration? Does the FAA permit class arbitration only under limited circumstances, such as when the contract expressly so provides? Or is this question left entirely to state law?) The final question was whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand.

The plurality opinion decided only the first question, concluding that the arbitrator and not a court should decide whether the contracts were indeed "silent" on the issue of class arbitration. The plurality noted that, "[i]n certain limited circumstances," involving "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," it is assumed "that the parties intended courts, not arbitrators," to make the decision. 539 U. S., at 452. But the plurality opined that the question whether a contract with an arbitration clause forbids class arbitration "does not fall into this narrow exception." *Ibid.* The plurality therefore concluded that the decision of the State Supreme Court should be vacated and that the case should be remanded for a decision by the arbitrator on the question whether the contracts were indeed "silent." The plurality did not decide either the second or the third question noted above.

JUSTICE STEVENS concurred in the judgment vacating and remanding because otherwise there would have been "no controlling judgment of the Court," but he did not endorse the plurality's rationale. *Id.*, at 455 (opinion concurring in judgment and dissenting in part). He did not take a definitive position on the first question, stating only that "*[a]rguably* the interpretation of the parties' agreement should have been made in the first instance by the arbitrator." *Ibid.* (emphasis added). But because he did not believe that Green Tree had raised the question of the appropriate decisionmaker, he preferred not to reach that question and, instead, would have affirmed the decision of the State Supreme Court on the ground that "the decision to conduct a class-action arbitration was correct as a matter of law." *Ibid.* Accordingly, his analysis bypassed the first question noted above and rested instead on his resolution of the second and third questions. Thus, *Bazzle* did not yield a majority decision on any of the three questions.

B

Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. See App. 89a (transcript of argument before arbitration panel) (counsel for Stolt-Nielsen states: "What *[Bazzle]* says is that the contract interpretation issue is left up to the arbitrator, that's the rule in *[Bazzle]*"). In fact, however, only the plurality decided that question. But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.

Unfortunately, however, both the parties and the arbitration panel seem to have misunderstood *Bazzle* in another respect, namely, that it established the standard to be applied by a decisionmaker in determining whether a contract may permissibly be interpreted to allow class arbitration. The arbitration panel began its discussion by stating that the parties "differ regarding *the rule of interpretation* to be gleaned from [the *Bazzle*] decision." App. to Pet. for Cert. 49a (emphasis added). The panel continued:

> "Claimants argue that *Bazzle* requires clear language that forbids class arbitration in order to bar a class action. The Panel, however, agrees with Respondents that the test is a more general one—arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action." *Ibid.*

As we have explained, however, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is

permitted.[8] The decision in *Bazzle* left that question open, and we turn to it now.

IV

While the interpretation of an arbitration agreement is generally a matter of state law, see *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630–631 (2009); *Perry* v. *Thomas*, 482 U. S. 483, 493, n. 9 (1987), the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989).

A

In 1925, Congress enacted the United States Arbitration Act, as the FAA was formerly known, for the express pur-

[8] AnimalFeeds invokes the parties' supplemental agreement as evidence that petitioners "waived" any claim that the arbitrators could not construe the arbitration agreement to permit class arbitration. Brief for Respondent 15. The dissent concludes, likewise, that the existence of the parties' supplemental agreement renders petitioners' argument under § 10(a)(4) "scarcely debatable." *Post*, at 694. These arguments are easily answered by the clear terms of the supplemental agreement itself. The parties expressly provided that their supplemental agreement "*does not alter* the scope of the Parties' arbitration agreements in any Charter Party Agreement," and that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose *any argument in favor of a class action arbitration* . . . and may not be relied upon by the Parties, any arbitration panel, *any court*, or any other tribunal for such purposes." App. to Pet. for Cert. 62a–63a (emphasis added). As with any agreement to arbitrate, we are obliged to enforce the parties' supplemental agreement "according to its terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 58 (1995). The question that the arbitration panel was charged with deciding was whether the arbitration clause in the Vegoilvoy charter party allowed for class arbitration, and nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the charter party itself. Thus, contrary to AnimalFeeds' argument, these statements show that petitioners did *not* waive their argument that *Bazzle* did not establish the standard for the decisionmaker to apply when construing an arbitration clause.

pose of making "valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." 43 Stat. 883. Reenacted and codified in 1947, see 61 Stat. 669,[9] the FAA provides, in pertinent part, that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. § 2. Under the FAA, a party to an arbitration agreement may petition a United States district court for an order directing that "arbitration proceed in the manner provided for in such agreement." § 4. Consistent with these provisions, we have said on numerous occasions that the central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt, supra,* at 479; *Mastrobuono* v. *Shearson Lehman Hutton, Inc.,* 514 U. S. 52, 57, 58 (1995); see also *Doctor's Associates, Inc.* v. *Casarotto,* 517 U. S. 681, 688 (1996). See generally 9 U. S. C. § 4.

Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the contractual rights and expectations of the parties." *Volt, supra,* at 479. In this endeavor, "as with any other contract, the parties' intentions control." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.,* 473 U. S. 614, 626 (1985). This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. See *AT&T Technologies, Inc.* v. *Communications Workers,* 475 U. S. 643, 648–649 (1986) ("[A]rbitrators derive

[9] See generally Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law & Contemp. Prob. 580, 580–581, n. 1 (1952) (recounting the history of the United States Arbitration Act and its 1947 reenactment and codification).

their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Mitsubishi Motors*, *supra*, at 628 ("By agreeing to arbitrate . . . , [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); see also *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties" (internal quotation marks omitted)).

Underscoring the consensual nature of private dispute resolution, we have held that parties are "'generally free to structure their arbitration agreements as they see fit.'" *Mastrobuono*, *supra*, at 57; see also *AT&T Technologies*, *supra*, at 648–649. For example, we have held that parties may agree to limit the issues they choose to arbitrate, see *Mitsubishi Motors*, *supra*, at 628, and may agree on rules under which any arbitration will proceed, *Volt*, *supra*, at 479. They may choose who will resolve specific disputes. *E. g.*, App. 30a; *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 57 (1974); *Burchell* v. *Marsh*, 17 How. 344, 349 (1855); see also *International Produce, Inc.* v. *A/S Rosshavet*, 638 F. 2d 548, 552 (CA2) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose"), cert. denied, 451 U. S. 1017 (1981).

We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. See *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement" (emphasis added)); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 20 (1983) ("[A]n arbitration agreement must be enforced notwithstand-

ing the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"); *Steelworkers*, *supra*, at 581 (an arbitrator "has no general charter to administer justice for a community which transcends the parties" (internal quotation marks omitted)); accord, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract *between the parties;* it is a way to resolve those disputes—but only those disputes—that the *parties* have agreed to submit to arbitration" (emphasis added)). It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties. *Volt*, 489 U. S., at 479.

B

From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue, see App. 77a. The critical point, in the view of the arbitration panel, was that petitioners did *not* "establish that the parties to the charter agreements intended to *preclude* class arbitration." App. to Pet. for Cert. 51a. Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly au-

thorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 557 (1964)). This recognition is grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1979).

An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 31 (1991); *Mitsubishi Motors*, 473 U. S., at 628; see also *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution" (citing *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 123 (2001))); *Gardner-Denver*, *supra*, at 57 ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations"). But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve

disputes through classwide arbitration. Cf. *First Options*, *supra*, at 945 (noting that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" contrary to their expectations).

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure, see, *e. g.*, *supra*, at 667, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. See App. 86a ("[W]e believe domestic class members could be in the hundreds" and that "[t]here could be class members that ship to and from the U. S. who are not domestic who we think would be covered"); see also, *e. g.*, *Bazzle*, 351 S. C., at 251, 569 S. E. 2d, at 352–353 (involving a class of 1,899 individuals that was awarded damages, fees, and costs of more than $14 million by a single arbitrator). Under the Class Rules, "[t]he presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations," see Addendum to Brief for AAA as *Amicus Curiae* 10a (Class Rule 9(a)), thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. Cf. *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 846 (1999) (noting that "the burden of justification rests on the exception" to the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" (internal quotation marks omitted)). And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, cf. App. in No. 06–3474–cv (CA2), at A–77, A–79, ¶¶ 30, 31, 40, even

though the scope of judicial review is much more limited, see *Hall Street*, 552 U. S., at 588. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.[10]

The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what "procedural mode" was available to present Animal-Feeds' claims. *Post*, at 696. If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. See *Howsam*, *supra*, at 84 (committing "procedural questions" presumptively to the arbitrator's discretion (internal quotation marks omitted)). But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was "no agreement" on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.

V

For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

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[10] We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was "no agreement" on the issue of class-action arbitration. App. 77a.

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

When an arbitration clause is silent on the question, may arbitration proceed on behalf of a class? The Court prematurely takes up that important question and, indulging in *de novo* review, overturns the ruling of experienced arbitrators.[1]

The Court errs in addressing an issue not ripe for judicial review. Compounding that error, the Court substitutes its judgment for that of the decisionmakers chosen by the parties. I would dismiss the petition as improvidently granted.[2] Were I to reach the merits, I would adhere to the strict limitations the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.*, places on judicial review of arbitral awards. § 10. Accordingly, I would affirm the judgment of the Second Circuit, which rejected petitioners' plea for vacation of the arbitrators' decision.

I

As the Court recounts, *ante*, at 667–670, this case was launched as a class action in federal court charging named ocean carriers (collectively, Stolt-Nielsen) with a conspiracy to extract supracompetitive prices from their customers (buyers of ocean-transportation services). That court action terminated when the Second Circuit held, first, that the parties' transactions were governed by contracts (charter parties) with enforceable arbitration clauses, and second, that the antitrust claims were arbitrable. *JLM Industries, Inc.* v. *Stolt-Nielsen S. A.*, 387 F. 3d 163, 175, 181 (2004).

Cargo-shipper AnimalFeeds International Corp. (AnimalFeeds) thereupon filed a demand for class arbitration of the

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[1] All three panelists are leaders in the international-dispute-resolution bar. See Brief for Respondent 8–9.

[2] Alternatively, I would vacate with instructions to dismiss for lack of present jurisdiction. See Reply to Brief in Opposition 12, n. 6.

antitrust-conspiracy claims.[3] Stolt-Nielsen contested AnimalFeeds' right to proceed on behalf of a class, but agreed to submission of that threshold dispute to a panel of arbitrators. Thus, the parties entered into a supplemental agreement to choose arbitrators and instruct them to "follow . . . Rul[e] 3 . . . of the American Arbitration Association's Supplementary Rules for Class Arbitrations." App. to Pet. for Cert. 59a. Rule 3, in turn, directed the panel to "determine . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class." App. 56a.

After receiving written submissions and hearing arguments, the arbitration panel rendered a clause-construction award. It decided unanimously—and only—that the "arbitration claus[e] [used in the parties' standard-form shipping contracts] permit[s] this . . . arbitration to proceed as a class arbitration." App. to Pet. for Cert. 52a. Stolt-Nielsen petitioned for court review urging vacatur of the clause-construction award on the ground that "the arbitrators [had] exceeded their powers." § 10(a)(4). The Court of Appeals upheld the award: "Because the parties specifically agreed that the arbitration panel would decide whether the arbitration claus[e] permitted class arbitration," the Second Circuit reasoned, "the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly." 548 F. 3d 85, 101 (2008).

II

I consider, first, the fitness of the arbitrators' clause-construction award for judicial review. The arbitrators decided the issue, in accord with the parties' supplemental

[3] Counsel for AnimalFeeds submitted in arbitration that "[i]t would cost . . . the vast majority of absent class members, and indeed the current claimants, . . . more to litigate the matter on an individual basis than they could recover. An antitrust case, particularly involving an international cartel[,] . . . is extraordinarily difficult and expensive to litigate." App. 82a (paragraph break omitted).

agreement, "as a threshold matter." App. 56a. Their decision that the charter-party arbitration clause permitted class arbitration was abstract and highly interlocutory. The panel did not decide whether the particular claims AnimalFeeds advanced were suitable for class resolution, see App. to Pet. for Cert. 48a–49a; much less did it delineate any class or consider whether, "if a class is certified, . . . members of the putative class should be required to 'opt in' to th[e] proceeding," *id.*, at 52a.

The Court, *ante*, at 670–671, n. 2, does not persuasively justify judicial intervention so early in the game or convincingly reconcile its adjudication with the firm final-judgment rule prevailing in the federal court system. See, *e. g.*, 28 U. S. C. § 1257 (providing for petitions for certiorari from "[f]inal judgments or decrees" of state courts); § 1291 (providing for Court of Appeals review of district court "final decisions"); *Catlin* v. *United States*, 324 U. S. 229, 233 (1945) (describing "final decision" generally as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" (internal quotation marks omitted)).

We have equated to "final decisions" a slim set of collateral orders that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 106 (2009) (quoting *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 470 (1978).[4]

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[4] Federal Rule of Civil Procedure 23(f), adopted in response to *Coopers & Lybrand*, gives courts of appeals discretion to permit an appeal from an order granting or denying class-action certification. But the rule would not permit review of a preliminary order of the kind at issue here, *i. e.*, one that defers decision whether to grant or deny certification.

Congress, of course, can provide exceptions to the "final-decision" rule. Prescriptions in point include § 1292 (immediately appealable "[i]nterlocutory decisions"); § 2072(c) (authorizing promulgation of rules defining when a district court ruling is final for purposes of appeal under § 1291); Fed. Rule Civ. Proc. 23(f) (pursuant to § 1292(e), accords courts of appeals discretion to permit appeals from district court orders granting or denying class-action certification); Rule 54(b) (providing for "entry of a final judgment as to one or more, but fewer than all, claims or parties"). Did Congress provide for immediate review of the preliminary ruling in question here?

Section 16 of the FAA, governing appellate review of district court arbitration orders, lists as an appealable disposition a district court decision "confirming or denying confirmation of an award or partial award." 9 U. S. C. § 16(a)(1)(D). Notably, the arbitrators in the matter at hand labeled their decision "Partial Final Clause Construction Award." App. to Pet. for Cert. 45a. It cannot be true, however, that parties or arbitrators can gain instant review by slicing off a preliminary decision or a procedural order and declaring its resolution a "partial award." Cf. *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 588 (2008) (FAA §§ 9–11, which provide for expedited review to confirm, vacate, or modify arbitration awards, "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

Lacking this Court's definitive guidance, some Courts of Appeals have reviewed arbitration awards "finally and definitely dispos[ing] of a separate independent claim." *E. g.*, *Metallgesellschaft A. G.* v. *M/V Capitan Constante*, 790 F. 2d 280, 283 (CA2 1986).[5] Others have considered "partial

[5] See *Metallgesellschaft A. G.*, 790 F. 2d, at 283, 284 (Feinberg, C. J., dissenting) (describing exception for separate and independent claims as "creat[ing], in effect, an arbitration analogue to Rule 54(b)").

award[s]" that finally "determin[e] liability, but . . . not . . . damages." *E. g., Hart Surgical, Inc.* v. *Ultracision, Inc.*, 244 F. 3d 231, 234 (CA1 2001).[6] Another confirmed an interim ruling on a "separate, discrete, independent, severable issue." *Island Creek Coal Sales Co.* v. *Gainesville*, 729 F. 2d 1046, 1049 (CA6 1984) (internal quotation marks omitted), abrogated on other grounds by *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U. S. 193 (2000).

Receptivity to review of preliminary rulings rendered by arbitrators, however, is hardly universal. See *Dealer Computer Servs., Inc.* v. *Dub Herring Ford*, 547 F. 3d 558 (CA6 2008) (arbitration panel's preliminary ruling that contract did not bar class proceedings held not ripe for review; arbitrators had not yet determined that arbitration *should* proceed on behalf of a class); *Metallgesellschaft A. G.*, 790 F. 2d, at 283, 285 (Feinberg, C. J., dissenting) ("[Piecemeal review] will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole, this benefits the parties, the arbitration process and the courts.").

While lower court opinions are thus divided, this much is plain: No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator's decision as preliminary as the "partial award" made in this case.[7]

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[6] But see *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976) (district court order determining liability but reserving decision on damages held not immediately appealable).

[7] The parties agreed that the arbitrators would issue a "partial final award," and then "stay all proceedings . . . to permit any party to move a court of competent jurisdiction to confirm or to vacate" the award. App. 56a. But an arbitration agreement, we have held, cannot "expand judicial review" available under the FAA. *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 586 (2008).

III

Even if Stolt-Nielsen had a plea ripe for judicial review, the Court should reject it on the merits. Recall that the parties jointly asked the arbitrators to decide, initially, whether the arbitration clause in their shipping contracts permitted class proceedings. See *supra*, at 688–689. The panel did just what it was commissioned to do. It construed the broad arbitration clause (covering "[a]ny dispute arising from the making, performance or termination of this Charter Party," App. to Pet. for Cert. 47a) and ruled, expressly and only, that the clause permitted class arbitration. The Court acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's *de novo* determination.

A

The controlling FAA prescription, § 10(a),[8] authorizes a court to vacate an arbitration panel's decision "only in very unusual circumstances." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995). The four grounds for va-

[8] Title 9 U. S. C. § 10(a) provides:

"In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

"(1) where the award was procured by corruption, fraud, or undue means;

"(2) where there was evident partiality or corruption in the arbitrators, or either of them;

"(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

"(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

catur codified in § 10(a) restate the longstanding rule that, "[i]f [an arbitration] award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court . . . will not set [the award] aside for error, either in law or fact." *Burchell* v. *Marsh*, 17 How. 344, 349 (1855).

The sole § 10 ground Stolt-Nielsen invokes for vacating the arbitrators' decision is § 10(a)(4). The question under that provision is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa* v. *Dean Witter Reynolds Inc.*, 121 F. 3d 818, 824 (CA2 1997); *Comprehensive Accounting Corp.* v. *Rudell*, 760 F. 2d 138, 140 (CA7 1985). The parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.

B

The Court's characterization of the arbitration panel's decision as resting on "policy," not law, is hardly fair comment, for "policy" is not so much as mentioned in the arbitrators' award. Instead, the panel tied its conclusion that the arbitration clause permitted class arbitration, App. to Pet. for Cert. 52a, to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations. *Id.*, at 49a–50a.

At the outset of its explanation, the panel rejected the argument, proffered by AnimalFeeds, that this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444 (2003), settled the matter by "requir[ing] clear language that *forbids* class arbitration in order to bar a class action." App. to Pet. for Cert. 49a (emphasis added). Agreeing with Stolt-Nielsen in this regard, the panel said that the test it

employed looked to the language of the particular agreement to gauge whether the parties "intended to permit or to preclude class action[s]." *Ibid.* Concentrating on the wording of the arbitration clause, the panel observed, is "consistent with New York law as articulated by the [New York] Court of Appeals . . . and with federal maritime law." *Ibid.*[9]

Emphasizing the breadth of the clause in question—" 'any dispute arising from the making, performance or termination of this Charter Party' shall be put to arbitration," *id.*, at 50a—the panel noted that numerous other partial awards had relied on language similarly comprehensive to permit class proceedings "in a wide variety of settings." *Id.*, at 49a–50a. The panel further noted "that many of the other panels [had] rejected arguments similar to those advanced by [Stolt-Nielsen]." *Id.*, at 50a.

The Court features a statement counsel for AnimalFeeds made at the hearing before the arbitration panel, and maintains that it belies any argument that the clause in question permits class arbitration: "[A]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Ante*, at 669 (quoting App. 77a); see *ante*, at 673, 676, 684, 687, and n. 10. The sentence quoted from the hearing transcript concluded: "[T]herefore there has been *no agreement to bar class arbitrations.*" App. 77a (emphasis added). Counsel quickly clarified his position: "It's also undisputed that the arbitration clause here contains broad language and this language should be interpreted to permit class arbitrations." *Id.*, at 79a. See also *id.*, at 80a (noting consistent recognition by arbitration panels that "a silent broadly worded arbitration clause, just like the one at issue here, should be construed to permit class arbitration"); *id.*, at 88a ("[B]road . . . language . . . silent as to class proceedings should be interpreted to permit a class proceeding.").

[9] On New York law, the panel referred to *Evans* v. *Famous Music Corp.*, 1 N. Y. 3d 452, 807 N. E. 2d 869 (2004).

Stolt-Nielsen, the panel acknowledged, had vigorously argued, with the support of expert testimony, that "the bulk of international shippers would never intend to have their disputes decided in a class arbitration." App. to Pet. for Cert. 52a. That concern, the panel suggested, might be met at a later stage; "if a class is certified," the panel noted, class membership could be confined to those who affirmatively "'opt in'" to the proceeding. *Ibid.*

The question properly before the Court is not whether the arbitrators' ruling was erroneous, but whether the arbitrators "exceeded their powers." § 10(a)(4). The arbitrators decided a threshold issue, explicitly committed to them, see *supra*, at 688–689, about the procedural mode available for presentation of AnimalFeeds' antitrust claims. Cf. *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, *ante*, at 408 (plurality opinion) ("Rules allowing multiple claims (and claims by or against multiple parties) to be litigated together . . . neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed."). That the arbitrators endeavored to perform their assigned task honestly is not contested. "Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 38 (1987). The arbitrators here not merely "arguably," but certainly, "construe[d] . . . the contract" with fidelity to their commission. *Ibid.* This Court, therefore, may not disturb the arbitrators' judgment, even if convinced that "serious error" infected the panel's award. *Ibid.*

C

The Court not only intrudes on a decision the parties referred to arbitrators. It compounds the intrusion by according the arbitrators no opportunity to clarify their decision and thereby to cure the error the Court perceives. Section

10(b), the Court asserts, invests in this tribunal authority to "decide the question that was originally referred to the panel." *Ante*, at 677. The controlling provision, however, says nothing of the kind. Section 10(b) reads, in full: "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, *direct a rehearing by the arbitrators.*" (Emphasis added.) Just as § 10(a)(4) provides no justification for the Court's disposition, see *supra*, at 693–696 and this page, so, too, § 10(b) provides no grounding for the Court's peremptory action.

IV

A

For arbitrators to consider whether a claim should proceed on a class basis, the Court apparently demands contractual language one can read as affirmatively authorizing class arbitration. See *ante*, at 684 ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."); *ante*, at 687. The breadth of the arbitration clause, and the absence of any provision waiving or banning class proceedings,[10] will not do. *Ante*, at 684–687.

The Court ties the requirement of affirmative authorization to "the basic precept that arbitration 'is a matter of con-

[10] Several courts have invalidated contractual bans on, or waivers of, class arbitration because proceeding on an individual basis was not feasible in view of the high costs entailed and the slim benefits achievable. See, *e. g.*, *In re American Express Merchants' Litigation*, 554 F. 3d 300, 315–316, 320 (CA2 2009); *Kristian* v. *Comcast Corp.*, 446 F. 3d 25, 55, 59 (CA1 2006); *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 162–163, 113 P. 3d 1100, 1110 (2005); *Leonard* v. *Terminix Int'l Co.*, 854 So. 2d 529, 539 (Ala. 2002) *(per curiam)*. Were there no right to proceed on behalf of a class in the first place, however, a provision banning or waiving recourse to this aggregation device would be superfluous.

sent, not coercion.'" *Ante,* at 681 (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)). Parties may "specify *with whom* they choose to arbitrate," the Court observes, just as they may "limit the issues they choose to arbitrate." *Ante,* at 683. But arbitrators, in delineating an appropriate class, need not, and should not, disregard such contractual constraints. In this case, for example, AnimalFeeds proposes to pursue, on behalf of a class, only "claims . . . arising out of any [charter-party agreement] . . . *that provides for arbitration.*" App. to Pet. for Cert. 56a (emphasis added). Should the arbitrators certify the proposed class, they would adjudicate only the rights of persons "with whom" Stolt-Nielsen agreed to arbitrate, and only "issues" subject to arbitration. *Ante,* at 683 (emphasis deleted).

The Court also links its affirmative-authorization requirement to the parties' right to stipulate rules under which arbitration may proceed. See *ibid.* The question, however, is the proper default rule when there is no stipulation. Arbitration provisions, this Court has noted, are a species of forum-selection clauses. See *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 519 (1974). Suppose the parties had chosen a New York *judicial forum* for resolution of "any dispute" involving a contract for ocean carriage of goods. There is little question that the designated court, state or federal, would have authority to conduct claims like AnimalFeeds' on a class basis. Why should the class-action prospect vanish when the "any dispute" clause is contained in an arbitration agreement? Cf. *Connecticut General Life Ins. Co.* v. *Sun Life Assurance Co. of Canada,* 210 F. 3d 771, 774–776 (CA7 2000) (reading contract's authorization to arbitrate "[a]ny dispute" to permit consolidation of arbitrations). If the Court is right that arbitrators ordinarily are not equipped to manage class proceedings, see *ante,* at 685–686, then the claimant should retain its right to proceed in that format in court.

B

When adjudication is costly and individual claims are no more than modest in size, class proceedings may be "the thing," *i. e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights. *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 617 (1997); *Carnegie* v. *Household Int'l, Inc.*, 376 F. 3d 656, 661 (CA7 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Mindful that disallowance of class proceedings severely shrinks the dimensions of the case or controversy a claimant can mount, I note some stopping points in the Court's decision.

First, the Court does not insist on express consent to class arbitration. Class arbitration may be ordered if "there is a contractual basis for concluding that the part[ies] *agreed*" "to submit to class arbitration." *Ante*, at 684; see *ante*, at 687, n. 10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."). Second, by observing that "the parties [here] are sophisticated business entities," and "that it is customary for the shipper to choose the charter party that is used for a particular shipment," the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis. *Ante*, at 684. While these qualifications limit the scope of the Court's decision, I remain persuaded that the arbitrators' judgment should not have been disturbed.

* * *

For the foregoing reasons, I would dismiss the petition for want of a controversy ripe for judicial review. Were I to reach the merits, I would affirm the Second Circuit's judgment confirming the arbitrators' clause-construction decision.

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SALAZAR, SECRETARY OF THE INTERIOR, ET AL. *v.* BUONO

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

No. 08–472. Argued October 7, 2009—Decided April 28, 2010

In 1934, members of the Veterans of Foreign Wars (VFW) placed a Latin cross on federal land in the Mojave National Preserve (Preserve) to honor American soldiers who died in World War I. Claiming to be offended by a religious symbol's presence on federal land, respondent Buono, a regular visitor to the Preserve, filed this suit alleging a violation of the First Amendment's Establishment Clause and seeking an injunction requiring the Government to remove the cross. In the litigation's first stage *(Buono I)*, the District Court found that Buono had standing to sue and, concluding that the presence of the cross on federal land conveyed an impression of governmental endorsement of religion, see *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, it granted Buono's requested injunctive relief (2002 injunction). The District Court did not consider whether the Government's actions regarding the cross had a secular purpose or caused entanglement with religion. While the Government's appeal was pending, Congress passed the Department of Defense Appropriations Act, 2004, § 8121(a) of which directed the Secretary of the Interior to transfer the cross and the land on which it stands to the VFW in exchange for privately owned land elsewhere in the Preserve (land-transfer statute). Affirming the District Court's judgment both as to standing and on the merits, the Ninth Circuit declined to address the statute's effect on Buono's suit or the statute's constitutionality *(Buono II)*. Because the Government did not seek review by this Court, the Court of Appeals' judgment became final. Buono then returned to the District Court seeking injunctive relief against the land transfer, either through enforcement or modification of the 2002 injunction. In 2005, that court rejected the Government's claim that the transfer was a bona fide attempt to comply with the injunction, concluding, instead, that it was actually an invalid attempt to keep the cross on display. The court granted Buono's motion to enforce the 2002 injunction; denied as moot his motion to amend it; and permanently enjoined the Government from implementing the land-transfer statute *(Buono III)*. The Ninth Circuit again affirmed, largely following the District Court's reasoning.

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

502 F. 3d 1069 and 527 F. 3d 758, reversed and remanded.

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JUSTICE KENNEDY, joined in full by THE CHIEF JUSTICE and in part by JUSTICE ALITO, concluded:

1. Buono has standing to maintain this action. Whatever the validity of the Government's argument that Buono's asserted injury—offense at a religious symbol's presence on federal land—is not personal to him and so does not confer Article III standing, that argument is not available at this stage of the litigation. The District Court rejected the argument in *Buono I*, the Ninth Circuit affirmed in *Buono II*, and the Court of Appeals' judgment became final and unreviewable upon the expiration of the 90-day deadline for filing a certiorari petition, 28 U. S. C. § 2101(c). Moreover, Buono had standing in *Buono III* to seek application of the injunction against the land-transfer statute. A party that obtains a judgment in its favor acquires a "judicially cognizable" interest in ensuring compliance with that judgment. See *Allen* v. *Wright*, 468 U. S. 737. Buono's entitlement to an injunction having been established in *Buono I* and *II*, he sought in *Buono III* to prevent the Government from frustrating or evading that injunction. His interests in doing so were sufficiently personal and concrete to support his standing, given the rights he obtained under the earlier decree against the same party as to the same cross and the same land. The Government's contention that Buono sought to extend, rather than to enforce, the 2002 injunction is not an argument about standing, but about the merits of the District Court's order. Pp. 711–713.

2. The District Court erred in enjoining the Government from implementing the land-transfer statute on the premise that the relief was necessary to protect Buono's rights under the 2002 injunction. Pp. 713–722.

(a) A court may order an injunction only after taking into account all the circumstances bearing on the need for prospective relief. See, *e. g.*, *United States* v. *Swift & Co.*, 286 U. S. 106, 114. Here, the District Court did not engage in the appropriate inquiry. The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. By dismissing as illicit the motives of Congress in passing it, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Placement of the cross on federal land by private persons was not an attempt to set the state's *imprimatur* on a particular creed. Rather, the intent was simply to honor fallen soldiers. Moreover, the cross stood for nearly seven decades before the statute was enacted, by which time the cross and the cause it commemorated had become entwined in the public consciousness. The 2002 injunction thus presented the Government with a dilemma. It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring. Deeming

neither alternative satisfactory, Congress enacted the land-transfer statute. The statute embodied a legislative judgment that this dispute is best resolved through a framework and policy of accommodation. The statute should not have been dismissed as an evasion, for it brought about a change of law and a congressional statement of policy applicable to the case. Pp. 713–717.

(b) Where legislative action undermines the basis for previous relief, the relevant question is whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances render prospective relief inappropriate. The District Court granted the 2002 injunction based solely on its conclusion that the presence of the cross on federal land conveyed an impression of governmental endorsement of religion, and the Ninth Circuit affirmed on the same grounds. Neither court considered whether the Government had acted based on an improper purpose. Given this sole reliance on perception, any further relief grounded on the injunction should have rested on the same basis. But the District Court used an injunction granted for one reason (perceived governmental endorsement) as the basis for enjoining conduct that was alleged to be objectionable for a different reason (an illicit governmental purpose). Ordering relief under such circumstances was improper. The court failed to consider whether the change in law and circumstances effected by the land-transfer statute had rendered the "reasonable observer" standard inappropriate to resolve the dispute. Nor did the court attempt to reassess *Buono I*'s findings in light of the accommodation policy embraced by Congress. Rather, it concentrated solely on the religious aspects of the cross, divorced from its background and context. Pp. 717–721.

(c) The same respect for a coordinate branch of Government that forbids striking down an Act of Congress except upon a clear showing of unconstitutionality, see, *e. g., United States* v. *Morrison*, 529 U. S. 598, 607, requires that a congressional command be given effect unless no legal alternative exists. Even if, contrary to the congressional judgment, the land transfer were thought an insufficient accommodation in light of the earlier endorsement finding, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the statute. See, *e. g., Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329. On remand, that court should conduct a proper inquiry into the continued necessity for injunctive relief in light of the statute. Pp. 721–722.

JUSTICE ALITO concluded that this case should not be remanded for the lower courts to decide whether implementation of the land-transfer statute would violate the District Court's injunction or the Establish-

ment Clause. Rather, because the factual record has been sufficiently developed to permit resolution of these questions, he would decide them and hold that the statute may be implemented. The case's singular circumstances presented Congress with a delicate problem. Its solution was an approach designed to eliminate any perception of religious sponsorship stemming from the location of the cross on federally owned land, while avoiding the disturbing symbolism that some would associate with the destruction of this historic monument. The mechanism Congress selected is quite common in the West, a "land exchange," whereby ownership of the land on which the cross is located would be transferred to the VFW in exchange for another nearby parcel of equal value. The land transfer would not violate the District Court injunction, the obvious meaning of which was simply that the Government could not allow the cross to remain on *federal* land. Nor would the statute's implementation constitute an endorsement of religion in violation of the Establishment Clause. The so-called "endorsement test" views a challenged religious display through the eyes of a hypothetical reasonable observer aware of the history and all other pertinent facts relating to the display. Here, therefore, this observer would be familiar with the monument's origin and history and thereby appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns. Finally, the statute was not enacted for the illicit purpose of embracing the monument's religious message but to commemorate the Nation's war dead and to avoid the disturbing symbolism that would have been created by the monument's destruction. Pp. 723–729.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded that this Court need not—indeed, *cannot*—decide this case's merits because Buono lacks Article III standing to pursue the relief he seeks, which is not enforcement of the original injunction but expansion of it. By enjoining the Government from implementing the statute at issue, the District Court's 2005 order went well beyond the original injunction's proscription of the cross's display on public property. Because Buono seeks new relief, he must show that he has standing to pursue that relief by demonstrating that blocking the land transfer will "redress or prevent actual or imminently threatened injury to [him] caused by private or official violation of law." *Summers* v. *Earth Island Institute*, 555 U. S. 488, 492. He has failed, however, to allege any such injury. Even assuming that being offended by a religious display constitutes a cognizable injury, it is merely speculative whether the cross will remain in place, and in any event Buono has made clear, by admitting he has no objection to Christian symbols on private property, that *he* will not be offended. Neither district courts' discretion to expand injunctions

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they have issued nor this District Court's characterization of its 2005 order as merely enforcing the existing injunction makes any difference. If in fact a court awards new relief, it must have Article III jurisdiction to do so. Pp. 729–735.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., joined, and in which ALITO, J., joined in part. ROBERTS, C. J., filed a concurring opinion, *post*, p. 723. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 723. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 729. STEVENS, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 735. BREYER, J., filed a dissenting opinion, *post*, p. 760.

Solicitor General Kagan argued the cause for petitioners. With her on the briefs were *Acting Assistant Attorney General Cruden*, *Deputy Solicitor General Katyal*, *Jeffrey B. Wall*, *Andrew C. Mergen*, *Charles R. Shockey*, and *Kathryn E. Kovacs*.

Peter J. Eliasberg argued the cause for respondent. With him on the brief were *Steven R. Shapiro*, *Michael C. Small*, *Daniel Mach*, and *William B. Rubenstein*.*

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*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, and *Heather L. Hagan* and *Ashley E. Tatman*, Deputy Attorneys General, by *Richard A. Svobodny*, Acting Attorney General of Alaska, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *James D. "Buddy" Caldwell* of Louisiana, *Michael A. Cox* of Michigan, *Henry McMaster* of South Carolina, *Greg Abbott* of Texas, and *Mark L. Shurtleff* of Utah; for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson, Sr.*, *Walter M. Weber*, *John P. Tuskey*, and *Laura B. Hernandez;* for the American Legion Department of California by *Benjamin W. Bull*, *Joseph P. Infranco*, and *Robert H. Tyler;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson*, *Eric C. Rassbach*, and *Hannah C. Smith;* for the Boy Scouts of America by *George A. Davidson*, *Carla A. Kerr*, *Scott H. Christensen*, and *David K. Park;* for the Christian Legal Society et al. by *Carl H. Esbeck;* for Citizens United et al. by *Darrin R. Toney*, *John N. Childs*, and *Michael Boos;* for the Eagle Forum Education and Legal Defense

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joins and JUSTICE ALITO joins in part.

In 1934, private citizens placed a Latin cross on a rock outcropping in a remote section of the Mojave Desert. Their purpose and intent was to honor American soldiers

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Fund by *Douglas G. Smith;* for Faith and Action et al. by *Bernard P. Reese, Jr.;* for the Foundation for Free Expression by *James L. Hirsen* and *Deborah J. Dewart;* for the Foundation for Moral Law by *John A. Eidsmoe* and *Benjamin D. DuPré;* for the International Municipal Lawyers Association by *Robert N. Driscoll;* for the National Legal Foundation by *Steven W. Fitschen;* for the Thomas More Law Center et al. by *Robert Joseph Muise, Charles S. LiMandri,* and *Manuel S. Klausner;* for the Utah Highway Patrol Association et al. by *Michael A. Sink* and *Frank D. Mylar, Jr.;* and for Veterans of Foreign Wars of the United States et al. by *Kelly J. Shackelford, Hiram S. Sasser III, R. Ted Cruz, Allyson N. Ho, Aaron Streett, Samuel Burk, Philip B. Onderdonk, Jr., Daniel J. Murphy, Chad M. Pinson,* and *James A. Clark.* A brief of *amici curiae* urging vacation was filed for Public Employees for Environmental Responsibility et al. by *Sri Srinivasan* and *Irving L. Gornstein.*

Briefs of *amici curiae* urging affirmance were filed for the American Humanist Association et al. by *Robert V. Ritter* and *Elizabeth L. Hileman;* for the American Jewish Congress et al. by *Andrew J. Pincus, Marc D. Stern,* and *Kara H. Stein;* for the American Muslim Armed Forces and Veterans Affairs Council et al. by *Douglas Laycock;* for Americans United for Separation of Church and State et al. by *Ayesha N. Khan, Richard B. Katskee, Steven M. Freeman, Steven C. Sheinberg, Pedro L. Irigonegaray, Margery F. Baker,* and *Mark J. Pelavin;* for the Baptist Joint Committee for Religious Liberty et al. by *Stephen B. Kinnaird, James W. Gilliam,* and *K. Hollyn Hollman;* for the Center for Inquiry by *Daniel S. Pariser, Ronald A. Lindsay,* and *Derek C. Araujo;* for David Antoon et al. by *Elaine J. Goldenberg;* for the Freedom from Religion Foundation by *Richard L. Bolton;* and for Jewish War Veterans of the United States of America, Inc., by *A. Stephen Hut, Jr.*

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who fell in World War I. The original cross deteriorated over time, but a reconstructed one now stands at the same place. It is on federal land.

The Court is asked to consider a challenge, not to the first placement of the cross or its continued presence on federal land, but to a statute that would transfer the cross and the land on which it stands to a private party. Department of Defense Appropriations Act, 2004, Pub. L. 108–87, § 8121(a), 117 Stat. 1100. The District Court permanently enjoined the Government from implementing the statute. The Court of Appeals affirmed. We conclude that its judgment was in error.

I

A

The Mojave National Preserve (Preserve) spans approximately 1.6 million acres in southeastern California. The Preserve is nestled within the Mojave Desert, whose picturesque but rugged territory comprises 25,000 square miles, exceeding in size the combined area of the Nation's five smallest States. See Merriam-Webster's Geographical Dictionary 755, 1228–1230 (3d ed. 1997). Just over 90 percent of the land in the Preserve is federally owned, with the rest owned either by the State of California or by private parties. The National Park Service, a division of the Department of the Interior, administers the Preserve as part of the National Park System. 16 U. S. C. §§ 410aaa–41 and 410aaa–46.

Sunrise Rock is a granite outcropping located within the Preserve. Sunrise Rock and the area in its immediate vicinity are federal land, but two private ranches are located less than two miles away. The record does not indicate whether fencing is used to mark the boundary of these ranches. In 1934, members of the Veterans of Foreign Wars (VFW) mounted a Latin cross on the rock as a memorial to soldiers who died in World War I. A Latin cross consists of two

bars—a vertical one and a shorter, horizontal one. The cross has been replaced or repaired at various times over the years, most recently in 1998 by Henry Sandoz. Sandoz is a private citizen who owns land elsewhere in the Preserve, a portion of which he is prepared to transfer to the Government in return for its conveyance to the VFW of the land on which the cross stands, all pursuant to the statute now under review.

The cross, as built by Sandoz, consists of 4-inch diameter metal pipes painted white. The vertical bar is less than eight feet tall. It cannot be seen from the nearest highway, which lies more than 10 miles away. It is visible, however, from Cima Road, a narrow stretch of blacktop that comes within 100 feet of Sunrise Rock.

The cross has been a gathering place for Easter services since it was first put in place; and Sunrise Rock and its immediate area continue to be used as a campsite. At one time the cross was accompanied by wooden signs stating "'The Cross, Erected in Memory of the Dead of All Wars,' and 'Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884.'" *Buono* v. *Kempthorne*, 527 F. 3d 758, 769 (CA9 2008). The signs have since disappeared, and the cross now stands unmarked.

B

Frank Buono, respondent here, is a retired Park Service employee who makes regular visits to the Preserve. Buono claims to be offended by the presence of a religious symbol on federal land. He filed suit in the United States District Court for the Central District of California. He alleged a violation of the Establishment Clause of the First Amendment and sought an injunction requiring the Government to remove the cross.

The litigation proceeded in what can be described as four stages. In the first, the District Court ruled in Buono's favor on opposing motions for summary judgment. *Buono*

v. *Norton*, 212 F. Supp. 2d 1202 (2002) *(Buono I)*. As an initial matter, the court found that Buono had standing to maintain his Establishment Clause challenge. *Id.*, at 1210–1214. On the merits, the parties agreed that the dispute should be governed by the so-called *Lemon* test, which the District Court formulated as follows:

> "A government religious practice or symbol will survive an Establishment Clause challenge when it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion." *Buono I*, *supra*, at 1214–1215 (citing *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971)).

The court expressly declined to consider whether the Government's actions regarding the cross had a secular purpose, 212 F. Supp. 2d, at 1214–1215, or whether they caused excessive entanglement with religion, *id.*, at 1217, n. 9. Instead, the court evaluated the primary effect of the cross by asking how it would be viewed by a "reasonable observer." *Id.*, at 1216. Concluding that presence of the cross on federal land conveyed an impression of governmental endorsement of religion, the court granted Buono's request for injunctive relief. The court's order in *Buono I* (2002 injunction) permanently forbade the Government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." App. to Pet. for Cert. 146a.

The United States Court of Appeals for the Ninth Circuit stayed the 2002 injunction to the extent that it required the cross to be removed or dismantled but did not forbid alternative methods of complying with the order. The Government covered the cross, first with a tarpaulin and later with a plywood box.

On appeal, the judgment of the District Court was affirmed, both as to standing and on the merits of Buono's Establishment Clause challenge. *Buono* v. *Norton*, 371 F. 3d

543 (CA9 2004) *(Buono II)*. Like the District Court, the Court of Appeals did not decide whether the Government's action, or nonaction, with respect to the cross had been motivated by a secular purpose. *Id.*, at 550. Its ruling was based instead on the conclusion that a reasonable observer would perceive a cross on federal land as governmental endorsement of religion. *Id.*, at 549–550. The Government did not seek review by this Court, so that the judgment of the Court of Appeals in *Buono II* became final.

C

During the relevant proceedings, Congress enacted certain statutes related to the cross:

(1) Before *Buono I* was filed, Congress passed an appropriations bill that included a provision forbidding the use of governmental funds to remove the cross. Consolidated Appropriations Act, 2001, Pub. L. 106–554, § 133, 114 Stat. 2763A–230.

(2) While *Buono I* was pending before the District Court, Congress designated the cross and its adjoining land "as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002, Pub. L. 107–117, § 8137(a), 115 Stat. 2278. The Secretary of the Interior was directed to expend up to $10,000 to acquire a replica of the original cross and its memorial plaque and to install the plaque at a suitable nearby location. § 8137(c).

(3) Three months after *Buono I* was decided, Congress again prohibited the spending of governmental funds to remove the cross. Department of Defense Appropriations Act, 2003, Pub. L. 107–248, § 8065(b), 116 Stat. 1551.

(4) While the Government's appeal in *Buono II* was pending, Congress passed a statute (land-transfer statute) directing the Secretary of the Interior to transfer to the VFW the Government's interest in the land that had been designated a

national memorial. Department of Defense Appropriations Act, 2004, § 8121(a), 117 Stat. 1100. In exchange, the Government was to receive land elsewhere in the preserve from Henry Sandoz and his wife. *Ibid.* Any difference in value between the two parcels would be equalized through a cash payment. §§ 8121(c), (d). The land-transfer statute provided that the property would revert to the Government if not maintained "as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." § 8121(e). The statute presents a central issue in this case.

The Court of Appeals in *Buono II* did not address the effect on the suit of a potential land transfer under the statute. The court noted that the transfer might "take as long as two years to complete," 371 F. 3d, at 545, and that its effect was not yet known, *id.*, at 545–546. The court thus "express[ed] no view as to whether a transfer completed under [the statute] would pass constitutional muster." *Id.*, at 546.

D

After the Court of Appeals affirmed in *Buono II*, Buono returned to the District Court seeking to prevent the land transfer. He sought injunctive relief against the transfer, either through enforcement or modification of the 2002 injunction. In evaluating his request the trial court described the relevant question as whether the land transfer was a bona fide attempt to comply with the injunction (as the Government claimed), or a sham aimed at keeping the cross in place (as Buono claimed). *Buono* v. *Norton*, 364 F. Supp. 2d 1175, 1178 (CD Cal. 2005) *(Buono III)*. In *Buono III*, the court did not consider whether the transfer itself was an "independent violation of the Establishment Clause." *Id.*, at 1182, n. 8. The court nevertheless concluded that the transfer was an attempt by the Government to keep the cross atop Sunrise Rock and so was invalid. The court granted Buono's motion to enforce the 2002 injunction; denied as

moot his motion to amend it; and permanently enjoined the Government from implementing the land-transfer statute. *Id.*, at 1182.

The Court of Appeals again affirmed, largely following the reasoning of the District Court. *Buono* v. *Kempthorne*, 502 F. 3d 1069 (CA9 2007). The Government's motion for rehearing en banc was denied over a dissent by Judge O'Scannlain, 527 F. 3d 758, and this Court granted certiorari, 555 U. S. 1169 (2009).

II

Before considering the District Court's order on the merits, the first inquiry must be with respect to Buono's standing to maintain this action. To demonstrate standing, a plaintiff must have "alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Horne* v. *Flores*, 557 U. S. 433, 445 (2009) (internal quotation marks omitted). The Government argues that Buono's asserted injury is not personal to him and so does not confer Article III standing. As noted above, Buono does not find the cross itself objectionable but instead takes offense at the presence of a religious symbol on federal land. Buono does not claim that, as a personal matter, he has been made to feel excluded or coerced, and so, the Government contends, he cannot object to the presence of the cross. Brief for Petitioners 12–17.

Whatever the validity of the objection to Buono's standing, that argument is not available to the Government at this stage of the litigation. When Buono moved the District Court in *Buono I* for an injunction requiring the removal of the cross, the Government raised the same standing objections it proffers now. Rejecting the Government's position, the District Court entered a judgment in Buono's favor, which the Court of Appeals affirmed in *Buono II*. The Government did not seek review in this Court. The judgment became final and unreviewable upon the expiration of the 90-day deadline under 28 U. S. C. § 2101(c) for filing a petition

for certiorari. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923); see *Missouri* v. *Jenkins*, 495 U. S. 33, 45 (1990) (90-day deadline is "mandatory and jurisdictional"). The Government cannot now contest Buono's standing to obtain the final judgment in *Buono I*.

Of course, even though the Court may not reconsider whether Buono had standing to seek the 2002 injunction, it is still necessary to evaluate his standing in *Buono III* to seek application of the injunction against the land-transfer statute. That measure of relief is embodied in the judgment upon which we granted review.

This was a measure of relief that Buono had standing to seek. A party that obtains a judgment in its favor acquires a "judicially cognizable" interest in ensuring compliance with that judgment. See *Allen* v. *Wright*, 468 U. S. 737, 763 (1984) (plaintiffs' right to enforce a desegregation decree to which they were parties is "a personal interest, created by law, in having the State refrain from taking specific actions"). Having obtained a final judgment granting relief on his claims, Buono had standing to seek its vindication.

The Government does not deny this proposition as a general matter. Instead, it argues that Buono was not seeking to vindicate—but rather to extend—the 2002 injunction. The first injunction prohibited the Government from maintaining the cross on Sunrise Rock; yet in *Buono III* he sought to preclude the land transfer, a different governmental action. The Government contends that Buono lacked standing to seek this additional relief. Reply Brief for Petitioners 5.

The Government's argument, however, is properly addressed to the relief granted by the judgment below, not to Buono's standing to seek that relief. The Government has challenged whether appropriate relief was granted in *Buono III* in light of the relevant considerations and legal principles, and we shall consider these questions. The standing inquiry, by contrast, turns on the alleged injury that

prompted the plaintiff to invoke the court's jurisdiction in the first place. Buono's entitlement to an injunction having been established in *Buono I* and *II*, he sought in *Buono III* to prevent the Government from frustrating or evading that injunction. Based on the rights he obtained under the earlier decree—against the same party, regarding the same cross and the same land—his interests in doing so were sufficiently personal and concrete to support his standing. Although Buono also argued that the land transfer should be prohibited as an "independent" Establishment Clause violation, the District Court did not address or order relief on that claim, which is not before us. *Buono III*, 364 F. Supp. 2d, at 1182, n. 8. This is not a case in which a party seeks to import a previous standing determination into a wholly different dispute.

In arguing that Buono sought to extend, rather than to enforce, the 2002 injunction, the Government in essence contends that the injunction did not provide a basis for the District Court to invalidate the land transfer. This is not an argument about standing but about the merits of the District Court's order. Those points now must be addressed.

III

The procedural history of this litigation must be considered to identify the issues now subject to review. The District Court granted the 2002 injunction after concluding that a cross on federal land violated the Establishment Clause. The Government unsuccessfully challenged that conclusion on appeal, and the judgment became final upon completion of direct review. At that point, the judgment "became res judicata to the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Travelers Indemnity Co.* v. *Bailey*, 557 U. S. 137, 152 (2009) (internal quotation marks omitted). The Govern-

ment therefore does not—and could not—ask this Court to reconsider the propriety of the 2002 injunction or the District Court's reasons for granting it.

The question now before the Court is whether the District Court properly enjoined the Government from implementing the land-transfer statute. The District Court did not consider whether the statute, in isolation, would have violated the Establishment Clause, and it did not forbid the land transfer as an independent constitutional violation. *Buono III*, *supra*, at 1182, n. 8. Rather, the court enjoined compliance with the statute on the premise that the relief was necessary to protect the rights Buono had secured through the 2002 injunction.

An injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief. See *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932). See also *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312 (1982); *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2942, pp. 39–42 (2d ed. 1995) (hereinafter Wright & Miller). Equitable relief is not granted as a matter of course, see *Weinberger*, 456 U. S., at 311–312, and a court should be particularly cautious when contemplating relief that implicates public interests, see *id.*, at 312 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction"); *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338 (1933) ("Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling"). Because injunctive relief "is drafted in light of what the court believes will be the future course of events, . . . a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an 'instrument of

wrong.'" Wright & Miller § 2961, at 393–394 (quoting *Swift & Co., supra,* at 115).

Here, the District Court did not engage in the appropriate inquiry. The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. The court, however, did not acknowledge the statute's significance. It examined the events that led to the statute's enactment and found an intent to prevent removal of the cross. Deeming this intent illegitimate, the court concluded that nothing of moment had changed. This was error. Even assuming that the land-transfer statute was an attempt to prevent removal of the cross, it does not follow that an injunction against its implementation was appropriate.

By dismissing Congress' motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. Cf. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 661 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part) ("[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"). Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers. See Brief for VFW et al. as *Amici Curiae* 15 (noting that the plaque accompanying the cross "was decorated with VFW decals").

Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness. See *ibid.* Members of the public gathered regularly at Sunrise Rock to pay their respects. Rather than let the cross deteriorate, community members repeatedly took it upon themselves to replace it. Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage. See note following 16 U. S. C. § 431 (listing officially designated national memorials, including the National D-Day Memorial and the Vietnam Veterans Memorial). Research discloses no other national memorial honoring American soldiers—more than 300,000 of them—who were killed or wounded in World War I. See generally A. Leland & M. Oboroceanu, Congressional Research Service Report for Congress, American War and Military Operations Casualties: Lists and Statistics 2 (2009). It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained. Cf. *Van Orden* v. *Perry*, 545 U. S. 677, 702–703 (2005) (BREYER, J., concurring in judgment) ("40 years" without legal challenge to a Ten Commandments display "suggest that the public visiting the [surrounding] grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage").

The 2002 injunction thus presented the Government with a dilemma. It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring. Cf. *id.*, at 704 (to invalidate a longstanding Ten Commandments display might "create the very kind of religiously based divisiveness that the Establishment Clause

seeks to avoid"). Deeming neither alternative to be satisfactory, Congress enacted the statute here at issue. Congress, of course, may not use its legislative powers to reopen final judgments. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 225–226 (1995). That principle, however, was not a bar to this statute. The Government's right to transfer the land was not adjudicated in *Buono I* or compromised by the 2002 injunction.

In belittling the Government's efforts as an attempt to "evade" the injunction, *Buono III*, 364 F. Supp. 2d, at 1182, the District Court had things backwards. Congress' prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations. See *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 513 (1982). Here, Congress adopted a policy with respect to land it now owns in order to resolve a specific controversy. Congress, the Executive, and the Judiciary all have a duty to support and defend the Constitution. See *United States* v. *Nixon*, 418 U. S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others"). The land-transfer statute embodies Congress' legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that, while challenged under the Establishment Clause, has complex meaning beyond the expression of religious views. That judgment should not have been dismissed as an evasion, for the statute brought about a change of law and a congressional statement of policy applicable to the case.

Buono maintains that any governmental interest in keeping the cross up must cede to the constitutional concerns on which the 2002 injunction was based. He argues that the land transfer would be "an incomplete remedy" to the consti-

tutional violation underlying the injunction and that the transfer would make achieving a proper remedy more difficult. Brief for Respondent 54.

A court must find prospective relief that fits the remedy to the wrong or injury that has been established. See *Swift & Co.*, 286 U. S., at 114 ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"). See also *United States* v. *United Shoe Machinery Corp.*, 391 U. S. 244, 249 (1968). Where legislative action has undermined the basis upon which relief has previously been granted, a court must consider whether the original finding of wrongdoing continues to justify the court's intervention. See *Railway Employees* v. *Wright*, 364 U. S. 642, 648–649 (1961); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 430–432 (1856). The relevant question is whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have rendered prospective relief inappropriate.

The District Court granted the 2002 injunction based solely on its conclusion that presence of the cross on federal land conveyed an impression of governmental endorsement of religion. The court expressly disavowed any inquiry into whether the Government's actions had a secular purpose or caused excessive entanglement. *Buono I*, 212 F. Supp. 2d, at 1215, 1217, n. 9. The Court of Appeals affirmed the injunction on the same grounds, similarly eschewing any scrutiny of governmental purpose. *Buono II*, 371 F. 3d, at 550.

Although, for purposes of the opinion, the propriety of the 2002 injunction may be assumed, the following discussion should not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable. The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance,

the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. See *Lee* v. *Weisman*, 505 U. S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution"). See also *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause" (internal quotation marks omitted)). Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Even assuming the propriety of the original relief, however, the question before the District Court in *Buono III* was whether to invalidate the land transfer. Given the sole reliance on perception as a basis for the 2002 injunction, one would expect that any relief grounded on that decree would have rested on the same basis. But the District Court enjoined the land transfer on an entirely different basis: its suspicion of an illicit governmental purpose. See *Buono III*, 364 F. Supp. 2d, at 1182. The court made no inquiry into the effect that knowledge of the transfer of the land to private ownership would have had on any perceived governmental endorsement of religion, the harm to which the 2002 injunction was addressed. The District Court thus used an injunction granted for one reason as the basis for enjoining conduct that was alleged to be objectionable for a different reason. Ordering relief under such circumstances was improper—absent a finding that the relief was necessary to address an independent wrong. See *ibid.*, n. 8 (noting that the court "need not consider [Buono's] other contention that the land transfer itself is an independent violation of the Establishment Clause").

The District Court should have evaluated Buono's modification request in light of the objectives of the 2002 injunction. The injunction was issued to address the impression conveyed by the cross on federal, not private, land. Even if its purpose were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government. Cf. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 471 (2009) ("[P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf").

Buono argues that the cross would continue to stand on Sunrise Rock, which has no visual differentiation from the rest of the primarily federally owned Preserve. He also points to the reversionary clause in the land-transfer statute requiring that the land be returned to the Government if not maintained as a World War I memorial. Finally, he notes that the cross remains designated a national memorial by an Act of Congress, which arguably would prevent the VFW from dismantling the cross even if it wanted to do so. Brief for Respondent 37–48.

The District Court failed to consider whether, in light of the change in law and circumstances effected by the land-transfer statute, the "reasonable observer" standard continued to be the appropriate framework through which to consider the Establishment Clause concerns invoked to justify the requested relief. As a general matter, courts considering Establishment Clause challenges do not inquire into "reasonable observer" perceptions with respect to objects on private land. Even if, however, this standard were the appropriate one, but see *County of Allegheny*, 492 U. S., at 668 (KENNEDY, J., concurring in judgment in part and dissenting in part) (criticizing the "reasonable observer" test); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S.

753, 763–768 (1995) (plurality opinion) (criticizing reliance on "perceived endorsement"), it is not clear that Buono's claim is meritorious. That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement. See *id.*, at 780 (O'Connor, J., concurring in part and concurring in judgment). But see *id.*, at 767–768 (plurality opinion) (doubting the workability of the reasonable observer test). Applying this test here, the message conveyed by the cross would be assessed in the context of all relevant factors. See *Van Orden*, 545 U. S., at 700 (BREYER, J., concurring in judgment) (the Establishment Clause inquiry "must take account of context and consequences"); *Lee*, 505 U. S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one").

The District Court did not attempt to reassess the findings in *Buono I* in light of the policy of accommodation that Congress had embraced. Rather, the District Court concentrated solely on the religious aspects of the cross, divorced from its background and context. But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality. See *United States* v. *Morrison*, 529 U. S. 598, 607 (2000); *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U. S. 87, 96 (1909). The same respect requires that a congressional command be given effect unless no legal alternative exists. Even if, contrary to the congres-

sional judgment, the land transfer were thought an insufficient accommodation in light of the earlier finding of religious endorsement, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the land-transfer statute. See *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006) (in granting relief, "we try not to nullify more of a legislature's work than is necessary, for we know that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people" (internal quotation marks omitted; alteration in original)); *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987). For instance, if there is to be a conveyance, the question might arise regarding the necessity of further action, such as signs to indicate the VFW's ownership of the land. As we have noted, Congress directed the Secretary of the Interior to install near the cross a replica of its original memorial plaque. One of the signs that appears in early photographs of the cross specifically identifies the VFW as the group that erected it.

Noting the possibility of specific remedies, however, is not an indication of agreement about the continued necessity for injunctive relief. The land-transfer statute's bearing on this dispute must first be determined. To date, this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules. In light of the finding of unconstitutionality in *Buono I*, and the highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance. On remand, if Buono continues to challenge implementation of the statute, the District Court should conduct a proper inquiry as described above.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring.

At oral argument, respondent's counsel stated that it "likely would be consistent with the injunction" for the Government to tear down the cross, sell the land to the Veterans of Foreign Wars, and return the cross to them, with the VFW immediately raising the cross again. Tr. of Oral Arg. 44. I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do—sell the land with the cross on it. "The Constitution deals with substance, not shadows." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867).

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

I join JUSTICE KENNEDY's opinion in all respects but one: I would not remand this case for the lower courts to decide whether implementation of the land-transfer statute enacted by Congress in 2003, Department of Defense Appropriations Act, 2004, § 8121, would violate the District Court's injunction or the Establishment Clause. The factual record has been sufficiently developed to permit resolution of these questions, and I would therefore decide them and hold that the statute may be implemented.

The singular circumstances surrounding the monument on Sunrise Rock presented Congress with a delicate problem, and the solution that Congress devised is true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance. In brief, the situation that Congress faced was as follows.

After service in the First World War, a group of veterans moved to the Mojave Desert, in some cases for health reasons.[1] They joined the Veterans of Foreign Wars (VFW),

[1] See Memorandum from Mark Luellen, Historian, Dept. of Interior, to Superintendent, Mojave National Preserve (Jan. 31, 2000) (Luellen Memo), Decl. of Charles R. Shockey in *Buono* v. *Norton*, No. EDCV01–216–RT (SGLx) (CD Cal., Mar. 13, 2002) (Exh. 17); Brief for VFW et al. as *Amici*

Death Valley Post 2884, and in 1934, they raised a simple white cross on an outcropping called Sunrise Rock to honor fallen American soldiers.[2] These veterans selected Sunrise Rock "in part because they believed there was a color shading on the Rock in the shape of an American soldier or 'doughboy.'"[3]

One of these men was John Riley Bembry, a miner who had served as a medic and had thus presumably witnessed the carnage of the war firsthand.[4] It is said that Mr. Bembry was not a particularly religious man, but he nevertheless agreed to look after the cross and did so for some years.[5]

The Sunrise Rock monument was located on land belonging to the Federal Government, but in this part of the country, where much of the land is federally owned, boundaries between Government and private land are often not marked,[6] and private citizens are permitted to go on and to use federal land for a variety of purposes.[7] Although Sunrise Rock was federally owned, Mr. Bembry and his fellow

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Curiae 6–7, 15 (hereinafter VFW Brief); see also B. Ausmus, East Mojave Diary 116 (1989) (hereinafter Ausmus).

[2] See Luellen Memo; VFW Brief 15–16.

[3] *Id.*, at 15.

[4] See Tr. of Oral Arg. 55; VFW Brief 7, 16; see also Ausmus 116.

[5] See VFW Brief 7, 16.

[6] See App. 79, 81 (testimony of respondent) (noting that when he first saw the monument, he did not know whether it was on public or private land); *id.*, at 80 (describing Mojave Preserve as "primarily federal land with a large amount of inholdings of non-federal land"); see also *Wilkie* v. *Robbins*, 551 U. S. 537, 541–543 (2007).

[7] See Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U. S. C. § 315 *et seq.;* General Mining Act of 1872, Rev. Stat. § 2319, 30 U. S. C. § 22; *Andrus* v. *Shell Oil Co.*, 446 U. S. 657, 658 (1980); see also E. Nystrom, Dept. of Interior, National Park Service, From Neglected Space To Protected Place: An Administrative History of Mojave National Preserve, ch. 2 (Mar. 2003) (describing mining and grazing in Mojave Preserve), online at http://www.nps.gov/history/history/online_books/moja/adhi.htm (all Internet materials as visited Apr. 23, 2010, and available in Clerk of Court's case file).

veterans took it upon themselves to place their monument on that spot, apparently without obtaining approval from any federal officials, and this use of federal land seems to have gone largely unnoticed for many years, in all likelihood due to the spot's remote and rugged location.

Sunrise Rock is situated far from any major population center; temperatures often exceed 100 degrees Fahrenheit in the summer; and visitors are warned of the dangers of traveling in the area.[8] As a result, at least until this litigation, it is likely that the cross was seen by more rattlesnakes than humans.

Those humans who made the trip to see the monument appear to have viewed it as conveying at least two significantly different messages. See *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 474 (2009) ("The meaning conveyed by a monument is generally not a simple one," and a monument may be "interpreted by different observers, in a variety of ways"). The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock, *Buono* v. *Norton*, 371 F. 3d 543, 548 (CA9 2004). But, as noted, the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of the Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.

This is roughly how things stood until the plaintiff in this case, an employee of the National Park Service who sometimes viewed the cross during the performance of his duties and claims to have been offended by its presence on federally owned land, brought this suit and obtained an injunction re-

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[8] See Dept. of Interior, National Park Service, Mojave National Preserve, Operating Hours & Seasons, http://www.nps.gov/moja/planyourvisit/hours.htm; D. Casebier, Mojave Road Guide: An Adventure Through Time 114 (1999); *Buono* v. *Norton*, 371 F. 3d 543, 549 (CA9 2004).

straining the Federal Government from "permitting the display of the Latin cross in the area of Sunrise Rock." App. to Pet. for Cert. 146a. After the Ninth Circuit affirmed that decision, and the Government elected not to seek review by this Court, Congress faced a problem.

If Congress had done nothing, the Government would have been required to take down the cross, which had stood on Sunrise Rock for nearly 70 years, and this removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable, if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage. Cf. *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (BREYER, J., concurring in judgment).

One possible solution would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave their lives in the First World War. In American military cemeteries overseas, the graves of soldiers who perished in that war were marked with either a white cross or a white Star of David.[9] More than 3,500 Jewish soldiers gave their lives for the United States in World War I,[10]

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[9] See D. Holt, American Military Cemeteries 473, 474 (1992); see also American Battle Monuments Commission, http://www.abmc.gov/cemeteries/cemeteries.php (containing photographs of the two types of markers). This policy presumably reflected the religious makeup of the Armed Forces at the time of the First World War. Today, veterans and their families may select any of 39 types of headstones. See Dept. of Veterans Affairs, Available Emblems of Belief for Placement on Government Headstones and Markers, http://www.cem.va.gov/hm/hmemb.asp.

[10] See J. Fredman & L. Falk, Jews in American Wars 100–101 (5th ed. 1954); Brief for Jewish War Veterans of the United States of America, Inc., as *Amicus Curiae* 33.

and Congress might have chosen to place a Star of David on Sunrise Rock so that the monument would duplicate those two types of headstones. But Congress may well have thought—not without reason—that the addition of yet another religious symbol would have been unlikely to satisfy the plaintiff, his attorneys, or the lower courts that had found the existing monument to be unconstitutional on the ground that it impermissibly endorsed religion.

Congress chose an alternative approach that was designed to eliminate any perception of religious sponsorship stemming from the location of the cross on federally owned land, while at the same time avoiding the disturbing symbolism associated with the destruction of the historic monument. The mechanism that Congress selected is one that is quite common in the West, a "land exchange."[11] Congress enacted a law under which ownership of the parcel of land on which Sunrise Rock is located would be transferred to the VFW in exchange for another nearby parcel of equal value. Congress required that the Sunrise Rock parcel be used for a war memorial, § 8121(a), 117 Stat. 1100, but Congress did not prevent the VFW from supplementing the existing monument or replacing it with a war memorial of a different design. Although JUSTICE STEVENS characterizes this land exchange as one that endorses "a particular religious view," *post*, at 760 (dissenting opinion), it is noteworthy that Congress, in which our country's religious diversity is well represented, passed this law by overwhelming majorities: 95–0 in the Senate and 407–15 in the House. See 149 Cong. Rec. 23110 (2003); *id.*, at 23306. In my view, there is no legal ground for blocking the implementation of this law.

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[11] See G. Draffan & J. Blaeloch, Commons or Commodity? The Dilemma of Federal Land Exchanges 10 (2000). Congressionally authorized land exchanges are common. See, *e. g.*, Consolidated Natural Resources Act of 2008, § 101(d), 122 Stat. 758; National Defense Authorization Act for Fiscal Year 2008, § 2845, 122 Stat. 554; City of Yuma Improvement Act, § 3, 120 Stat. 3369; Act of Dec. 23, 2004, § 1, 118 Stat. 3919.

JUSTICE STEVENS contends that the land transfer would violate the District Court injunction, but that argument, for the reasons explained in JUSTICE SCALIA's opinion, see *post*, at 730 (concurring in judgment), is plainly unsound. The obvious meaning of the injunction was simply that the Government could not allow the cross to remain on *federal* land.

There is also no merit in JUSTICE STEVENS' contention that implementation of the statute would constitute an endorsement of Christianity and would thus violate the Establishment Clause. Assuming that it is appropriate to apply the so-called "endorsement test," this test would not be violated by the land exchange. The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display. See *ante*, at 720–721 (plurality opinion). Here, therefore, this observer would be familiar with the origin and history of the monument and would also know both that the land on which the monument is located is privately owned and that the new owner is under no obligation to preserve the monument's present design. With this knowledge, a reasonable observer would not view the land exchange as the equivalent of the construction of an official World War I memorial on the National Mall. Cf. *post*, at 759 (STEVENS, J., dissenting). Rather, a well-informed observer would appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns.

Finally, I reject JUSTICE STEVENS' suggestion that the enactment of the land-transfer law was motivated by an illicit purpose. *Post*, at 757. I would not be "so dismissive of Congress." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 460 (2010) (STEVENS, J., concurring in part and dissenting in part). Congress has shown notable solicitude for the rights of religious minorities. See, *e. g.*, Religious Freedom Restoration Act of 1993, 42 U. S. C. § 2000bb *et seq.;*

Religious Land Use and Institutionalized Persons Act of 2000, 42 U. S. C. §2000cc *et seq.* I would not jump to the conclusion that Congress' aim in enacting the land-transfer law was to embrace the religious message of the cross; rather, I see no reason to doubt that Congress' consistent goal, in legislating with regard to the Sunrise Rock monument, has been to commemorate our Nation's war dead and to avoid the disturbing symbolism that would have been created by the destruction of the monument.

For these reasons, I would reverse the decision below and remand with instructions to vacate the order prohibiting the implementation of the land-transfer statute.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I agree with the plurality that the Court of Appeals erred in affirming the District Court's order enjoining the transfer of the memorial to the Veterans of Foreign Wars (VFW). My reason, however, is quite different: In my view we need not—indeed, *cannot*—decide the merits of the parties' dispute, because Frank Buono lacks Article III standing to pursue the relief he seeks. The District Court had no power to award the requested relief, and our authority is limited to "'announcing the fact and dismissing the cause.'" *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1869)).

The plurality is correct that Buono's standing to obtain the *original* injunction is not before us. See *ante*, at 711–712.[1]

[1] The Court of Appeals' conclusion that Buono had standing to seek the original injunction does not, however, control our decision here under the law-of-the-case doctrine. That doctrine comes into play only if an issue we are asked to resolve has already been decided in the same litigation. See *Quern* v. *Jordan*, 440 U. S. 332, 347, n. 18 (1979). In its earlier decision, the Ninth Circuit addressed only Buono's standing to seek the original injunction barring the display of the cross on public land. See *Buono* v. *Norton*, 371 F. 3d 543, 546–548 (2004). It had no occasion to address his standing to seek an expansion of the injunction to bar a transfer en-

Nor is Buono's standing to request enforcement of the original injunction at issue. If he sought only to compel compliance with the existing order, Article III would not stand in his way.

As the plurality all but admits, however, the relief Buono requests and the District Court awarded in *this* proceeding is not enforcement of the original injunction but expansion of it. See *ante*, at 719. The only reasonable reading of the original injunction, in context, is that it proscribed the cross's display on federal land. Buono's alleged injuries arose from the cross's presence on public property, see App. 50, 59, and the injunction accordingly prohibited the Government, its "employees, agents, and those in active concert with [them] . . . from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." App. to Pet. for Cert. 146a. Barring the Government from "permitting" the cross's display at a particular location makes sense only if the Government owns the location. As the proprietor, it can remove the cross that private parties have erected and deny permission to erect another. But if the land is privately owned, the Government can prevent the cross's display only by making it *illegal*. Prohibitory legislation does not consist of a mere refusal to "permi[t]," nor is the enactment of legislation what the injunction commanded (a command that would raise serious First Amendment and separation-of-powers questions).[2]

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abling the cross's display on private property. Moreover, Buono failed to raise the issue in his brief in opposition to certiorari, and we may deem it waived. See this Court's Rule 15.2; cf. *Knowles* v. *Iowa*, 525 U. S. 113, 116, n. 2 (1998).

[2] The principal dissent does not dispute that the original injunction did not require the Government to ban the cross's display on private land, yet it insists that the injunction nonetheless forbade transferring the land to a private party who could keep the cross in place. *Post*, at 740–741 (opinion of STEVENS, J.). But there is no basis in the injunction's text for treating a sale of the land to a private purchaser who does not promise to take the cross down as "permitting" the cross's display, when failing to

The District Court's 2005 order purporting to "enforce" the earlier injunction went well beyond barring the display of the cross on public property. *Buono* v. *Norton*, 364 F. Supp. 2d 1175, 1182 (CD Cal. 2005). At Buono's request, the court enjoined certain Government officials and "anyone acting in concert with them . . . from implementing the provisions of Section 8121 of Public Law 108–87," the statutory provision enacted after the original injunction that directs the Executive Branch to transfer the memorial to the VFW. *Ibid.*

Because Buono seeks new relief, he must show (and the District Court should have ensured) that he has standing to pursue it. As the party invoking federal-court jurisdiction, Buono "bears the burden of showing that he has standing for each type of relief sought," *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493 (2009); see *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983). A plaintiff cannot sidestep Article III's requirements by combining a request for injunctive relief for which he *has* standing with a request for injunctive relief for which he *lacks* standing. And for the same reason, a plaintiff cannot ask a court to expand an existing injunction unless he has standing to seek the additional relief.

Buono must therefore demonstrate that the additional relief he sought—blocking the transfer of the memorial to a private party—will "redress or prevent actual or imminently threatened injury to [him] caused by private or official violation of law." *Summers*, *supra*, at 492. He has failed, how-

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forbid the cross's presence on already-private land within the Mojave National Preserve would not be treated as such. The latter no less involves "allow[ing] the act or existence of" or "tolerat[ing]" the display of the cross. Webster's New International Dictionary 1824 (2d ed. 1954). The principal dissent responds that in determining whether the transfer complies with the original injunction we "cannot start from a baseline in which the cross has *already* been transferred." *Post*, at 741. But the effect of transferring the land to a private party free to keep the cross standing is identical, so far as the original injunction is concerned, to allowing a party who already owned the land to leave the cross in place.

ever, to allege any actual or imminent injury. To begin with, the predicate for any injury he might assert—that the VFW, after taking possession of the land, will continue to display the cross—is at this stage merely speculative.[3] Nothing in the statutes compels the VFW (or any future proprietor) to keep it up. The land reverts to the Government only if "the conveyed property is no longer being maintained as a war memorial," Pub. L. 108–87, § 8121(e), 117 Stat. 1100, which does not depend on whether the cross remains.[4]

Moreover, Buono has not alleged, much less established, that he will be harmed if the VFW does decide to keep the cross. To the contrary, his amended complaint averred that "he is deeply offended by the display of a Latin Cross on government-owned property" but "has no objection to Christian symbols on private property." App. 50. In a subsequent deposition he agreed with the statement that "[t]he only thing that's offensive about this cross is that [he has] discovered that it's located on federal land." *Id.*, at 85. And in a signed declaration several months later, he reiterated that although the "presence of the cross on federally owned land in the Preserve deeply offends [him] and impairs

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[3] Buono argues that the Government's continued supervision of the site, its reversionary interest in the property, and the memorial's ongoing designation as a national memorial add to the Establishment Clause violation. Brief for Respondent 37–48. But those aspects would be irrelevant if the cross were no longer displayed.

[4] The principal dissent insists, *post*, at 738–739, n. 2, that it is clear the cross will remain because the VFW asserted in an *amicus* brief that it "intends to maintain and preserve the Veterans Memorial as a memorial to United States veterans," and elsewhere referred to "the seven-foot-tall cross and plaque that comprise the Veterans Memorial," Brief for VFW of the United States et al. as *Amici Curiae* 4, 7. But the group's stated intentions do not prove that the cross will stay put. The VFW might not follow through on its plans (this VFW post already became "defunct" once during this litigation, *id.*, at 34); it might move the cross to another private parcel and substitute a different monument on Sunrise Rock; or it might sell the land to someone else who decides to honor the dead without the cross.

[his] enjoyment of the Preserve," he "ha[s] no objection to Christian symbols on private property." *Id.*, at 64–65. In short, even assuming that being "deeply offended" by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury, Buono has made clear that *he* will not be offended.[5]

These same considerations bear upon the plurality's assertion that Buono has standing to "prevent the Government from frustrating or evading" the original injunction, *ante*, at 713. If this refers to frustration or evasion in a narrow sense, the injunction is in no need of—indeed, is insusceptible of—protection. It was issued to remedy the sole complaint that Buono had brought forward: erection of a cross on public land. And it was entirely effective in remedying that complaint, having induced Congress to abandon public ownership of the land. If meant in this narrow sense, the plurality's assertion of a need to prevent frustration or evasion by the Government ignores the reality that the District Court's 2005 order awarded new relief beyond the scope of the original injunction. The revised injunction is directed at Buono's *new* complaint that the manner of abandoning public ownership and the nature of the new private ownership violate the Establishment Clause. Now it may be that a court has subject-matter jurisdiction to prevent frustration or evasion

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[5] The principal dissent argues that despite these disclaimers in Buono's complaint, deposition, and declaration, his real injury is his inability "to freely use the area of the Preserve around the cross because the Government's unconstitutional endorsement of the cross will induce him to avoid the Sunrise Rock area." *Post*, at 739, n. 2 (internal quotation marks and citation omitted). But the only "endorsement" of which Buono complained was "[t]he placement of the Cross on federally-owned land," App. 59, which "offend[s]" him only because the property "is not open to groups and individuals to erect other freestanding, permanent displays," *id.*, at 50. Nothing in Buono's complaint, deposition, or declaration establishes that he will be unable "to freely use the area of the Preserve" if Sunrise Rock is made private property and its new proprietor displays the cross.

of its prior injunction in a broader sense—that is, to eliminate an unconstitutional manner of satisfying that prior injunction. But it surely cannot do so unless it has before it someone who has standing to complain of that unconstitutional manner. If preventing frustration or evasion of an injunction includes expanding it to cover additional actions that produce no concrete harm to the original plaintiff, our standing law in this area will make no sense.

It is no answer that a district court has discretion to expand an injunction it has issued if it finds the existing terms are not fulfilling the original purpose. Doubtless it can do that, and is in that sense the master of its own injunctions. But whether the District Court abused that discretion by enlarging the injunction is beside the point. What matters is that it granted relief beyond the existing order, and that Buono must have had standing to seek the extension.

It also makes no difference that the District Court *said* it was merely enforcing its original injunction. The question is whether *in fact* the new order goes beyond the old one. If so, the court must satisfy itself of jurisdiction to award the additional relief—which includes making certain the plaintiff has standing. See *Steel Co.*, 523 U. S., at 94. That is true whether the court revisits the injunction at a party's request or on its own initiative; Article III's case-or-controversy requirement is not merely a prerequisite to relief, but a restraint on judicial power. See *Summers*, 555 U. S., at 492–493.[6]

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[6] I agree with JUSTICE BREYER that in interpreting an ambiguous injunction we should give great weight to the interpretation of the judge who issued it. *Post*, at 761–762 (dissenting opinion). But that does not mean we must accept any construction a district court places upon an order it has issued. Here there is no reasonable reading of the original injunction that would bar the land transfer but would not also require the Government to ban "the display of the Latin cross" on *private* land "in the area of Sunrise Rock in the Mojave National Preserve," App. to Pet. for Cert. 146a—an implausible interpretation no one advocates.

* * *

Keeping within the bounds of our constitutional authority often comes at a cost. Here, the litigants have lost considerable time and money disputing the merits, and we are forced to forgo an opportunity to clarify the law. But adhering to Article III's limits upon our jurisdiction respects the authority of those whom the people have chosen to make and carry out the laws. In this case Congress has determined that transferring the memorial to private hands best serves the public interest and complies with the Constitution, and the Executive defends that decision and seeks to carry it out. Federal courts have no warrant to revisit that decision—and to risk replacing the people's judgment with their own—unless and until a proper case has been brought before them. This is not it.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, dissenting.

In 2002 Congress designated a "five-foot-tall white cross" located in the Mojave National Preserve (Preserve) "as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, Pub. L. 107–117, § 8137(a), 115 Stat. 2278. Later that year, in a judgment not open to question, the District Court determined that the display of that cross violated the Establishment Clause because it "convey[ed] a message of endorsement of religion." *Buono* v. *Norton*, 212 F. Supp. 2d 1202, 1217 (CD Cal. 2002) *(Buono I)*. The question in this case is whether Congress' subsequent decision to transfer ownership of the property underlying the cross cured that violation.

"The Establishment Clause, if nothing else, prohibits government from 'specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.'" *Van Orden* v. *Perry*, 545

U. S. 677, 718 (2005) (STEVENS, J., dissenting) (quoting *Lee* v. *Weisman*, 505 U. S. 577, 641 (1992) (SCALIA, J., dissenting)). A Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ. In my view, the District Court was right to enforce its prior judgment by enjoining Congress' proposed remedy—a remedy that was engineered to leave the cross intact and that did not alter its basic meaning. I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.

I

As the history recounted by the plurality indicates, this case comes to us in a procedural posture that significantly narrows the question presented to the Court. In the first stage of this litigation, the District Court and the Court of Appeals ruled that the Government violated the Establishment Clause by permitting the display of a single white Latin cross at Sunrise Rock. Those courts further ruled that the appropriate remedy was an injunction prohibiting the Government from "permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." App. 39. The Government declined to seek a writ of certiorari following those rulings. Accordingly, for the purpose of this case, it is settled that "the Sunrise Rock cross will project a message of government endorsement [of religion] to a reasonable observer," *Buono* v. *Norton*, 371 F. 3d 543, 549 (CA9 2004) *(Buono II)*, and that the District Court's remedy for that endorsement was proper.

We are, however, faced with an additional fact: Congress has enacted a statute directing the Secretary of the Interior to transfer a 1-acre parcel of land containing the cross to the Veterans of Foreign Wars (VFW), subject to certain conditions, in exchange for a 5-acre parcel of land elsewhere in the

Preserve. See Department of Defense Appropriations Act, 2004, Pub. L. 108–87, § 8121, 117 Stat. 1100. The District Court found that the land transfer under § 8121 "violate[d] [the] court's judgment ordering a permanent injunction" and did not "actually cur[e] the continuing Establishment Clause violation." *Buono* v. *Norton*, 364 F. Supp. 2d 1175, 1182 (CD Cal. 2005) *(Buono III)*. The District Court therefore enforced its 2002 judgment by enjoining the transfer, without considering whether "the land transfer itself is an independent violation of the Establishment Clause." *Ibid.*, n. 8. Because the District Court did not base its decision upon an independent Establishment Clause violation, the constitutionality of the land-transfer statute is not before us. See *ante*, at 714. Instead, the question we confront is whether the District Court properly enforced its 2002 judgment by enjoining the transfer.

In answering that question we, like the District Court, must first consider whether the transfer would violate the 2002 injunction. We must then consider whether changed circumstances nonetheless rendered enforcement of that judgment inappropriate; or conversely whether they made it necessary for the District Court to bar the transfer, even if the transfer is not expressly prohibited by the prior injunction, in order to achieve the intended objective of the injunction. The plurality correctly notes that "'a court must never ignore significant changes in the law or circumstances underlying an injunction,'" *ibid.* (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2961, pp. 393–394 (2d ed. 1995) (hereinafter Wright & Miller)), and "'[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need,'" *ante*, at 718 (quoting *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932)).[1] At the same time,

[1] One point of contention: I accept as a general matter that a court must consider whether "legislative action has undermined the basis upon which relief has previously been granted." *Ante*, at 718. But the effect of the

it is axiomatic that when a party seeks to enforce or modify an injunction, the only circumstances that matter are *changed* circumstances. See *Swift*, 286 U. S., at 119 ("The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making").

I further accept that the District Court's task was to evaluate the changed circumstances "in light of the objectives of the 2002 injunction." *Ante*, at 720. This case does not simply pit a plaintiff's "prior showing of illegality" against a defendant's claim that "changed circumstances have rendered prospective relief inappropriate." *Ante*, at 718. That formulation implies that the changed circumstances all cut in one direction, against prospective relief, and that the defendant has asked the court to alleviate its obligations. But it is important to note that in this case, the Government did not move to "alleviate or eliminate conditions or restrictions imposed by the original decree" so as to permit the transfer. Wright & Miller § 2961, at 397. Rather, it was the *beneficiary* of the original injunction who went back into court seeking its enforcement or modification in light of the transfer. Plainly, respondent had standing to seek enforcement of a decree in his favor.[2]

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legislative action in this case is different from its effect in our cases espousing that principle, which stand for the proposition that if a *statutory* "right has been modified by the competent authority" since the decree, then an injunction enforcing the prior version of that right must be modified to conform to the change in the law. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 432 (1856); see also *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961) ("In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. . . . [I]t [must] be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives"). In a constitutional case such as this, legislative action may modify the facts, but it cannot change the applicable law.

[2] To the extent the Government challenges respondent's standing to seek the initial injunction, that issue is not before the Court for the reasons the

Respondent argued that such action was necessary, either to enforce the plain terms of the 2002 injunction or to "achieve the purposes of the provisions of the decree," *United States* v. *United Shoe Machinery Corp.*, 391 U. S. 244, 249 (1968); see Wright & Miller §2961, at 393 ("[A] court must continually be willing to redraft the order at the request of the party who obtained equitable relief in order to insure that the decree accomplishes its intended result"). Only at that point did the Government argue that changed circumstances made prospective relief unnecessary. This difference in focus is a subtle one, but it is important to emphasize that the question that was before the District Court—and that is now before us—is whether enjoining the transfer was necessary to effectuate the letter or logic of the 2002 judgment.

Although I agree with the plurality's basic framework, I disagree with its decision to remand the case to the District Court. The District Court already "engage[d] in the appropriate inquiry," *ante*, at 715, and it was well within its rights to enforce the 2002 judgment. First, the District Court

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plurality states. See *ante*, at 711–712. Moreover, in my view respondent has standing even under the analysis that JUSTICE SCALIA undertakes. It is not at all "speculative," *ante*, at 732 (opinion concurring in judgment), that the VFW will continue to display the cross. VFW Post 385, the beneficiary of the land transfer, has filed an *amici* brief in this case indicating it "intends to maintain and preserve the Veterans Memorial," Brief for VFW et al. 4, by which it means the cross, *id.*, at 7 (identifying the Veterans Memorial as the "cross and plaque"). Respondent did, in his amended complaint, aver that he was offended specifically "by the display of a Latin Cross on government-owned property." App. 50. But his claimed injury is that he is "unable to freely use the area of the Preserve around the cross," *Buono II*, 371 F. 3d 543, 547 (CA9 2004) (internal quotation marks and brackets omitted), because the Government's unconstitutional endorsement of the cross will induce him to avoid the Sunrise Rock area, even though it offers the most convenient route to the Preserve, App. 65. That endorsement and respondent's resulting injury not only persist, but have been aggravated by the Government's actions since the complaint was filed.

properly recognized that the transfer was a means of "permitting"—indeed, encouraging—the display of the cross. The transfer therefore would violate the terms of the court's original injunction. Second, even if the transfer would not violate the terms of the 2002 injunction, the District Court properly took into account events that transpired since 2002 and determined that barring the transfer was necessary to achieve the intended result of the 2002 decree, as the transfer would not eliminate government endorsement of religion.

II

The first step in the analysis is straightforward: The District Court had to ask whether the transfer of the property would violate the extant injunction. Under the terms of that injunction, the answer was yes.

The 2002 injunction barred the Government from "permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." App. 39. The land-transfer statute mandated transfer of the land to an organization that has announced its intention to maintain the cross on Sunrise Rock. That action surely "permit[s]" the display of the cross. See 11 Oxford English Dictionary 578 (2d ed. 1989) (defining "permit" as "[t]o admit or allow the doing or occurrence of; to give leave or opportunity for"). True, the Government would no longer exert direct control over the cross. But the transfer itself would be an act permitting its display.

I therefore disagree with JUSTICE SCALIA that the "only reasonable reading of the original injunction . . . is that it proscribed the cross's display on federal land." *Ante*, at 730. If the land were already privately owned, JUSTICE SCALIA may be correct that the cross' display on Sunrise Rock would not violate the injunction because the Government would not have to do anything to allow the cross to stand, and the Government could try to prevent its display only by making such

a display illegal. But the Government does own this land, and the transfer statute requires the Executive Branch to take an affirmative act (transfer to private ownership) designed to keep the cross in place. In evaluating a claim that the Government would impermissibly "permit" the cross' display by effecting a transfer, a court cannot start from a baseline in which the cross has *already* been transferred.

Moreover, § 8121 was designed specifically to foster the display of the cross. Regardless of why the Government wanted to "accommodat[e]" the interests associated with its display, *ante*, at 717 (plurality opinion), it was not only foreseeable but also intended that the cross would remain standing. Indeed, so far as the record indicates, the Government had no other purpose for turning over this land to private hands. It was therefore proper for the District Court to find that the transfer would violate its 2002 injunction and to enforce that injunction against the transfer.

III

As already noted, it was respondent, the beneficiary of the injunction, who moved the District Court for relief. When the beneficiary of an injunction seeks relief "to achieve the purposes of the provisions of the decree," *United Shoe Machinery Corp.*, 391 U. S., at 249, a district court has the authority to "modify the decree so as to achieve the required result with all appropriate expedition," *id.*, at 252. Thus, regardless of whether the transfer was prohibited by the plain terms of the 2002 judgment, the District Court properly inquired into whether enjoining the transfer was necessary to achieve the objective of that judgment. The Government faces a high burden in arguing the District Court exceeded its authority. A decree "may not be changed in the interests of the defendants if the purposes of the litigation . . . have not been fully achieved." *Id.*, at 248 (emphasis deleted). And contrary to the Government's position,

the changed circumstances in this case support, rather than count against, the District Court's enforcement decision.

The objective of the 2002 judgment, as the plurality grudgingly allows, was to "avoi[d] the perception of governmental endorsement" of religion. *Ante*, at 720; see *Buono III*, 364 F. Supp. 2d, at 1178 (analyzing " 'whether government action endorsing religion has actually ceased' " in light of the transfer). The parties do not disagree on this point; rather, they dispute whether the transfer would end government endorsement of the cross. Compare Brief for Petitioners 21 ("Congress's transfer of the land . . . ends any governmental endorsement of the cross") with Brief for Respondent 34 ("[T]he government's endorsement of the Christian cross is not remedied" by the land transfer). The District Court rightly found that the transfer would not end government endorsement of the cross.

A government practice violates the Establishment Clause if it "either has the purpose or effect of 'endorsing' religion." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592 (1989). "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Id.*, at 593–594 (quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 687 (1984) (O'Connor, J., concurring)).

The 2002 injunction was based on a finding that display of the cross had the effect of endorsing religion. That is, "the Sunrise Rock cross . . . project[s] a message of government endorsement [of religion] to a reasonable observer." *Buono II*, 371 F. 3d, at 549. The determination that the Government had endorsed religion necessarily rested on two premises: first, that the Government endorsed the cross, and

second, that the cross "take[s] a position on questions of religious belief" or "'mak[es] adherence to a religion relevant . . . to a person's standing in the political community,'" *County of Allegheny*, 492 U. S., at 594. Taking the District Court's 2002 finding of an Establishment Clause violation as res judicata, as we must, the land transfer has the potential to dislodge only the first of those premises, in that the transfer might change the Government's endorsing relationship with the cross. As I explain below, I disagree that the transfer ordered by § 8121 would in fact have this result. But it is also worth noting at the outset that the transfer statute could not (and does not) dislodge the second premise—that the cross conveys a religious message. Continuing government endorsement of the cross is thus continuing government endorsement of religion.

In my view, the transfer ordered by § 8121 would not end government endorsement of the cross for two independently sufficient reasons. First, after the transfer it would continue to appear to any reasonable observer that the Government has endorsed the cross, notwithstanding that the name has changed on the title to a small patch of underlying land. This is particularly true because the Government has designated the cross as a national memorial, and that endorsement continues regardless of whether the cross sits on public or private land. Second, the transfer continues the existing Government endorsement of the cross because the purpose of the transfer is to preserve its display. Congress' intent to preserve the display of the cross maintains the Government's endorsement of the cross.

The plurality does not conclude to the contrary; that is, it does not decide that the transfer would end government endorsement of the cross and the religious message it conveys. Rather, the plurality concludes that the District Court did not conduct an appropriate analysis, and it remands the case for a do-over. I take up each of the purported faults the plurality finds in the District Court's analy-

sis in my examination of the reasons why the transfer does not cure the existing Establishment Clause violation.

Perception of the Cross Post-Transfer

The 2002 injunction was based upon a finding of impermissible effect: The "Sunrise Rock cross . . . project[s] a message of government endorsement [of religion] to a reasonable observer." *Buono II*, 371 F. 3d, at 549. The transfer would not end that impermissible state of affairs because the cross, post-transfer, would still have "the effect of communicating a message of government endorsement . . . of religion." *Lynch*, 465 U. S., at 692 (O'Connor, J., concurring). As the Court of Appeals correctly found, "[n]othing in the present posture of the case alters" the conclusion that a "reasonable observer would perceive governmental endorsement of the message" the cross conveys. *Buono* v. *Kempthorne*, 527 F. 3d 758, 783 (CA9 2008) *(Buono IV)*.[3]

[3] The plurality faults the District Court for not engaging in this analysis, but the District Court did implicitly consider how a reasonable observer would perceive the cross post-transfer when it analyzed the terms of the transfer, the Government's continuing property rights in the conveyed land, and the history of the Government's efforts to preserve the cross. Furthermore, the Court of Appeals affirmed the District Court's order on the express ground that a reasonable observer would still perceive government endorsement of the cross. See *Buono IV*, 527 F. 3d, at 782–783.

THE CHIEF JUSTICE suggests this is much ado about nothing because respondent's counsel conceded that the injunction would not be violated were the Government to have gone through an "empty ritual" of taking down the cross before transferring the land. *Ante*, at 723 (concurring opinion). But in the colloquy to which THE CHIEF JUSTICE refers, counsel assumed that the Government would not retain a reversionary interest in the land, and that the cross would not retain its designation as a national memorial. See Tr. of Oral Arg. 44–45. Even under THE CHIEF JUSTICE's revised version of the hypothetical, I would not so quickly decide that taking down the cross makes no material difference. And counsel's statement takes no position as to whether the hypothetical poses any constitutional problem independent of the injunction. Regardless, we must deal with the substance of the case before us, which involves much more than Congress directing the Government to execute a simple land transfer.

In its original judgment, the Court of Appeals found that a well-informed reasonable observer would perceive government endorsement of religion, notwithstanding the cross' initial "placement by private individuals," based upon the following facts: "that the cross rests on public land[,] . . . that Congress has designated the cross as a war memorial and prohibited the use of funds to remove it, and that the Park Service has denied similar access for expression by an adherent of the . . . Buddhist faith." *Buono II*, 371 F. 3d, at 550. After the transfer, a well-informed observer would know that the cross was no longer on public land, but would additionally be aware of the following facts: The cross was once on public land, the Government was enjoined from permitting its display, Congress transferred it to a specific purchaser in order to preserve its display in the same location, and the Government maintained a reversionary interest in the land. From this chain of events, in addition to the factors that remain the same after the transfer, he would perceive government endorsement of the cross.[4]

Particularly important to this analysis is that although the transfer might remove the implicit endorsement that presence on public land signifies, see *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 801 (1995) (STEVENS, J., dissenting) ("The very fact that a sign is installed on public property implies official recognition and reinforcement of its message"), it would not change the fact that the Government has taken several explicit actions to endorse this cross. In its decision upholding the initial entry of the injunction, the Court of Appeals found those actions contributed to a

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[4] A less informed reasonable observer, see *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 807 (1995) (STEVENS, J., dissenting), would reach the same conclusion because the cross would still appear to stand on Government property. The transfer merely "carv[es] out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it." *Buono IV*, 527 F. 3d 758, 783 (CA9 2008). For any reasonable observer, then, the transfer simply would not change the effect of the cross.

reasonable observer's perception of government endorsement. *Buono II*, 371 F. 3d, at 550. Their significance does not depend upon the ownership of the land.

In 2000, and again after the District Court had entered its initial injunction, Congress passed legislation prohibiting the use of any federal funds to remove the cross from its location on federal property. See Consolidated Appropriations Act, 2001, Pub. L. 106–554, § 133, 114 Stat. 2763A–230; Department of Defense Appropriations Act, 2003, Pub. L. 107–248, § 8065(b), 116 Stat. 1551. Thus, beyond merely acquiescing in the continued presence of a cross on federal property, Congress singled out that cross for special treatment, and it affirmatively commanded that the cross must remain.

Congress also made a more dramatic intervention. Without the benefit of any committee hearings or floor debate in either the Senate or the House of Representatives—indeed, without a moment of discussion in any official forum—Congress passed legislation officially designating the "five-foot-tall white cross" in the Mojave Desert "as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." § 8137(a), 115 Stat. 2278. Thereafter, the cross was no longer just a local artifact; it acquired a formal national status of the highest order. Once that momentous step was taken, changing the identity of the owner of the underlying land could no longer change the public or private character of the cross. The Government has expressly adopted the cross as its own.[5]

[5] The plurality barely mentions this designation, except to assert that the designation gave recognition to the historical meaning of the cross. See *ante*, at 716. But the plurality does not acknowledge that when the Ninth Circuit affirmed the 2002 judgment, it concluded that the designation is one of the factors that would lead a reasonable observer to perceive government endorsement of religion. See *Buono II*, 371 F. 3d, at 550. Nor does the plurality address the effect of that designation on a reasonable observer's perception of the cross, regardless of whether the cross sits on private land. See *ante*, at 720.

Even though Congress recognized this cross for its military associations, the solitary cross conveys an inescapably sectarian message. See *Separation of Church and State Comm.* v. *Eugene*, 93 F. 3d 617, 626 (CA9 1996) (O'Scannlain, J., concurring in result) ("[T]he City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans"). As the District Court observed, it is undisputed that the "[L]atin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono I*, 212 F. Supp. 2d, at 1205. We have recognized the significance of the Latin cross as a sectarian symbol,[6] and no participant in this litigation denies that the cross bears that social meaning. Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.[7]

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[6] See, *e. g.*, *Pinette*, 515 U. S., at 760 (characterizing Ku Klux Klan-sponsored cross as religious speech); *id.*, at 776 (O'Connor, J., concurring in part and concurring in judgment) ("[T]he cross is an especially potent sectarian symbol"); *id.*, at 792 (Souter, J., concurring in part and concurring in judgment) ("[T]he Latin cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point"); *id.*, at 798, n. 3 (STEVENS, J., dissenting) ("[T]he Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity"); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 661 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part) ("[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion").

[7] Context is critical to the Establishment Clause inquiry, and not every use of a religious symbol in a war memorial would indicate government endorsement of a religious message. See, *e. g.*, *Van Orden* v. *Perry*, 545 U. S. 677, 701 (2005) (BREYER, J., concurring in judgment) ("[T]o determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the

More fundamentally, however, the message conveyed by the cross is not open to reconsideration given the posture of this case. The plurality employs a revealing turn of phrase when it characterizes the cross as "a symbol that, while challenged under the Establishment Clause, has complex meaning beyond the expression of religious views." *Ante*, at 717. The days of considering the cross itself as *challenged* under the Establishment Clause are over; it is settled that the government is not permitted to endorse the cross. However complex the meaning of the cross, the Court of Appeals in 2004 considered and rejected the argument that its dual symbolism as a war memorial meant that government endorsement of the cross did not amount to endorsement of religion. See *Buono II*, 371 F. 3d, at 549, n. 5. All we are debating at this juncture is whether the shift from public to private ownership of the land sufficiently distanced the Government from the cross; we are no longer debating the message the cross conveys to a reasonable observer. In arguing that Congress can legitimately favor the cross because of its purported double meaning, the plurality implicitly tries to reopen what is closed.[8]

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display"); *County of Allegheny*, 492 U. S., at 598 ("[T]he effect of a crèche display turns on its setting"); *Lynch* v. *Donnelly*, 465 U. S. 668, 694 (1984) (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"). But this cross is not merely one part of a more elaborate monument that, taken as a whole, may be understood to convey a primarily nonreligious message. Rather, the cross is the only symbol conveying any message at all.

[8] The plurality's assertions regarding the meaning of the cross are therefore beside the point. For the record, however, I cannot agree that a bare cross such as this conveys a nonsectarian meaning simply because crosses are often used to commemorate "heroic acts, noble contributions, and patient striving" and to honor fallen soldiers. *Ante*, at 721. The cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith. The cross has sometimes been used, it is true, to represent the sacrifice of an individual, as when it marks the grave of a

The plurality also poses a different objection to consideration of whether the transfer would change a reasonable observer's perception of the cross. The plurality suggests that the "'reasonable observer' standard" may not "be the appropriate framework" because "courts considering Establishment Clause challenges do not," as a general matter, "inquire into 'reasonable observer' perceptions with respect to objects on private land." *Ante*, at 720. Once again, the plurality's approach fails to pay heed to the posture of this case.

At the risk of stating the obvious, respondent is not simply challenging a private object on private land. Although "an Establishment Clause violation must be moored in government action of some sort," *Pinette*, 515 U. S., at 779 (O'Connor, J., concurring in part and concurring in judgment), respondent's objection to the transfer easily meets that test for two reasons. First, he is currently challenging official legislation, taken in response to an identified Establishment Clause violation. That legislation would transfer public land to a particular private party, with the proviso that the transferee must use the land to fulfill a specific public function or else the land reverts to the Government. Second, even once the transfer is complete, the cross would remain a national memorial. The cross is therefore not a purely "private" object in any meaningful sense.

Notwithstanding these facts, the plurality appears to conclude that the transfer might render the cross purely private speech. It relies in part on the plurality opinion in *Pinette* for its suggestion that the reasonable observer standard may

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fallen soldier or recognizes a state trooper who perished in the line of duty. Even then, the cross carries a religious meaning. But the use of the cross in such circumstances is linked to, and shows respect for, the individual honoree's faith and beliefs. I, too, would consider it tragic if the Nation's fallen veterans were to be forgotten. See *ibid.* But there are countless different ways, consistent with the Constitution, that such an outcome may be averted.

not be apposite, and *Pinette* addressed a privately owned cross displayed in a public forum. The *Pinette* plurality would have rejected the idea that "a neutrally behaving government" can ever endorse "*private* religious expression," *id.*, at 764, even if a reasonable observer would perceive government endorsement, *id.*, at 768. But the *Pinette* plurality acknowledged that government favoritism of private religious speech is unconstitutional, as when a government "giv[es] sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter)." *Id.*, at 766. And in this case, the Government is not acting neutrally: The transfer statute and the Government actions preceding it have all favored the cross.

Furthermore, even assuming (wrongly) that the cross would be purely private speech after the transfer, and even assuming (quite implausibly) that the transfer statute is neutral with respect to the cross, it would still be appropriate for the District Court to apply the reasonable observer standard. The majority of the *Pinette* Court rejected the *per se* rule proposed by the plurality. Instead, the relevant standard provides that the Establishment Clause is violated whenever "the State's own actions . . . , and their relationship to the private speech at issue, *actually convey* a message of endorsement." *Id.*, at 777 (opinion of O'Connor, J.). Moreover, the Establishment Clause "imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message." *Ibid.* It is particularly appropriate in this context—when the issue is whether the transfer cures an already identified Establishment Clause violation—for the District Court to consider whether the Government, by complying with § 8121, would have taken sufficient steps to avoid being perceived as endorsing the cross.

As I explained at the outset of this section, the answer to that inquiry is surely no. The reasonable observer "who

knows all of the pertinent facts and circumstances surrounding the symbol and its placement," *ante*, at 721, would perceive that the Government has endorsed the cross: It prohibited the use of federal funds to take down the cross, designated the cross as a national memorial, and engaged in "herculean efforts to preserve the Latin Cross" following the District Court's initial injunction, *Buono III*, 364 F. Supp. 2d, at 1182. Those efforts include a transfer statute designed to keep the cross in place. Changing the ownership status of the underlying land in the manner required by § 8121 would not change the fact that the cross conveys a message of government endorsement of religion.

Purpose in Enacting the Transfer Statute

Even setting aside that the effect of the post-transfer cross would still be to convey a message of government endorsement of religion, the District Court was correct to conclude that § 8121 would not cure the Establishment Clause violation because the very purpose of the transfer was to preserve the display of the cross. That evident purpose maintains government endorsement of the cross. The plurality does not really contest that this was Congress' purpose, *ante*, at 715, so I need not review the evidence in great detail. Suffice it to say that the record provides ample support. The land-transfer statute authorizes a conveyance to the particular recipient that has expressed an intent to preserve the cross. See Brief for VFW et al. as *Amici Curiae* 4 (transfer recipient "intends to maintain and preserve the Veterans Memorial"); *id.*, at 7 (identifying Veterans Memorial as the "cross and plaque"). And it conveys the particular land that has already been designated "as a national memorial" commemorating the veterans of World War I, § 8121(a), 117 Stat. 1100, subject to a reversionary clause requiring that a memorial "commemorating United States participation in World War I and honoring the American veterans of that war" be

maintained, § 8121(e), *ibid.* If it does not categorically require the new owner of the property to display the existing memorial meeting that description (the cross), see § 8137, 115 Stat. 2278, the statute most certainly encourages this result. Indeed, the Government concedes that Congress sought to "*preserve* a longstanding war memorial" at the site, Brief for Petitioners 28 (emphasis added), and the only memorial that could be "preserved" at Sunrise Rock is the cross itself.

The plurality insists, however, that even assuming the purpose of the land transfer was to preserve the display of the cross, enjoining the transfer was not necessarily appropriate. It contends the District Court failed to give adequate consideration to "the context in which the [land-transfer] statute was enacted and the reasons for its passage," *ante,* at 715, and it directs the District Court's attention to three factors: the message intended by the private citizens who first erected the cross, *ibid.;* the time the cross stood on Sunrise Rock and its historical meaning, *ante,* at 716; and Congress' balancing of "opposing interests" and selection of a "policy of accommodation," *ante,* at 716–717; see also *ante,* at 721.

The first two of these factors are red herrings. The District Court, in its enforcement decision, had no occasion to consider anew either the private message intended by those who erected the cross or how long the cross had stood atop Sunrise Rock. Neither of these factors constituted a novel or changed circumstance since the entry of the 2002 injunction. Whatever message those who initially erected the cross intended—and I think we have to presume it was a Christian one, at least in part, for the simple reason that those who erected the cross chose to commemorate American veterans in an explicitly Christian manner—that historical fact did not change between 2002 and 2005. I grant that the amount of time the cross had stood on Sunrise Rock did change, from 68 years to 71 years, but no one can seriously maintain that "the historical meaning that the cross had at-

tained," *ante*, at 716, was materially transformed in that 3-year increment.[9]

This brings us to the final factor identified by the plurality: Congress' "policy of accommodation" for the cross.[10] Of course, the District Court did consider Congress' "policy" in the sense that it considered the result Congress was trying to achieve with respect to the cross, *i. e.*, to keep it in place. See *Buono III*, 364 F. Supp. 2d, at 1182 ("[T]he proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation"). But I understand the plurality to be faulting the

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[9] I also disagree with the plurality's factual premise that "the cross and the cause it commemorated had become entwined in the public consciousness" in a secular manner, *ante*, at 716. Although some members of the community knew that the cross had been originally erected as a war memorial, there is no support in the record for the idea that members of the public "gathered regularly at Sunrise Rock to pay their respects," *ibid.*, to the fallen of World War I or any other veterans. The study conducted by a National Park Service historian indicates that a group of veterans gathered at the cross as early as 1935 for Easter sunrise services. Memorandum from Mark Luellen to Superintendent, Mojave National Preserve (Jan. 31, 2000), Decl. of Peter J. Eliasberg in *Buono* v. *Norton*, No. EDCV 01–216–RT (SGLx) (CD Cal., Mar. 13, 2002), p. 20 (Exh. 7). But there is no evidence that gatherings were ever held for Armistice Day or Veterans Day. The study further reveals that a local club organized social events for the community at the cross from 1950 to 1975 and that after a local veteran passed away in 1984, the "memory and associations of the white cross . . . as a war memorial" faded but locals were "inspired . . . to reinstate the Easter sunrise services" at the cross. *Ibid.*

[10] Although the plurality uses the term "accommodation," I do not read its opinion to suggest that Congress' policy vis-à-vis the cross has anything to do with accommodating any individual's religious practice. Cf. *County of Allegheny*, 492 U. S., at 601, n. 51 ("Nor can the display of the crèche be justified as an 'accommodation' of religion. . . . To be sure, prohibiting the display . . . deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes").

District Court for failing to inquire into a deeper level of motivation: If the purpose of the transfer was to keep the cross in place, what was the purpose of keeping the cross in place?

I do not see why it was incumbent upon the District Court to examine this second-order purpose when determining whether the transfer violated the 2002 injunction. As discussed in Part II, *supra*, the injunction barred the Government from permitting the display of the cross, which fairly encompasses any act providing an opportunity for the cross' display. It was entirely appropriate for the District Court to characterize a transfer with the purpose of preserving the cross as an attempt to evade that injunction, and to find that the Government's purpose to preserve the cross maintains government endorsement of the cross.

The plurality would have the District Court revise its entire analysis of whether the transfer would end government endorsement, in light of the plurality's view of the land-transfer statute's putative second-order purpose. That analysis ignores the procedural posture of the case. If the question before the Court were whether § 8121 itself violated the Establishment Clause, then this argument might have merit. But we are instead examining whether action taken with the purpose of preserving the display of the cross cures or continues government endorsement. In my view, that purpose continues the impermissible endorsement of—indeed, favoritism toward—the cross, regardless of *why* Congress chose to intervene as it did.

In any event, Congress' second-order purpose does little for the plurality's position. Without relying on any legislative history or findings—there are none—the plurality opines that Congress wanted to keep the cross in place in order to accommodate those who might view removal as "conveying disrespect for those the cross was seen as honoring," *ante*, at 716, and it suggests that this decision was an acceptable method of "balanc[ing] opposing interests" be-

cause the cross "has complex meaning beyond the expression of religious views," *ante*, at 717. As I have already explained, the meaning of the cross (complex or otherwise) is no longer before us, and the plurality's reliance on a "congressional statement of policy," *ibid.*, as negating any government endorsement of religion finds no support in logic or precedent. The cross cannot take on a nonsectarian character by congressional (or judicial) fiat, and the plurality's evaluation of Congress' actions is divorced from the methodology prescribed by our doctrine.[11]

Our precedent provides that we evaluate purpose based upon what the objective indicia of intent would reveal to a reasonable observer. See *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 862 (2005) ("The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act" (internal quotation

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[11] JUSTICE ALITO similarly affords great weight to Congress' purported interest in "avoiding the disturbing symbolism associated with the destruction of the historic monument." *Ante*, at 727 (opinion concurring in part and concurring in judgment). But we surely all can agree that once the government has violated the Establishment Clause, as has been adjudged in this case and is now beyond question, a plaintiff must be afforded a complete remedy. That remedy may sometimes require removing a religious symbol, and regrettably some number of people may perceive the remedy as evidence that the government "is bent on eliminating from all public places and symbols any trace of our country's religious heritage," *ante*, at 726. But it does not follow that the government can decline to cure an Establishment Clause violation in order to avoid offense. It may be the case that taking down the symbol is not the only remedy. The proper remedy, like the determination of the violation itself, is necessarily context specific, and even if it involves moving the cross, it need not involve the "demolition" or "destruction" of the cross, see *ante*, at 726, 727. Regardless, in this case the only question before us is whether this particular transfer provided a complete remedy. We have no way of knowing whether Congress' motivation was to minimize offense, but in any event that interest does not ameliorate the remedial ineffectiveness of § 8121.

marks omitted)). "[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *Id.*, at 866 (quoting *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 315 (2000)). The plurality nowhere engages with how a reasonable observer would view Congress' "policy of accommodation" for this cross. Instead, the plurality insists that deference is owed because of "Congress' prerogative to balance opposing interests and its institutional competence to do so." *Ante*, at 717.

The proper remedy for an Establishment Clause violation is a legal judgment, which is not the sort of issue for which Congress "'has both wisdom and experience . . . that is far superior to ours.'" *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 461 (2010) (STEVENS, J., concurring in part and dissenting in part) (quoting *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 650 (1996) (STEVENS, J., dissenting)). Moreover, the inference that Congress has exercised its institutional competence—or even its considered judgment—is significantly weaker in a case such as this, when the legislative action was "buried in a defense appropriations bill," *Buono III*, 364 F. Supp. 2d, at 1181, and, so far as the record shows, undertaken without any deliberation whatsoever. I am not dismissive of Congress, see *ante*, at 728 (opinion of ALITO, J.), but § 8121 presents no factual findings, reasoning, or long history of "'careful legislative adjustment,'" *Citizens United*, 558 U. S., at 461 (opinion of STEVENS, J.) (quoting *Federal Election Comm'n* v. *Beaumont*, 539 U. S. 146, 162, n. 9 (2003)), to which I could possibly defer. Congress did not devote "years of careful study" to § 8121, *Citizens United*, 558 U. S., at 463 (opinion of STEVENS, J.), nor did it develop a record of any kind, much less an exhaustive one, see *id.*, at 411–412 (noting the legislative record for the Bipartisan Campaign Reform Act of 2002 spanned 100,000

pages). The concurrence's attempt to draw an equivalence between a provision tucked silently into an appropriations bill and a major statute debated and developed over many years is, to say the least, not persuasive. All legislative acts are not fungible.

Furthermore, in the Establishment Clause context, we do not accord any special deference to the legislature on account of its generic advantages as a policymaking body, and the purpose test is not "satisfied so long as *any* secular purpose for the government action is apparent," *McCreary County*, 545 U. S., at 865, n. 13 (emphasis added). Nor can the government pursue a secular aim through religious means. See *Van Orden*, 545 U. S., at 715 (STEVENS, J., dissenting) ("Though the State of Texas may genuinely wish to combat juvenile delinquency, and may rightly want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium"). It is odd that the plurality ignores all of these well-settled principles in exalting this particular legislative determination.

A reasonable observer, considering the nature of this symbol, the timing and the substance of Congress' efforts, and the history of the Sunrise Rock site, could conclude that Congress chose to preserve the cross primarily because of its salience as a cross. Cf. *McCreary County*, 545 U. S., at 873 ("If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls . . . "). But no such conclusion is necessary to find for respondent.[12]

[12] I have not "jump[ed] to the conclusion that Congress' aim in enacting the land-transfer law was to embrace the religious message of the cross." *Ante*, at 729 (opinion of ALITO, J.). I think a reasonable observer could come to that conclusion, but my point is that so long as we agree that Congress' aim was to preserve the cross (which JUSTICE ALITO does not dispute), Congress' reason for preserving the cross does not matter. But if we were debating whether Congress had a religious purpose in passing the transfer statute, I would contest the relevance of the vote count to that

The religious meaning of the cross was settled by the 2002 judgment; the only question before us is whether the Government has sufficiently distanced itself from the cross to end government endorsement of it. At the least, I stress again, a reasonable observer would conclude that the Government's purpose in transferring the underlying land did not sufficiently distance the Government from the cross. Indeed, § 8121 evidenced concern for whether the cross would be displayed. The District Court was therefore correct to find that the transfer would not end government endorsement of religion.

IV

In sum, I conclude that the transfer ordered by § 8121 will not end the pre-existing Government endorsement of the cross, and to the contrary may accentuate the problem in some respects. Because the transfer would perpetuate the Establishment Clause violation at issue in the 2002 injunction, I further conclude that enjoining the transfer was necessary to secure relief. Given the transfer statute's fundamental inadequacy as a remedy, there was—and is—no need for the District Court to consider "less drastic relief than complete invalidation of the . . . statute." *Ante*, at 722. Allowing the transfer to go forward would interfere with the District Court's authority to enforce its judgment and deprive the District Court of the ability to ensure a complete remedy. Nor could allowing the transfer to go forward be made a complete remedy with add-on measures, such as signs or fences indicating the ownership of the land. Such measures would not completely end the government endorsement of this cross, as the land would have been transferred in a manner favoring the cross and the cross would remain designated as a national memorial. Enjoining com-

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inquiry, see *ante*, at 727, and particularly so in this case. One cannot infer much of anything about the land-transfer provision from the fact that an appropriations bill passed by an overwhelming majority.

pliance with § 8121 was therefore a proper exercise of the District Court's authority to enforce the 2002 judgment.

* * *

Congressional action, taken after due deliberation, that honors our fallen soldiers merits our highest respect. As far as I can tell, however, it is unprecedented in the Nation's history to designate a bare, unadorned cross as the national war memorial for a particular group of veterans. Neither the Korean War Memorial, the Vietnam War Memorial, nor the World War II Memorial commemorates our veterans' sacrifice in sectarian or predominantly religious ways. Each of these impressive structures pays equal respect to all members of the Armed Forces who perished in the service of our country in those conflicts. In this case, by contrast, a sectarian symbol *is* the memorial. And because Congress has established no other national monument to the veterans of the Great War, this solitary cross in the middle of the desert is *the* national World War I memorial. The sequence of legislative decisions made to designate and preserve a solitary Latin cross at an isolated location in the desert as a memorial for those who fought and died in World War I not only failed to cure the Establishment Clause violation but also, in my view, resulted in a dramatically inadequate and inappropriate tribute.

I believe that most judges would find it to be a clear Establishment Clause violation if Congress had simply directed that a solitary Latin cross be erected on the Mall in the Nation's Capital to serve as a World War I memorial. Congress did not erect this cross, but it commanded that the cross remain in place, and it gave the cross the imprimatur of Government. Transferring the land pursuant to § 8121 would perpetuate rather than cure that unambiguous endorsement of a sectarian message.

The Mojave Desert is a remote location, far from the seat of our Government. But the Government's interest in hon-

oring all those who have rendered heroic public service regardless of creed, as well as its constitutional responsibility to avoid endorsement of a particular religious view, should control wherever national memorials speak on behalf of our entire country.

I respectfully dissent.

JUSTICE BREYER, dissenting.

The District Court in this case entered a permanent injunction forbidding the Government to "permi[t] the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." App. 39. Subsequently, Government authorities covered the cross with a plywood box so that it could not be seen. Congress then enacted a statute directing the Secretary of the Interior to convey to a private entity approximately one acre of land upon which the cross stood, presumably so that the cross could be displayed uncovered. The plaintiff, returning to the District Court, asked that court to " 'hold that the transfer violates the . . . injunction.' " *Buono* v. *Norton*, 364 F. Supp. 2d 1175, 1177 (CD Cal. 2005) (quoting plaintiff's motion). The court held that it did. *Id.*, at 1182. And the question before us is whether the law permits the District Court so to interpret its injunction.

To answer this question we need not address any significant issue of Establishment Clause law. Because the Government has already lost the case, taken an appeal, and lost the appeal, we must take as a given the lower court's resolution of the Establishment Clause question before the land transfer. That is to say, as the plurality points out, *ante*, at 713–714, we must here assume that the original display of the cross violated the Constitution because "the presence of the cross on federal land conveys a message" to a "reasonable observer" of governmental "endorsement of religion." *Buono* v. *Norton*, 212 F. Supp. 2d 1202, 1216–1217 (CD Cal. 2002). See *Travelers Indemnity Co.* v. *Bailey*, 557 U. S. 137, 152 (2009) (once orders become final on direct review, they

are res judicata to the parties). For the same reason, we must here assume that the plaintiff originally had standing to bring the lawsuit. *Ante*, at 711–712; see also *ante*, at 729 (SCALIA, J., concurring in judgment); *Travelers*, *supra*, at 152 (orders are no less preclusive when the collateral attack is jurisdictional). And, as the plurality also points out, the plaintiff consequently has standing now to seek enforcement of the injunction. *Ante*, at 712–713; see also *Allen* v. *Wright*, 468 U. S. 737, 763 (1984).

Moreover, we are not faced with the question whether changed circumstances require modification of the injunction. The Government did not ask the District Court to modify it. In fact, the Government did not ask the District Court for any relief at all. Rather, it was the plaintiff who asked the District Court either (1) to "'hold that the [land] transfer violates the current injunction,'" or (2) to "'modify that injunction to prohibit the land transfer because it violates the Establishment Clause.'" 364 F. Supp. 2d, at 1177 (quoting plaintiff's motion). The District Court did the former, *i. e.*, it interpreted the injunction as prohibiting the Government from transferring the land for purposes of displaying the cross. And having granted the plaintiff's request to enforce the injunction, it dismissed the plaintiff's alternative request to modify the injunction as moot.

Thus, as I said at the outset, the only question before us is whether the law permits the District Court to hold that the land transfer (presumably along with the subsequent public display of the cross) falls within the scope of its original injunctive order, an order that says the Government must not "permi[t] the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." App. 39. In my view the law authorizes the District Court to do so.

The legal principles that answer the question presented are found not in the Constitution but in cases that concern the law of injunctions. First, the law of injunctions grants a district court considerable leeway to interpret the meaning

and application of its own injunctive order. Members of this Court have written that the "construction given to" an "injunction by the issuing judge . . . is entitled to great weight." *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 795 (1994) (SCALIA, J., concurring in judgment in part and dissenting in part). And the Courts of Appeals have consistently held that district courts have considerable discretion in interpreting and applying their own injunctive decrees. See, *e. g.*, *JTH Tax, Inc.* v. *H & R Block Eastern Tax Servs., Inc.*, 359 F. 3d 699, 705 (CA4 2004); *Alabama Nursing Home Assn.* v. *Harris*, 617 F. 2d 385, 388 (CA5 1980). This principle is longstanding and well established, as reflected in a prominent treatise writer's summary of the case law: "The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and . . . courts of appellate powers are exceedingly averse to interfering with the exercise of such judgment and discretion." 2 J. High, Law of Injunctions § 1458, pp. 1467–1468 (4th ed. 1905).

Second, a court should construe the scope of an injunction in light of its purpose and history, in other words, "what the decree was really designed to accomplish." *Mayor of Vicksburg* v. *Henson*, 231 U. S. 259, 273 (1913). Courts have long looked to "the objects for which the [injunctive] relief was granted, as well as the circumstances attending it," in deciding whether an enjoined party has complied with an injunction. 2 High, *supra*, § 1446, at 1455, and n. 68 (citing cases); see also *John B. Stetson Co.* v. *Stephen L. Stetson Co.*, 128 F. 2d 981, 983 (CA2 1942). And they have long refused to "permit defendants to evade responsibility for violating an injunction, by doing through subterfuge a thing which is not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing." *Stodder* v. *Rosen Talking Mach. Co.*, 247 Mass. 60, 68, 141 N. E. 569, 571 (1923).

These two principles adequately support the District Court's interpretation and application of the injunctive language at issue here. As an initial matter, the plain text of the injunction is reasonably read to prohibit the transfer. Right now, the cross is covered with a plywood box; after the transfer, the box will be removed and the cross will be displayed. The transfer thus "permits" the public "display" of the cross. Indeed, that is the statute's objective.

Consideration of the injunction's purpose points in the same direction. The injunction rested upon the District Court's determination that the display of the cross "conveys a message of endorsement of religion" to "a reasonable observer" in violation of the Establishment Clause. 212 F. Supp. 2d, at 1216–1217. (As I have said, for present purposes we must assume that this is so.) The purpose of the injunction is to prevent the conveyance of such a message to the reasonable observer.

With that purpose in mind, consider the following facts that confronted the District Court when the plaintiff asked it to enforce the decree:

- The Government had designated the "white cross . . . as well as a limited amount of adjoining [land]" as a national memorial. Pub. L. 107–117, § 8137(a), 115 Stat. 2278.
- The new statute directed the transfer of the "property . . . designated . . . as a national memorial" to a private entity with an interest in maintaining the cross in its current location, in exchange for a parcel of land located elsewhere in the preserve owned by private individuals who have taken a similar interest in the cross. Pub. L. 108–87, §§ 8121(a) and (b), 117 Stat. 1100.
- The transfer was made "subject to the condition that the recipient maintain the conveyed property as a memorial," and the property reverts to the United States if the Secretary determines that the recipient has failed to do so. § 8121(e), *ibid.*

- After the transfer, the cross would sit on 1 acre of privately owned land in a 1.6 million acre national preserve, over 90% of which is federally owned. 212 F. Supp. 2d, at 1205.
- Congress had previously prevented the use of federal funds to remove the cross from its present location. Pub. L. 107–248, § 8065(b), 116 Stat. 1551; Pub. L. 106–554, § 133, 114 Stat. 2763A–230.

The District Court considered the facts before it through the lens of the injunction's original purpose. See 364 F. Supp. 2d, at 1180 (explaining that the "[G]overnment's continuing control over the Latin cross" and the involvement of private parties who "desir[e] its continued presence in the Preserve" "demonstrat[e]" that the transfer would not end "the [G]overnment's apparent endorsement of a particular religion"); *id.*, at 1182 (considering the historical context of the transfer statute); see also *Buono* v. *Kempthorne*, 527 F. 3d 758, 783 (CA9 2008) ("carving out a tiny parcel of property in the midst of this vast Preserve . . . will do nothing to minimize the impermissible governmental endorsement" perceived by the reasonable observer). And it concluded that the land transfer would frustrate that purpose. See 364 F. Supp. 2d, at 1182 (the transfer would "keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation"); see also 527 F. 3d, at 783 (finding that "[n]othing in the present posture of the case alters . . . earlier conclusions" regarding what a reasonable observer would perceive). In my view, this is a reasonable conclusion.

The injunction forbids the Government to permit the display of the cross on Sunrise Rock, and its basic purpose was to prevent a reasonable observer from believing that the Government had endorsed the cross. Under the circumstances presented to the District Court, the transfer would have resulted in such a display and might well have conveyed

such a message. Consequently, the District Court's decision that the land transfer violated the injunction as written and intended was not an abuse of discretion. And that is what the Ninth Circuit properly held on appeal. What the Establishment Clause implications of the changed circumstances may be is a matter not before us. Cf. *Frew* v. *Hawkins*, 540 U. S. 431, 442 (2004) ("If the [enjoined defendant] establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms").

Because my conclusion rests primarily upon the law of injunctions, because that law is fairly clear, and because we cannot properly reach beyond that law to consider the underlying Establishment Clause and standing questions, I can find no federal question of general significance in this case. I believe we should not have granted the petition for certiorari. Having granted it, the Court should now dismiss the writ as improvidently granted. Since the Court has not done so, however, I believe that we should simply affirm the Ninth Circuit's judgment.

With respect, I dissent.

Syllabus

RENICO, WARDEN *v.* LETT

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

No. 09–338. Argued March 29, 2010—Decided May 3, 2010

From jury selection to jury instructions in a Michigan court, respondent Lett's first trial for, *inter alia*, first-degree murder took less than nine hours. During approximately four hours of deliberations, the jury sent the trial court seven notes, including one asking what would happen if the jury could not agree. The judge called the jury and the attorneys into the courtroom and questioned the foreperson, who said that the jury was unable to reach a unanimous verdict. The judge then declared a mistrial, dismissed the jury, and scheduled a new trial. At Lett's second trial, after deliberating for only 3 hours and 15 minutes, a new jury found him guilty of second-degree murder. On appeal, Lett argued that because the judge in his first trial had announced a mistrial without any manifest necessity to do so, the Double Jeopardy Clause barred the State from trying him a second time. Agreeing, the Michigan Court of Appeals reversed the conviction. The Michigan Supreme Court reversed. It concluded that, under *United States* v. *Perez*, 9 Wheat. 579, 580, a defendant may be retried following the discharge of a deadlocked jury so long as the trial court exercised its "sound discretion" in concluding that the jury was deadlocked and thus that there was a "manifest necessity" for a mistrial; and that, under *Arizona* v. *Washington*, 434 U. S. 497, 506–510, an appellate court must generally defer to a trial judge's determination that a deadlock has been reached. It then found that the judge at Lett's first trial had not abused her discretion in declaring the mistrial, observing that the jury had deliberated a sufficient amount of time following a short, noncomplex trial; that the jury had sent several notes, including one appearing to indicate heated discussions; and that the foreperson had stated that the jury could not reach a verdict. In Lett's federal habeas petition, he contended that the Michigan Supreme Court's rejection of his double jeopardy claim was "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U. S. C. § 2254(d)(1), and thus that he was not barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) from obtaining federal habeas relief. The District Court granted the writ, and the Sixth Circuit affirmed.

Syllabus

Held: Because the Michigan Supreme Court's decision in this case was not unreasonable under AEDPA, the Sixth Circuit erred in granting Lett habeas relief. Pp. 772–779.

(a) The question under AEDPA is whether the Michigan Supreme Court's determination was "an unreasonable application of . . . clearly established Federal law," § 2254(d)(1), not whether it was an incorrect application of that law, see *Williams* v. *Taylor*, 529 U. S. 362, 410. AEDPA imposes a "highly deferential standard for evaluating state-court rulings," *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7, and "demands that [they] be given the benefit of the doubt," *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (*per curiam*). Pp. 772–773.

(b) Here, the "clearly established Federal law" is largely undisputed. When a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial for the defendant before a new jury, *Perez*, 9 Wheat., at 579–580. Trial judges may declare a mistrial when, "in their opinion, taking all the circumstances into consideration, there is a manifest necessity" for doing so, *id.*, at 580, *i. e.*, a "high degree" of necessity, *Washington*, *supra*, at 506. The decision whether to grant a mistrial is reserved to the "broad discretion" of the trial judge, *Illinois* v. *Somerville*, 410 U. S. 458, 462, and the discretion "to declare a mistrial [for a deadlocked jury] is . . . accorded great deference by a reviewing court," *Washington*, *supra*, at 510, although this deference is not absolute. This Court has expressly declined to require the "mechanical application" of any "rigid formula," *Wade* v. *Hunter*, 336 U. S. 684, 690–691, when a trial judge decides to declare a mistrial due to jury deadlock, and it has explicitly held that the judge is not required to make explicit findings of "manifest necessity" or "articulate on the record all the factors" informing his discretion, *Washington*, *supra*, at 517. The Court has never required a judge in these circumstances to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse. Moreover, the legal standard applied by the Michigan Supreme Court is a general one—whether there was an abuse of the "broad discretion" reserved to the trial judge, *Somerville*, *supra*, at 462. Because AEDPA authorizes a federal court to grant relief only when a state court's application of federal law was unreasonable, it follows that "[t]he more general the rule" at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—"the more leeway [state] courts have in reaching outcomes in case-by-case determinations." *Yarborough* v. *Alvarado*, 541 U. S. 652, 664. Pp. 773–776.

Syllabus

(c) The Michigan Supreme Court's adjudication involved a straightforward application of this Court's longstanding precedents to the facts of Lett's case. The state court cited this Court's double jeopardy cases—from *Perez* to *Washington*—applying those precedents to the particular facts before it and finding no abuse of discretion in light of the length of deliberations following a short, uncomplicated trial, the jury's notes to the judge, and the fact that the foreperson stated that the jury could not reach a verdict. It was thus reasonable for the court to determine that the trial judge had exercised sound discretion in declaring a mistrial. The Sixth Circuit concluded otherwise because it disagreed with the inferences that the Michigan Supreme Court had drawn from the facts. The Circuit Court's interpretation is not implausible, but other reasonable interpretations of the record are also possible. It was not objectively unreasonable for the Michigan Supreme Court to conclude that the trial judge's exercise of discretion was sound, both in light of what happened at trial and the fact that the relevant legal standard is a general one, to which there is no "plainly correct or incorrect" answer in this case. *Yarborough*, *supra*, at 664. The Sixth Circuit failed to grant the Michigan courts the dual layers of deference required by AEDPA and this Court's double jeopardy precedents. Pp. 776–778.

(d) The Sixth Circuit also erred in relying on its own *Fulton* v. *Moore* decision for the proposition that *Arizona* v. *Washington* sets forth three specific factors that determine whether a judge has exercised sound discretion. Because *Fulton* does not constitute "clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), failure to apply it does not independently authorize habeas relief under AEDPA. Nor can *Fulton* be understood merely to illuminate this Court's decision in *Washington*, as *Washington* did not set forth any such test to determine whether a trial judge has exercised sound discretion in declaring a mistrial. Pp. 778–779.

(e) The Court does not deny that the trial judge in this case could have been more thorough before declaring a mistrial. Nonetheless, the steps that the Sixth Circuit thought she should have taken were not required—either under this Court's double jeopardy precedents or, by extension, under AEDPA. P. 779.

316 Fed. Appx. 421, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER, J., joined as to Parts I and II, *post*, p. 780.

Joel D. McGormley argued the cause for petitioner. With him on the briefs were *Michael A. Cox*, Attorney General of Michigan, *B. Eric Restuccia*, Solicitor General, and *Laura L. Moody*, First Assistant Attorney General.

Marla Rose McCowan, by appointment of the Court, 558 U. S. 1145, argued the cause for respondent. With her on the brief were *Michael Mittlestat*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case requires us to review the grant of a writ of habeas corpus to a state prisoner under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d). The District Court in this case issued the writ to respondent Reginald Lett on the ground that his Michigan murder conviction violated the Double Jeopardy Clause of the Constitution, and the U. S. Court of Appeals for the Sixth Circuit affirmed. In doing so, however, these courts misapplied AEDPA's deferential standard of review. Because we conclude that the Michigan Supreme Court's application of federal law was not unreasonable, we reverse.

I

On August 29, 1996, an argument broke out in a Detroit liquor store. The antagonists included Adesoji Latona, a taxi driver; Charles Jones, a passenger who claimed he had been wrongfully ejected from Latona's cab; and Reginald Lett, a friend of Jones's. After the argument began, Lett left the liquor store, retrieved a handgun from another friend outside in the parking lot, and returned to the store. He shot Latona twice, once in the head and once in the chest. Latona died from his wounds shortly thereafter. See *People* v. *Lett*, 466 Mich. 206, 208–209, 644 N. W. 2d 743, 745 (2002).

Michigan prosecutors charged Lett with first-degree murder and possession of a firearm during the commission of a

felony. His trial took place in June 1997. From jury selection to jury instructions the trial took less than nine hours, spread over six different days. *Id.*, at 209, 644 N. W. 2d, at 745.

The jury's deliberations began on June 12, 1997, at 3:24 p.m., and ran that day until 4 p.m. *Id.*, at 209, n. 1, 644 N. W. 2d, at 745, n. 1. After resuming its work the next morning, the jury sent the trial court a note—one of seven it sent out in its two days of deliberations—stating that the jurors had "'a concern about our voice levels disturbing any other proceedings that might be going on.'" *Id.*, at 209, n. 2, 644 N. W. 2d, at 745, n. 2. Later, the jury sent out another note, asking "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'" *Id.*, at 209, 644 N. W. 2d, at 745.

The trial transcript does not reveal whether the judge discussed the jury's query with counsel, off the record, upon receiving this last communication. *Id.*, at 209, n. 3, 644 N. W. 2d, at 745, n. 3. What is clear is that at 12:45 p.m. the judge called the jury back into the courtroom, along with the prosecutor and defense counsel. Once the jury was seated, the following exchange took place:

> "THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?
>
> "THE FOREPERSON: [Identified herself.]
>
> "THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?
>
> "THE FOREPERSON: Yes, there is.
>
> "THE COURT: All right. Do you believe that it is hopelessly deadlocked?
>
> "THE FOREPERSON: The majority of us don't believe that—
>
> "THE COURT: (Interposing) Don't say what you're going to say, okay?

"THE FOREPERSON: Oh, I'm sorry.

"THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

"THE FOREPERSON: (No response)

"THE COURT: Yes or no?

"THE FOREPERSON: No, Judge." Tr. in No. 96–08252 (Recorder's Court, Detroit, Mich.), pp. 319–320.

The judge then declared a mistrial, dismissed the jury, and scheduled a new trial for later that year. Neither the prosecutor nor Lett's attorney made any objection.

Lett's second trial was held before a different judge and jury in November 1997. This time, the jury was able to reach a unanimous verdict—that Lett was guilty of second-degree murder—after deliberating for only 3 hours and 15 minutes. *Lett*, *supra*, at 210, and n. 4, 644 N. W. 2d, at 746, and n. 4.

Lett appealed his conviction to the Michigan Court of Appeals. He argued that the judge in his first trial had announced a mistrial without any manifest necessity for doing so. Because the mistrial was an error, Lett maintained, the State was barred by the Double Jeopardy Clause of the U. S. Constitution from trying him a second time. The Michigan Court of Appeals agreed with Lett and reversed his conviction.

The State appealed to the Michigan Supreme Court, which reversed the Court of Appeals. The court explained that under our decision in *United States* v. *Perez*, 9 Wheat. 579 (1824), a defendant may be retried following the discharge of a deadlocked jury, even if the discharge occurs without the defendant's consent. *Lett*, 466 Mich., at 216–217, 644 N. W. 2d, at 749. There is no Double Jeopardy Clause violation in such circumstances, it noted, so long as the trial court exercised its "'sound discretion'" in concluding that the jury was deadlocked and thus that there was a "'manifest necessity'"

for a mistrial. *Ibid.* (quoting *Perez, supra,* at 580; emphasis deleted). The court further observed that, under our decision in *Arizona* v. *Washington,* 434 U. S. 497, 506–510 (1978), an appellate court must generally defer to a trial judge's determination that a deadlock has been reached. 466 Mich., at 218–222, 644 N. W. 2d, at 750–752.

After setting forth the applicable law, the Michigan Supreme Court determined that the judge at Lett's first trial had not abused her discretion in declaring the mistrial. *Id.*, at 223, 644 N. W. 2d, at 753. The court cited the facts that the jury "had deliberated for at least four hours following a relatively short, and far from complex, trial," that the jury had sent out several notes, "including one that appears to indicate that its discussions may have been particularly heated," and—"[m]ost important"—"that the jury foreperson expressly stated that the jury was not going to reach a verdict." *Ibid.*

Lett petitioned for a federal writ of habeas corpus. Again he argued that the trial court's declaration of a mistrial constituted an abuse of discretion because there was no manifest necessity to cut short the jury's deliberations. He further contended that the Michigan Supreme Court's rejection of his double jeopardy claim amounted to "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States," and thus that he was not barred by AEDPA, 28 U. S. C. § 2254(d)(1), from obtaining federal habeas relief. The District Court agreed and granted the writ. 507 F. Supp. 2d 777 (ED Mich. 2007). On appeal, a divided panel of the U. S. Court of Appeals for the Sixth Circuit affirmed. 316 Fed. Appx. 421 (2009). The State petitioned for review in our Court, and we granted certiorari. 558 U. S. 1047 (2009).

II

It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an

abuse of discretion for her to have done so—the applicable standard on direct review. The question under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was "an unreasonable application of . . . clearly established Federal law." § 2254(d)(1).

We have explained that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams* v. *Taylor*, 529 U. S. 362, 410 (2000). Indeed, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.*, at 411. Rather, that application must be "objectively unreasonable." *Id.*, at 409. This distinction creates "a substantially higher threshold" for obtaining relief than *de novo* review. *Schriro* v. *Landrigan*, 550 U. S. 465, 473 (2007). AEDPA thus imposes a "highly deferential standard for evaluating state-court rulings," *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997), and "demands that state-court decisions be given the benefit of the doubt," *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*).[1]

The "clearly established Federal law" in this area is largely undisputed. In *Perez*, we held that when a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial for the defendant before a new jury. 9 Wheat., at 579–580. We explained that trial judges may declare a mistrial "whenever, in their opinion, taking all the circumstances into

[1] The dissent correctly points out that AEDPA itself "never uses the term 'deference.'" *Post*, at 797 (opinion of STEVENS, J.). But our cases have done so over and over again to describe the effect of the threshold restrictions in 28 U. S. C. § 2254(d) on granting federal habeas relief to state prisoners. See, *e. g.*, *Wellons* v. *Hall*, 558 U. S. 220, 223–224, n. 3 (2010) (*per curiam*); *Smith* v. *Spisak*, 558 U. S. 139, 142–143 (2010); *McDaniel* v. *Brown*, 558 U. S. 120, 132–133 (2010) (*per curiam*); *Cone* v. *Bell*, 556 U. S. 449, 463, 472 (2009); *Knowles* v. *Mirzayance*, 556 U. S. 111, 112, n. 2 (2009); *Waddington* v. *Sarausad*, 555 U. S. 179, 194 (2009).

consideration, there is a manifest necessity" for doing so. *Id.*, at 580. The decision to declare a mistrial is left to the "sound discretion" of the judge, but "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Ibid.*

Since *Perez*, we have clarified that the "manifest necessity" standard "cannot be interpreted literally," and that a mistrial is appropriate when there is a "'high degree'" of necessity. *Washington*, *supra*, at 506. The decision whether to grant a mistrial is reserved to the "broad discretion" of the trial judge, a point that "has been consistently reiterated in decisions of this Court." *Illinois* v. *Somerville*, 410 U. S. 458, 462 (1973). See also *Gori* v. *United States*, 367 U. S. 364, 368 (1961).

In particular, "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." *Washington*, 434 U. S., at 510. A "mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial." *Id.*, at 509; see also *Downum* v. *United States*, 372 U. S. 734, 736 (1963) (deadlocked jury is the "classic example" of when the State may try the same defendant twice).

The reasons for "allowing the trial judge to exercise broad discretion" are "especially compelling" in cases involving a potentially deadlocked jury. *Washington*, 434 U. S., at 509. There, the justification for deference is that "the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." *Id.*, at 510, n. 28. In the absence of such deference, trial judges might otherwise "employ coercive means to break the apparent deadlock," thereby creating a "significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.*, at 510, 509.

This is not to say that we grant *absolute* deference to trial judges in this context. *Perez* itself noted that the judge's exercise of discretion must be "sound," 9 Wheat., at 580, and we have made clear that "[i]f the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears," *Washington*, 434 U. S., at 510, n. 28. Thus "if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate." *Ibid.* Similarly, "if a trial judge acts irrationally or irresponsibly, . . . his action cannot be condoned." *Id.*, at 514 (citing *United States* v. *Jorn*, 400 U. S. 470 (1971), and *Somerville*, *supra*, at 469).

We have expressly declined to require the "mechanical application" of any "rigid formula" when trial judges decide whether jury deadlock warrants a mistrial. *Wade* v. *Hunter*, 336 U. S. 684, 691, 690 (1949). We have also explicitly held that a trial judge declaring a mistrial is not required to make explicit findings of " 'manifest necessity' " nor to "articulate on the record all the factors which informed the deliberate exercise of his discretion." *Washington*, *supra*, at 517. And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse. In 1981, then-Justice Rehnquist noted that this Court had never "overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the 'manifest necessity' standard had not been met." *Winston* v. *Moore*, 452 U. S. 944, 947 (opinion dissenting from denial of certiorari). The same remains true today, nearly 30 years later.

The legal standard applied by the Michigan Supreme Court in this case was whether there was an abuse of the "broad discretion" reserved to the trial judge. *Somerville*, *supra*, at 462; *Washington*, *supra*, at 509. This type of general standard triggers another consideration under AEDPA. When assessing whether a state court's application of federal law is unreasonable, "the range of reasonable judgment can depend in part on the nature of the relevant rule" that the state court must apply. *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004). Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably*, it follows that "[t]he more general the rule" at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—"the more leeway [state] courts have in reaching outcomes in case-by-case determinations." *Ibid.*; see also *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009).

III

In light of all the foregoing, the Michigan Supreme Court's decision in this case was not unreasonable under AEDPA, and the decision of the Court of Appeals to grant Lett a writ of habeas corpus must be reversed.

The Michigan Supreme Court's adjudication involved a straightforward application of our longstanding precedents to the facts of Lett's case. The court cited our own double jeopardy cases—from *Perez* to *Washington*—elaborating upon the "manifest necessity" standard for granting a mistrial and noting the broad deference that appellate courts must give trial judges in deciding whether that standard has been met in any given case. *Lett*, 466 Mich., at 216–222, 644 N. W. 2d, at 749–752. It then applied those precedents to the particular facts before it and found no abuse of discretion, especially in light of the length of deliberations after a short and uncomplicated trial, the jury notes suggesting heated discussions and asking what would happen "if we can't agree," and—"[m]ost important"—"the fact that the

jury foreperson expressly stated that the jury was not going to reach a verdict." *Id.*, at 223, 644 N. W. 2d, at 753. In these circumstances, it was reasonable for the Michigan Supreme Court to determine that the trial judge had exercised sound discretion in declaring a mistrial.

The Court of Appeals for the Sixth Circuit concluded otherwise. It did not contest the Michigan Supreme Court's description of the objective facts, but disagreed with the inferences to be drawn from them. For example, it speculated that the trial judge may have misinterpreted the jury's notes as signs of discord and deadlock when, read literally, they expressly stated no such thing. 316 Fed. Appx., at 427. It further determined that the judge's brief colloquy with the foreperson may have wrongly implied a false equivalence between "mere disagreement" and "genuine deadlock," and may have given rise to "inappropriate pressure" on her to say that the jury would be unable to reach a verdict. *Id.*, at 426–427. The trial judge's mistakes were so egregious, in the Court of Appeals' view, that the Michigan Supreme Court's opinion finding no abuse of discretion was not only wrong but objectively unreasonable. *Id.*, at 427.

The Court of Appeals' interpretation of the trial record is not implausible. Nor, for that matter, is the more inventive (surely not "crude") speculation of the dissent. *Post*, at 789. After all, the jury only deliberated for four hours, its notes were arguably ambiguous, the trial judge's initial question to the foreperson was imprecise, and the judge neither asked for elaboration of the foreperson's answers nor took any other measures to confirm the foreperson's prediction that a unanimous verdict would not be reached.[2]

But other reasonable interpretations of the record are also possible. Lett's trial was not complex, and there is no reason that the jury would necessarily have needed more than

[2] We do not think it reasonable, however, to contend that "the foreperson had no solid basis for estimating the likelihood of deadlock." *Post*, at 790. She had, after all, participated in the jury's deliberations.

a few hours to deliberate over his guilt. The notes the jury sent to the judge certainly could be read as reflecting substantial disagreement, even if they did not say so outright. Most important, the foreperson expressly told the judge—in response to her unambiguous question "Are you going to reach a unanimous verdict, or not?"—that the jury would be unable to agree. *Lett*, *supra*, at 210, 644 N. W. 2d, at 745.

Given the foregoing facts, the Michigan Supreme Court's decision upholding the trial judge's exercise of discretion—while not necessarily correct—was not objectively unreasonable.[3] Not only are there a number of plausible ways to interpret the record of Lett's trial, but the standard applied by the Michigan Supreme Court—whether the judge exercised sound discretion—is a general one, to which there is no "plainly correct or incorrect" answer in this case. *Yarborough*, *supra*, at 664; see also *Knowles*, *supra*, at 123. The Court of Appeals' ruling in Lett's favor failed to grant the Michigan courts the dual layers of deference required by AEDPA and our double jeopardy precedents.

The Court of Appeals also erred in a second respect. It relied upon its own decision in *Fulton* v. *Moore*, 520 F. 3d 522 (CA6 2008), for the proposition "that *Arizona v. Washington* sets forth three factors that determine whether a judge has exercised sound discretion in declaring a mistrial: whether the judge (1) heard the opinions of the parties' counsel about the propriety of the mistrial; (2) considered the alternatives to a mistrial; and (3) acted deliberately, instead

[3] It is not necessary for us to decide whether the Michigan Supreme Court's decision—or, for that matter, the trial judge's declaration of a mistrial—was right or wrong. The latter question, in particular, is a close one. As Lett points out, at a hearing before the Michigan Court of Appeals, the state prosecutor expressed the view that the judge had in fact erred in dismissing the jury and declaring a mistrial. The Michigan Supreme Court declined to accept this confession of error, *People* v. *Lett*, 463 Mich. 939, 620 N. W. 2d 855 (2000), and in any event—for the reasons we have explained—whether the trial judge was right or wrong is not the pertinent question under AEDPA.

of abruptly." 316 Fed. Appx., at 426. It then cited *Fulton*'s interpretation of *Washington* to buttress its conclusion that the Michigan Supreme Court erred in concluding that the trial judge had exercised sound discretion. 316 Fed. Appx., at 428.

The *Fulton* decision, however, does not constitute "clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA. Nor, as the dissent suggests, can *Fulton* be understood merely to "illuminat[e]" *Washington*. *Post*, at 796. *Washington* nowhere established these three factors as a constitutional test that "determine[s]" whether a trial judge has exercised sound discretion in declaring a mistrial. 316 Fed. Appx., at 426.

In concluding that Lett is not entitled to a writ of habeas corpus, we do not deny that the trial judge could have been more thorough before declaring a mistrial. As the Court of Appeals pointed out, *id.*, at 427–428, she could have asked the foreperson additional followup questions, granted additional time for further deliberations, or consulted with the prosecutor and defense counsel before acting. Any of these steps would have been appropriate under the circumstances. None, however, was required—either under our double jeopardy precedents or, by extension, under AEDPA.

* * *

AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts. Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER joins as to Parts I and II, dissenting.

At common law, courts went to great lengths to ensure the jury reached a verdict. Fourteenth-century English judges reportedly loaded hung juries into oxcarts and carried them from town to town until a judgment "'bounced out.'"[1] Less enterprising colleagues kept jurors as *de facto* "prisoners" until they achieved unanimity.[2] The notion of a mistrial based on jury deadlock did not appear in Blackstone's Commentaries;[3] it is no surprise, then, that colonial juries virtually always returned a verdict.[4] Well into the 19th and even the 20th century, some American judges continued to coax unresolved juries toward consensus by threatening to deprive them of heat,[5] sleep,[6] or sustenance[7] or to lock them in a room for a prolonged period of time.[8]

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[1] Comment, Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge," 31 U. Chi. L. Rev. 386 (1964) (citing G. Crabb, A History of English Law 287 (1829)); see *King* v. *Ledgingham*, 1 Vent. 97, 86 Eng. Rep. 67 (K. B. 1670); 2 M. Hale, Pleas of the Crown 297 (1736).

[2] J. Baker, An Introduction to English Legal History 75 (4th ed. 2002); see also 1 W. Holdsworth, A History of English Law 318–319 (rev. 7th ed. 1956).

[3] "When the evidence on both sides is closed," Blackstone observed of criminal cases, "the jury cannot be discharged till they have given in their verdict." 4 Commentaries on the Laws of England 354 (1769).

[4] See Thomas & Greenbaum, Justice Story Cuts the Gordian Knot of Hung Jury Instructions, 15 Wm. & Mary Bill Rights J. 893, 897 (2007). According to these scholars, "[t]he first report of a mistrial for failure to reach a verdict in an American court was 1807." *Ibid.*

[5] See, *e. g.*, *Mead* v. *Richland Center*, 237 Wis. 537, 540–541, 297 N. W. 419, 421 (1941).

[6] See, *e. g.*, *Commonwealth* v. *Moore*, 398 Pa. 198, 204–205, 157 A. 2d 65, 69 (1959).

[7] See, *e. g.*, *Cole* v. *Swan*, 4 Greene 32, 33 (Iowa 1853).

[8] See, *e. g.*, *Canterberry* v. *Commonwealth*, 222 Ky. 510, 513–514, 1 S. W. 2d 976, 977 (1928).

Mercifully, our legal system has evolved, and such harsh measures are no longer tolerated. Yet what this history demonstrates—and what has not changed—is the respect owed "a defendant's valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). Our longstanding doctrine applying the Double Jeopardy Clause attests to the durability and fundamentality of this interest.

"The reasons why this 'valued right' merits constitutional protection are worthy of repetition." *Arizona* v. *Washington*, 434 U. S. 497, 503 (1978).

> "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.*, at 503–505 (footnotes omitted).

"The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957).[9]

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[9] As Justice Harlan observed, "[a] power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial." *United States* v. *Jorn*, 400 U. S. 470, 479 (1971) (plurality opinion).

We have come over the years to recognize that jury coercion poses a serious threat to jurors and defendants alike, and that the accused's interest in a single proceeding must sometimes yield "to the public's interest in fair trials designed to end in just judgments," *Wade*, 336 U. S., at 689; and we have therefore carved out exceptions to the common-law rule. But the exceptions are narrow. For a mistrial to be granted at the prosecutor's request, "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Washington*, 434 U. S., at 505. A judge who acts *sua sponte* in declaring a mistrial must similarly make sure, and must enable a reviewing court to confirm, that there is a "'manifest necessity'" to deprive the defendant of his valued right. *Ibid.*

In this case, the trial judge did not meet that burden. The record suggests that she discharged the jury without considering any less extreme courses of action, and the record makes quite clear that she did not fully appreciate the scope or significance of the ancient right at stake. The Michigan Supreme Court's decision rejecting Reginald Lett's double jeopardy claim was just as clearly in error.

I

No one disputes that a "genuinely deadlocked jury" is "the classic basis" for declaring a mistrial or that such declaration, under our doctrine, does not preclude reprosecution, *id.*, at 509; what is disputed in this case is whether the trial judge took adequate care to ensure the jury was genuinely deadlocked. A long line of precedents from this Court establishes the "governing legal principle[s]," *Williams* v. *Taylor*, 529 U. S. 362, 413 (2000), for resolving this question. Although the Court acknowledges these precedents, *ante*, at 773–775, it minimizes the heavy burden we have placed on trial courts.

"The fountainhead decision . . . is *United States* v. *Perez*, 9 Wheat. 579 (1824)." *Illinois* v. *Somerville*, 410 U. S. 458, 461 (1973).[10] Writing for a unanimous Court, Justice Story articulated a "manifest necessity" standard that continues to govern the double jeopardy analysis for mistrial orders:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *United States* v. *Perez*, 9 Wheat. 579, 580 (1824).

This passage, too, is worthy of repetition, because in it the *Perez* Court struck a careful balance. The Court established the authority of trial judges to discharge the jury prior to verdict, but in recognition of the novelty and potential injustice of the practice, the Court subjected that authority to several constraints: The judge may not declare a mistrial unless "there is a manifest necessity for the act" or

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[10] See also *Gori* v. *United States*, 367 U. S. 364, 368 (1961) (*Perez* is "authoritative starting point of our law in this field").

"the ends of public justice" so require; and in determining whether such conditions exist, the judge must exercise "sound discretion," "conscientious[ness]," and "the greatest caution," reserving the discharge power for "urgent circumstances" and "very plain and obvious causes." *Ibid.* What exact circumstances and causes would meet that bar, the Court declined to specify. Recognizing that trial proceedings may raise innumerable complications, so that "it is impossible to define" in advance all of the possible grounds for "interfere[nce]," the Court set forth general standards for judicial conduct rather than categorical rules for specific classes of situations. *Ibid.*

The seeds of our entire jurisprudence on the permissibility of retrial following an initial mistrial are packed into this one passage. Later Courts have fleshed out *Perez*, without making significant innovations or additions. Justice Story's formulation has been "quoted over and over again to provide guidance in the decision of a wide variety of cases," *Washington*, 434 U. S., at 506, and it has been "consistently adhered to by this Court in subsequent decisions," *Somerville*, 410 U. S., at 462.

Thus, we have repeatedly reaffirmed that the power to discharge the jury prior to verdict should be reserved for "extraordinary and striking circumstances," *Downum* v. *United States*, 372 U. S. 734, 736 (1963) (internal quotation marks omitted); that the trial judge may not take this "weighty" step, *Somerville*, 410 U. S., at 471, unless and until he has "scrupulous[ly]" assessed the situation and "take[n] care to assure himself that [it] warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal," *United States* v. *Jorn*, 400 U. S. 470, 485, 486 (1971) (plurality opinion);[11] that, to exercise

[11] See also *Jorn*, 400 U. S., at 486 ("[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal

sound discretion, the judge may not act "irrationally," "irresponsibly," or "precipitately" but must instead act "deliberately" and "careful[ly]," *Washington*, 434 U. S., at 514–515, 516;[12] and that, in view of "the elusive nature of the problem," mechanical rules are no substitute in the double jeopardy mistrial context for the sensitive application of general standards, *Jorn*, 400 U. S., at 485 (plurality opinion).[13] The governing legal principles in this area are just that—principles—and their application to any particular set of facts entails an element of judgment.

As the Court emphasizes, we have also repeatedly reaffirmed that trial judges have considerable leeway in determining whether the jury is deadlocked, that they are not bound to use specific procedures or to make specific findings, and that reviewing courts must accord broad deference to their decisions. *Ante*, at 773–775. But the reviewing court still has an important role to play; the application of deference "does not, of course, end the inquiry." *Washington*, 434 U. S., at 514. "In order to ensure that [the defendant's constitutional] interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Ibid.* "If the record re-

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he might believe to be favorably disposed to his fate"). *Jorn* was technically a plurality opinion, but in all relevant respects it was a majority product. Justices Black and Brennan believed the Court lacked jurisdiction over the appeal, and for that reason they withheld their full assent. *Id.*, at 488 (statement concurring in judgment). "However, in view of a decision by a majority of the Court to reach the merits, they join[ed] the judgment of the Court." *Ibid.* As petitioner acknowledges, *Jorn* broke no new ground: Its "holding is consistent [with] and no broader than *Perez*." Reply Brief for Petitioner 18, n. 50.

[12] See Brief for Petitioner 13–14, 25, 32 (recognizing this "constitutional floor").

[13] Accord, *Arizona* v. *Washington*, 434 U. S. 497, 506 (1978); *Illinois* v. *Somerville*, 410 U. S. 458, 462 (1973); *Downum* v. *United States*, 372 U. S. 734, 737 (1963); *Gori*, 367 U. S., at 369.

veals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for . . . deference by an appellate court disappears." *Id.*, at 510, n. 28. And while trial judges need not follow any precise regimen to facilitate appellate review, they must at least take care to ensure that "[t]he basis for [a] mistrial order is adequately disclosed by the record." *Id.*, at 517.

Our precedents contain examples of judicial action on both sides of the line. We have, for instance, allowed a second trial when the jurors in the first trial, after 40 hours of deliberation, "announced in open court that they were unable to agree," and no "specific and traversable fact[s]" called their deadlock into question. *Logan* v. *United States*, 144 U. S. 263, 298 (1892). We have likewise permitted reprosecution when the initial judge heard "extended argument" from both parties on the mistrial motion, acted with evident "concern for the possible double jeopardy consequences of an erroneous ruling," and "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding." *Washington*, 434 U. S., at 501, 515, 516.

On the other hand, we have barred retrial when the first judge acted "abruptly," cutting off the prosecutor "in midstream" and discharging the jury without giving the parties an opportunity to object. *Jorn*, 400 U. S., at 487 (plurality opinion); see also *Somerville*, 410 U. S., at 469 (characterizing *Jorn* judge's actions as "erratic"). And we have opined that, while trial judges have considerable leeway in deciding whether to discharge the jury, "[w]e resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Downum*, 372 U. S., at 738 (internal quotation marks omitted).

II

The Court accurately describes the events leading up to this trial judge's declaration of mistrial, *ante*, at 770–771, but it glides too quickly over a number of details that, taken to-

gether, show her decisionmaking was neither careful nor well considered. If the "manifest necessity" and "sound discretion" standards are to have any force, we must demand more from our trial courts.

It is probably fair to say that this trial was not especially complex, *ante*, at 772, 777, but neither was it a trivial affair. Lett was charged with the most serious of crimes, first-degree murder, as well as possession of a firearm during the commission of a felony. He faced a potential sentence of life imprisonment if convicted. Seventeen witnesses provided testimony over the course of 10 calendar days. See 507 F. Supp. 2d 777, 779, 785–786 (ED Mich. 2007); see also *id.*, at 785 (discussing "piecemeal fashion" in which evidence was presented to the jury).

The jury's first period of deliberation on Thursday afternoon lasted less than 40 minutes. "The jury likely spent" that brief session "doing little more than electing a foreperson." *People* v. *Lett*, 466 Mich. 206, 227, 644 N. W. 2d 743, 755 (2002) (Cavanagh, J., dissenting). The jury deliberated a few more hours on Friday morning prior to discharge. During that time, it sent the trial court seven notes. Most were inconsequential, routine queries. The first note on Friday morning raised "'a concern about [the jurors'] voice levels,'" Letter from M. McCowan to Clerk of Court (Mar. 4, 2010), p. 2, but nothing in the record relates this concern to the substance or tenor of their discussion. At 12:27 p.m., the jury sent the fateful missive, asking: "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'" *Ibid.* Seconds later, still at 12:27 p.m., the jury sent another note: "'What about lunch?'" *Ibid.*

At 12:45 p.m., the trial judge initiated a colloquy with the foreperson that concluded in the mistrial declaration. See *ante*, at 770–771 (reproducing transcript of colloquy). Even accounting for the imprecision of oral communication, the judge made an inordinate number of logical and legal missteps during this short exchange. Cf. *Somerville*, 410 U. S., at

469 (critiquing "erratic" mistrial inquiry). It does not take much exegetical skill to spot them.

The judge began by stating: "'I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time.'" *Ante*, at 770. This "'conclu[sion]'" was a non sequitur. The note asked what would happen *if* the jury could not agree; it gave no indication that the jury had *already* reached an irrevocable impasse. The judge ignored the request for information that the note actually contained. Instead, she announced that deadlock was the jury's "'situation at this time,'" thereby prejudging the question she had ostensibly summoned the foreperson to probe: namely, whether the jury was in fact deadlocked.

The judge continued: "'I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?'" *Ibid.* As the Federal Court of Appeals observed, this question "improperly conflated deadlock with mere disagreement." 316 Fed. Appx. 421, 426 (CA6 2009). Deadlock is a "condition or situation in which it is impossible to proceed or act; a complete standstill." 4 Oxford English Dictionary 290 (2d ed. 1989). Disagreement among jurors is perfectly normal and does not come close to approaching the "imperious necessity" we have required for their discharge. *Downum*, 372 U. S., at 736.

The trial judge then modulated her inquiry: "'Do you believe [the jury] is hopelessly deadlocked?'" *Ante*, at 770. The foreperson was in the midst of replying, "'The majority of us don't believe that—,'" when the judge appears to have cut her off. *Ibid.* One cannot "fault the trial judge" for wanting "to preserve the secrecy of jury deliberations," 507 F. Supp. 2d, at 787, but two aspects of the foreperson's truncated reply are notable. First, it "tends to show that the foreperson did not feel prepared to declare definitively that the jury was hopelessly deadlocked." *Ibid.* If she had been so prepared, then it is hard to see why she would begin

her response with a descriptive account of the "'majority'" viewpoint.

Second, the foreperson's reply suggests the jury may have been leaning toward acquittal. Admittedly, this is crude speculation, but it is entirely possible that the foreperson was in the process of saying, "The majority of us don't believe that he's guilty." Or: "The majority of us don't believe that there is sufficient evidence to prove one of the counts." (On retrial, Lett was convicted on both counts.) These possibilities are, I submit, linguistically more probable than something like the following: "The majority of us don't believe that Lett is guilty, whereas a minority of us believe that he is—*and we are hopelessly deadlocked on the matter.*" And they are logically far more probable than something along the lines of, "The majority of us don't believe that we will ever be able to reach a verdict," as the foreperson had been given no opportunity to poll her colleagues on this point. Yet only such implausible endings could have supported a conclusion that it was manifestly necessary to discharge the jury.[14]

The judge then steered the conversation back to the issue of deadlock, asking: "'Are you going to reach a unanimous verdict, or not?'" *Ante*, at 771. After the foreperson hesitated, the judge persisted: "'Yes or no?'" *Ibid.* The foreperson replied: "'No, Judge.'" *Ibid.* Two aspects of this interchange are also notable. First, the judge's question, though "very direct," was "actually rather ambiguous," because it gave the foreperson no temporal or legal context

[14] Another reading of the foreperson's reply is available: Her statement, "'The majority of us don't believe that,'" may have been a complete sentence. In other words, she may have meant to convey, "The majority of us don't believe that we are hopelessly deadlocked." The trial-court transcript places an em dash rather than a period after the word "that," but this is hardly dispositive evidence of intonation or intent. However, the trial judge's contemporaneous reaction, the fact that the foreperson was not permitted to consult with the other jurors on the issue of deadlock, and respondent's failure to advance this reading undercut its plausibility.

within which to understand what was being asked. 507 F. Supp. 2d, at 787. "The foreperson could have easily thought the judge meant, 'Are you going to reach a unanimous verdict in the next hour?' or 'before the lunch recess?' or 'by the end of the day?'" *Ibid.* (emphasis deleted). Even if the foreperson assumed no time constraint, she could have easily thought the judge meant, "Are you, in your estimation, *more likely than not* to reach a unanimous verdict?" An affirmative answer to that question would likewise fall far short of manifest necessity.

Second, the foreperson's hesitation suggests a lack of confidence in her position. That alone ought to have called into question the propriety of a mistrial order. But the judge bore down and demanded an unqualified answer, "'Yes or no.'" Most of the time when we worry about judicial coercion of juries, we worry about judges pressuring them, in the common-law manner, to keep deliberating until they return a verdict they may not otherwise have chosen. This judge exerted pressure so as to prevent the jury from reaching any verdict at all. In so doing, she cut off deliberations well before the point when it was clear they would no longer be fruitful. Recall that prior to summoning the foreperson for their colloquy, the trial judge gave her no opportunity to consult with the other jurors on the matter that would be discussed. So, the foreperson had no solid basis for estimating the likelihood of deadlock. Recall, as well, that almost immediately after sending the judge a note asking what would happen if they disagreed, the jury sent a note asking about lunch. Plainly, this was a group that was prepared to go on with its work.

The judge then declared a mistrial on the spot. Her entire exchange with the foreperson took three minutes, from 12:45 p.m. to 12:48 p.m. App. to Pet. for Cert. 93a–94a. The entire jury deliberations took roughly four hours. The judge gave the parties no opportunity to comment on the

foreperson's remarks, much less on the question of mistrial. Cf. *Washington*, 434 U. S., at 515–516 (trial judge "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial"); Fed. Rule Crim. Proc. 26.3 ("Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives"). Just as soon as the judge declared a mistrial, she set a new pretrial date, discharged the jury, and concluded proceedings. By 12:50 p.m., everyone was free to take off for the weekend. App. to Pet. for Cert. 94a.

In addition to the remarkable "hast[e]," *Washington*, 434 U. S., at 515, n. 34, and "inexplicabl[e] abrupt[ness]," 316 Fed. Appx., at 428, with which she acted, it is remarkable what the trial judge did not do. "Never did the trial judge consider alternatives or otherwise provide evidence that she exercised sound discretion. For example, the judge did not poll the jurors, give an instruction ordering further deliberations, query defense counsel about his thoughts on continued deliberations, or indicate on the record why a mistrial declaration was necessary." *Lett*, 466 Mich., at 227–228, 644 N. W. 2d, at 755 (Cavanagh, J., dissenting). Nor did the judge invite any argument or input from the prosecutor, make any findings of fact or provide any statements illuminating her thought process, follow up on the foreperson's final response, or give any evident consideration to the ends of public justice or the balance between the defendant's rights and the State's interests. The manner in which this discharge decision was made contravened standard trial-court guidelines.[15]

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[15] See, *e. g.*, ABA Standards for Criminal Justice, Discovery and Trial by Jury 15–5.4, pp. 256–257 (3d ed. 1996) ("A trial judge should be able to send the jury back for further deliberations notwithstanding its indication that it has been unable to agree. The general view is that a court may

The judge may not have had a constitutional obligation to take any one of the aforementioned measures, but she did have an obligation to exercise sound discretion and thus to "assure h[er]self that the situation warrant[ed] action on h[er] part foreclosing the defendant from a potentially favorable judgment by the tribunal." *Jorn*, 400 U. S., at 486 (plurality opinion).

Add all these factors up, and I fail to see how the trial judge exercised anything resembling "sound discretion" in declaring a mistrial, as we have defined that term. Indeed, I fail to see how a record could disclose much less evidence of sound decisionmaking. Within the realm of realistic, nonpretextual possibilities, this mistrial declaration was about as precipitate as one is liable to find. Despite the multitude of cases involving hung-jury mistrials that have arisen over the years, neither petitioner nor the Court has been able to identify any in which such abrupt judicial action has been upheld. See Tr. of Oral Arg. 12–15. Even the prosecutor felt compelled to acknowledge that the trial court's decision

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send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged. . . . [I]t is believed that a jury should not be permitted to avoid a reasonable period of deliberation merely by repeated indications that it is unhappy over its inability to agree"); Federal Judicial Center, Manual on Recurring Problems in Criminal Trials 162 (5th ed. 2001) ("Before declaring a mistrial, a trial judge must consider all the procedural alternatives to a mistrial, and, after finding none of them to be adequate, make a finding of manifest necessity for the declaration of a mistrial"); National Conference of State Trial Judges of the Judicial Administration Division of the American Bar Association and the National Judicial College, The Judge's Book 220 (2d ed. 1994) ("The jury should be given full opportunity to decide the case, considering the number of days of evidence it heard"); State Justice Institute, National Center for State Courts & National Judicial College, Jury Trial Management for the 21st Century §3, Module #3 (2009), online at http://www.icmelearning.com/jtm (as visited Apr. 30, 2010, and available in Clerk of Court's case file) ("'Deliberating jurors should be *offered assistance* when apparent impasse is reported'").

to discharge the jury "'clearly was error.'" 316 Fed. Appx., at 427 (quoting postconviction hearing transcript).

The Michigan Supreme Court's contrary conclusion was unreasonable. The court suggested that an abuse of discretion should only be found "'when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof."'" *Lett*, 466 Mich., at 221, n. 12, 644 N. W. 2d, at 751, n. 12 (quoting *Alken-Ziegler, Inc.* v. *Waterbury Headers Corp.*, 461 Mich. 219, 227, 600 N. W. 2d 638, 642 (1999)). Finding that the record in this case "provides sufficient justification for the mistrial declaration," *Lett*, 466 Mich., at 218, 644 N. W. 2d, at 750, the court concluded that the declaration constituted a permissible exercise of judicial discretion, *id.*, at 223, 644 N. W. 2d, at 753. The court listed, without explaining, several reasons for this conclusion. The jury "had deliberated for at least four hours following a relatively short, and far from complex, trial"; it "had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated"; the parties did not object to the mistrial order; and, "[m]ost important," "the jury foreperson expressly stated that the jury was not going to reach a verdict." *Ibid.;* see *ante*, at 777–778 (reprising this list).[16]

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[16] Like the trial court before it, the Michigan Supreme Court did not make any factual findings to bolster its unreasonable legal conclusion. As the State Court of Appeals noted, the trial judge declared a mistrial as soon as she extracted a suggestive answer from the foreperson. She "never even found on the record that the jury was genuinely deadlocked." *People* v. *Lett*, No. 209513, 2000 WL 33423221, *4 (Apr. 21, 2000) *(per curiam);* see also *People* v. *Lett*, 466 Mich. 206, 225, 644 N. W. 2d 743, 754 (2002) (trial court did not "articulate a rationale on the record"). The Michigan Supreme Court expressly declined to commit to the position that the jury really was deadlocked or that manifest necessity really did exist. See, *e. g.*, *id.*, at 220, 644 N. W. 2d, at 751 ("The issue is not whether this Court would have found manifest necessity"). Accordingly, even if 28

These reasons do not suffice to justify the mistrial order. Four hours is not a long time for jury deliberations, particularly in a first-degree murder case. Indeed, it would have been "remarkable" if the jurors "could review the testimony of all [the] witnesses in the time they were given, let alone conclude that they were deadlocked." 507 F. Supp. 2d, at 786. The jury's note pertaining to its volume level does not necessarily indicate anything about the "heated[ness]," *Lett*, 466 Mich., at 223, 644 N. W. 2d, at 753, of its discussion. "[T]here is no other suggestion in the record that such was the case, and the trial judge did not draw that conclusion." 507 F. Supp. 2d, at 786. Although it would have been preferable if Lett had tried to lodge an objection, defense counsel was given no meaningful opportunity to do so—the judge discharged the jury simultaneously with her mistrial order, counsel received no advance notice of either action, and he may not even have been informed of the content of the jury's notes. See *ante*, at 771; 316 Fed. Appx., at 428 ("At no point before the actual declaration of the mistrial was it even mentioned on the record as a potential course of action by the court. The summary nature of the trial court's actions . . . rendered an objection both unlikely and meaningless" (internal quotation marks omitted)). Counsel's failure to object is therefore legally irrelevant.[17] And, as detailed above, the

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U. S. C. § 2254(e)(1) were to apply to this appeal, there were no "determination[s] of a factual issue made by a State court" that we would have to "presum[e] to be correct." In any event, none of the relevant facts in the case are disputed, and no argument concerning § 2254(e)(1) was properly raised in this Court or passed upon below.

[17] See *Jorn*, 400 U. S., at 487 (plurality opinion) ("[I]ndeed, the trial judge acted so abruptly in discharging the jury that, had the . . . defendant [been disposed] to object to the discharge of the jury, there would have been no opportunity to do so"); see also *Lett*, 2000 WL 33423221, *2 (noting that failure to object to the jury's discharge does not constitute consent under Michigan law). While a defendant's affirmative request for or consent to a mistrial may be relevant to the double jeopardy inquiry, see, *e. g.*, *Jorn*, 400 U. S., at 485 (plurality opinion), we have never suggested that

foreperson's remarks were far more equivocal and ambiguous, in context, than the Michigan Supreme Court allowed.

The Michigan Supreme Court's defense of the trial court's actions is thus weak on its own terms. It collapses entirely under the weight of the many defects in the trial court's process, virtually all of which the court either overlooked or discounted.

The unreasonableness of the Michigan Supreme Court's decision is highlighted by the decisions of the three other courts that have addressed Lett's double jeopardy claim, each of which ruled in his favor, as well as the dissent filed by two Michigan Supreme Court justices and the opinion of the State's own prosecutor. This Court's decision unfortunately compounds the deleterious consequences of the Michigan Supreme Court's ruling. "Although the trial judge's decision is entitled to great deference, it is not the place of a reviewing court to extract factoids from the record in an attempt to salvage a bad decision." 507 F. Supp. 2d, at 787.

III

The Court does not really try to vindicate the Michigan Supreme Court on the merits, but instead ascribes today's outcome to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The foregoing analysis shows why the Michigan Supreme Court's ruling cannot be saved by 28 U. S. C. § 2254(d)(1), however construed. That ruling was not only incorrect but also unreasonable by any fair measure. Three particular facets of the Court's AEDPA analysis require a brief comment.

First, the fact that the substantive legal standard applied by the state court "is a general one" has no bearing on the standard of review. *Ante,* at 778. We have said that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*

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defendants must object to such orders to preserve a claim, much less object to an order issued *sua sponte* and without any advance notice.

v. *Alvarado*, 541 U. S. 652, 664 (2004). But this statement stands only for the unremarkable proposition that more broadly framed rules will tend to encompass a broader set of conforming applications. Regardless of the nature of the legal principle at issue, the task of a federal court remains the same under § 2254(d)(1): to determine whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." General standards are no less binding law than discrete rules.[18]

Second, I do not agree that the Federal Court of Appeals "erred" by "rel[ying] upon its own decision" applying *Arizona* v. *Washington*. *Ante*, at 778. The Sixth Circuit was well aware that its own decision "does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Ante*, at 779 (quoting § 2254(d)(1)). The panel expressly stated that it "review[ed] the Michigan Supreme Court's decision to determine only whether it was objectively unreasonable in light of the holdings of the Supreme Court." 316 Fed. Appx., at 425. The panel examined its own precedents not as the relevant "clearly established Federal law" under AEDPA, but as a tool for illuminating the precise contours of that law. Lower courts routinely look to circuit cases to "provide evidence that Supreme Court precedents ha[ve] clearly established a rule as of a particular time or [to] shed light on the 'reasonableness' of the state courts' application of existing Supreme Court precedents." 2 R.

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[18] In recognition of this basic insight, our precedents "have made clear" that a state-court decision may be "unreasonable" within the meaning of § 2254(d)(1) when the "state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Wiggins* v. *Smith*, 539 U. S. 510, 520 (2003) (quoting *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003)); see also *Williams* v. *Taylor*, 529 U. S. 362, 413 (2000). This is a critical feature of our AEDPA jurisprudence. Federal habeas review would be meaningless if, for relief to be granted, we required a perfect congruence between the facts that gave rise to our governing precedents and the facts that confronted the state court in any particular case.

Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3, p. 1585, n. 10 (5th ed. 2005) (hereinafter Hertz & Liebman). This is a healthy practice—indeed, a vital practice, considering how few cases this Court decides—and we have never disapproved it.

Finally, I do not agree that AEDPA authorizes "the dual layers of deference" the Court has utilized in this case. *Ante*, at 778. There is little doubt that AEDPA "directs federal courts to attend to every state-court judgment with utmost care." *Williams*, 529 U. S., at 389 (opinion of STEVENS, J.). But the statute never uses the term "deference," and the legislative history makes clear that Congress meant to preserve robust federal-court review. *Id.*, at 386–387; see also Hertz & Liebman § 32.3, at 1587–1589, n. 13 (summarizing congressional record and noting that "[t]he aspect of prior practice that most troubled AEDPA's supporters was the federal court's inattention to, and lack of respect for, state court decisions that the federal court, if it only looked, would find to be legally correct"). Any attempt to prevent federal courts from exercising independent review of habeas applications would have been a radical reform of dubious constitutionality, and Congress "would have spoken with much greater clarity" if that had been its intent. *Williams*, 529 U. S., at 379 (opinion of STEVENS, J.).

So on two levels, it is absolutely "necessary for us to decide whether the Michigan Supreme Court's decision . . . was right or wrong." *Ante*, at 778, n. 3. If a federal judge were firmly convinced that such a decision were wrong, then in my view not only would he have no statutory duty to uphold it, but he might also have a constitutional obligation to reverse it. And regardless of how one conceptualizes the distinction between an incorrect and an "unreasonable" state-court ruling under § 2254(d)(1), one must always determine whether the ruling was wrong to be able to test the magnitude of any error. Substantive and methodological considerations compel federal courts to give habeas

claims a full, independent review—and then to decide for themselves. Even under AEDPA, there is no escaping the burden of judgment.

* * *

In this case, Reginald Lett's constitutional rights were violated when the trial court terminated his first trial without adequate justification and he was subsequently prosecuted for the same offense. The majority does not appear to dispute this point, but it nevertheless denies Lett relief by applying a level of deference to the state court's ruling that effectively effaces the role of the federal courts. Nothing one will find in the United States Code or the United States Reports requires us to turn a blind eye to this manifestly unlawful conviction.

I respectfully dissent.

Syllabus

HUI ET AL. *v.* CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CASTANEDA, ET AL.

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

No. 08–1529. Argued March 2, 2010—Decided May 3, 2010

While detained by immigration authorities, Francisco Castaneda persistently sought treatment for a bleeding, suppurating lesion. Although a U. S. Public Health Service (PHS) physician's assistant and three outside specialists repeatedly advised that Castaneda urgently needed a biopsy, petitioners—a PHS physician and a commissioned PHS officer—denied the request. After Castaneda was released from custody, tests confirmed that he had metastatic cancer. He then filed this suit, raising medical negligence claims against the United States under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346, 2671–2680, and constitutional claims against petitioners under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397. When Castaneda died, respondents, his representative and heir, were substituted as plaintiffs. The District Court denied petitioners' motion to dismiss the *Bivens* action, rejecting their claim of absolute immunity under 42 U. S. C. § 233(a), which provides: "The [FTCA] remedy *against the United States* provided by [28 U. S. C. §§ 1346(b) and 2672] for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any [PHS] commissioned officer or employee . . . while acting within the scope of his office or employment, *shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee.*" (Emphasis added.) The Ninth Circuit affirmed.

Held: The immunity provided by § 233(a) precludes *Bivens* actions against individual PHS officers or employees for harms arising out of constitutional violations committed while acting within the scope of their office or employment. Pp. 805–813.

(a) The Court's inquiry begins and ends with § 233(a)'s text, which plainly precludes a *Bivens* action against petitioners by limiting recovery for harms arising from the conduct at issue to an FTCA action against the United States. The breadth of § 233(a)'s words "exclusive" and "any" supports this reading, as does the provision's inclusive reference to all civil proceedings arising out of "the same subject-matter." Because the phrase "exclusive of any other civil action" is easily broad enough to accommodate both known and unknown causes of action, the

Court's reading is not undermined by the fact that § 233(a) preceded *Bivens*. The later enacted Westfall Act further supports this understanding of § 233(a). In amending the FTCA to make its remedy against the United States exclusive for most claims against Government employees for their official conduct, the Westfall Act essentially duplicated § 233(a)'s exclusivity language, 28 U. S. C. § 2679(b)(1), but provided an explicit exception for constitutional violations, § 2679(b)(2). This shows that Congress did not understand the exclusivity provided by § 2679(b)(1)—or the substantially similar § 233(a)—to imply such an exception. Pp. 805–807.

(b) Respondents' arguments to the contrary do not undermine the Court's conclusion. Pp. 807–812.

(1) Respondents' heavy reliance on *Carlson* v. *Green*, 446 U. S. 14, is misplaced. *Carlson* is inapposite to the issue in this case—whether petitioners are immune from suit for the alleged violations—because the *Carlson* petitioners invoked no official immunity. Instead, the case considered the separate question whether a remedy was available under the Eighth Amendment for alleged violations of the Cruel and Unusual Punishments Clause notwithstanding that a federal remedy was also available under the FTCA. Pp. 807–808.

(2) Contrary to respondents' contention, § 233(a) does not incorporate a *Bivens* exception through its cross-reference to § 1346(b) and that section's cross-reference to the FTCA, which includes the Westfall Act exception for constitutional claims, § 2679(b)(2)(A). Because § 233(a) refers only to "[t]he *remedy* . . . provided by sections 1346(b) and 2672" (emphasis added), only those portions of the FTCA that establish its remedy are incorporated by § 233(a)'s reference to § 1346. Section 2679(b) is not such a provision. Pp. 808–809.

(3) Respondents' claim that the Westfall Act's *Bivens* exception, § 2679(b)(2)(A), directly preserves a *Bivens* action against PHS officers and employees is belied by the fact that the provision by its terms applies only to the specific immunity set forth in "[p]aragraph (1)." Moreover, if § 233(a) forecloses a *Bivens* action against PHS personnel, respondents' reading of § 2679(b)(2)(A) would effect an implied repeal of the more specific § 233(a). Repeals by implication are not favored and will not be presumed absent a clear and manifest legislative intent to repeal. *Hawaii* v. *Office of Hawaiian Affairs*, 556 U. S. 163, 175. Nothing suggests that Congress intended § 2679(b) to repeal § 233(a)'s more comprehensive immunity. Pp. 809–810.

(4) Respondents' contention that other features of § 233 show that § 233(a) does not make the FTCA remedy exclusive of all other actions against PHS personnel is rejected. Neither § 233(c) nor § 233(f) indicates that an injured party may maintain a *Bivens* action against

an individual PHS officer or employee in these circumstances. Pp. 810–812.

546 F. 3d 682, reversed and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

Elaine J. Goldenberg argued the cause for petitioners. With her on the briefs for petitioner Stephen Gonsalves were *Paul M. Smith*, *William M. Hohengarten*, *Matthew S. Hellman*, and *David P. Sheldon*. *Steven J. Renick* and *Patrick L. Hurley* filed briefs for petitioner Esther Hui.

Pratik A. Shah argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Barbara L. Herwig*, *Howard S. Scher*, and *David S. Cade*.

Conal Doyle argued the cause for respondents. With him on the brief were *Adele P. Kimmel*, *Amy Radon*, *Arthur H. Bryant*, *Leslie A. Brueckner*, and *Thomas M. Dempsey*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether 42 U. S. C. § 233(a), as added, 84 Stat. 1870, precludes an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), against U. S. Public Health Service (PHS) personnel for constitutional violations arising out of their official duties. When federal employees are sued for damages for harms caused in the course of their employment, the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346, 2671–2680, generally authorizes substitution of the United States as the defend-

**Timothy B. Hyland* filed a brief for the Commissioned Officers Association of the United States Public Health Service, Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Jeffrey W. Sarles* and *Steven R. Shapiro;* for National Experts on Health Services for Detained Persons by *Jonathan S. Franklin* and *Tillman J. Breckenridge;* for the National Immigrant Justice Center by *Suzanne Sahakian* and *Charles Roth;* and for Representative John Conyers, Jr., et al. by *Jonathan S. Massey*.

ant. Section 233(a) makes the FTCA remedy against the United States "exclusive of any other civil action or proceeding" for any personal injury caused by a PHS officer or employee performing a medical or related function "while acting within the scope of his office or employment." Based on the plain language of § 233(a), we conclude that PHS officers and employees are not personally subject to *Bivens* actions for harms arising out of such conduct.

I

Francisco Castaneda was detained by U. S. Immigration and Customs Enforcement (ICE) at the San Diego Correctional Facility (SDCF) beginning in March 2006. According to the complaint later filed in the District Court, when Castaneda arrived at SDCF he had on his penis an irregular, raised lesion that measured roughly two centimeters square.[1] Castaneda promptly brought his condition to the attention of medical personnel working for the Division of Immigration Health Services, reporting that the lesion was growing in size and becoming more painful and that it frequently bled and emitted a discharge. Petitioner Dr. Esther Hui, a civilian PHS employee, was the physician responsible for Castaneda's medical care during his detention at SDCF. Petitioner Commander Stephen Gonsalves, a commissioned PHS officer, was a health services administrator at SDCF during the relevant period.

Between March 2006 and January 2007, Castaneda persistently sought treatment for his condition. As his disease progressed, the lesion became increasingly painful and interfered with his urination, defecation, and sleep. In December 2006, Castaneda additionally reported a lump in his groin. A PHS physician's assistant and three outside spe-

[1] Because this case comes to us on petitioners' motion to dismiss, we assume the truth of respondents' factual allegations. See *Fitzgerald* v. *Barnstable School Comm.*, 555 U. S. 246, 249 (2009).

cialists repeatedly advised that Castaneda needed a biopsy to ascertain whether he had cancer. Petitioners denied requests for a biopsy and other recommended procedures as "elective." App. 244, 249–251. Instead, Castaneda was treated with ibuprofen and antibiotics and was given an additional ration of boxer shorts.

After a fourth specialist recommended a biopsy in January 2007, the procedure was finally authorized. Instead of providing treatment, however, ICE released Castaneda from custody on February 5. A week later, biopsy results confirmed that Castaneda was suffering from penile cancer. The next day, Castaneda had his penis amputated, and he began chemotherapy after tests confirmed that the cancer had metastasized to his groin. The treatment was unsuccessful, and Castaneda died in February 2008.

Three months before his death, Castaneda filed suit against petitioners in the United States District Court for the Central District of California. As relevant, Castaneda raised medical negligence claims against the United States under the FTCA and *Bivens* claims against petitioners for deliberate indifference to his serious medical needs in violation of his Fifth, Eighth, and Fourteenth Amendment rights.[2] After Castaneda's death, respondents—Castaneda's sister, Yanira Castaneda, and his daughter, Vanessa Castaneda (by and through her mother, Lucia Pelayo)—amended the complaint to substitute themselves as plaintiffs. Yanira and Vanessa Castaneda are respectively the representative of and heir to Castaneda's estate.

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[2] In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971), this Court recognized an implied cause of action for damages against federal officers alleged to have violated the petitioner's Fourth Amendment rights. We subsequently found such a remedy available for violations of an individual's rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Due Process Clause. See *Carlson* v. *Green*, 446 U. S. 14, 17–19 (1980); *Davis* v. *Passman*, 442 U. S. 228, 230 (1979).

Petitioners moved to dismiss the claims against them, contending that § 233(a) gives them absolute immunity from *Bivens* actions by making a suit against the United States under the FTCA the exclusive remedy for harms caused by PHS personnel in the course of their medical or related duties. The District Court denied the motion, concluding that § 233(a)'s text and history evidence a congressional intent to preserve *Bivens* actions. *Castaneda* v. *United States*, 538 F. Supp. 2d 1279, 1288–1295 (2008). Petitioners filed an interlocutory appeal.[3]

The Court of Appeals for the Ninth Circuit affirmed the District Court's judgment that § 233(a) does not preclude respondents' *Bivens* claims. *Castaneda* v. *United States*, 546 F. 3d 682 (2008).[4] The court cited *Carlson* v. *Green*, 446 U. S. 14 (1980), for the proposition that a *Bivens* remedy is unavailable only when an alternative remedy is both expressly declared to be a substitute and can be viewed as equally effective, or when special factors militate against direct recovery. Looking to the statute's text and history, the court noted that § 233(a) does not mention the Constitution or recovery thereunder and found it significant that § 233 was enacted prior to this Court's decision in *Bivens*. Drawing further support for its view from the statute's legislative history and from subsequent congressional enactments, the Court of Appeals concluded that § 233(a) does not expressly make the remedy under the FTCA a substitute for relief under *Bivens*.

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[3] Although it does not bear directly on the question presented in this case, we note that while petitioners' appeal was pending the Government filed a formal notice admitting liability with respect to respondents' claims for medical negligence under the FTCA. App. 329.

[4] The court concluded that it had jurisdiction over the interlocutory appeal because district court orders denying absolute immunity constitute "final decisions" for purposes of 28 U. S. C. § 1291. See 546 F. 3d, at 687 (citing *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–527 (1985)); see also *Osborn* v. *Haley*, 549 U. S. 225, 238–239 (2007).

For essentially the reasons given in *Carlson*, 446 U. S., at 20–23, the Court of Appeals also determined that the FTCA remedy is not equally effective as a *Bivens* remedy. Unlike the remedy under the FTCA, the court reasoned, a *Bivens* remedy is awarded against individual defendants and may include punitive damages. Additionally, *Bivens* cases may be tried before a jury, and liability is governed by uniform federal rules rather than the law of the State in which the violation occurred. After further concluding that no special factors militate against finding a remedy available in these circumstances, the court held that respondents' *Bivens* action could proceed.

As the Ninth Circuit recognized, its holding conflicts with the Second Circuit's decision in *Cuoco* v. *Moritsugu*, 222 F. 3d 99 (2000), which construed § 233(a) to foreclose *Bivens* actions against PHS personnel. We granted certiorari to resolve this conflict. 557 U. S. 966 (2009).

II

A

Our inquiry in this case begins and ends with the text of § 233(a). See *Harris Trust and Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U. S. 238, 254 (2000). The statute provides in pertinent part that

> "[t]he remedy *against the United States* provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, *shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee* (or his estate) whose act or omission gave rise to the claim." § 233(a) (emphasis added).

Section 233(a) grants absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of their employment by barring all actions against them for such conduct. By its terms, § 233(a) limits recovery for such conduct to suits against the United States. The breadth of the words "exclusive" and "any" supports this reading, as does the provision's inclusive reference to all civil proceedings arising out of "the same subject-matter." We have previously cited § 233(a) to support the contention that "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy." *Carlson*, 446 U. S., at 20. The meaning of § 233(a) has become no less explicit since we last made that observation.

Our reading of § 233(a)'s text is not undermined by the fact that the provision preceded our decision in *Bivens*. Contrary to the view of the Court of Appeals, that a *Bivens* remedy had not yet been recognized when § 233(a) was enacted does not support the conclusion that Congress, in making the remedy provided by the FTCA "exclusive of any other civil action," did not mean what it said. Language that broad easily accommodates both known and unknown causes of action.

The later enacted Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 102 Stat. 4563, further supports this understanding of § 233(a). The Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims against Government employees arising out of their official conduct.[5] In providing this official immunity, Congress used

[5] Prior to the Westfall Act amendments, the FTCA authorized substitution of the United States as a defendant in suits against federal employees for harms arising out of conduct undertaken in the scope of their employment, see 28 U. S. C. § 1346(b) (1982 ed.), but it made that remedy "exclusive" only for harms resulting from a federal employee's operation of a motor vehicle, § 2679(b).

essentially the same language as it did in § 233(a), stating that the remedy against the United States is "exclusive of any other civil action or proceeding," § 2679(b)(1). Notably, Congress also provided an exception for constitutional violations. Pursuant to § 2679(b)(2), the immunity granted by § 2679(b)(1) "does not extend or apply to a civil action against an employee of the Government . . . brought for a violation of the Constitution of the United States." § 2679(b)(2)(A). The Westfall Act's explicit exception for *Bivens* claims is powerful evidence that Congress did not understand the exclusivity provided by § 2679(b)(1)—or the substantially similar § 233(a)—to imply such an exception. Given Congress' awareness of pre-existing immunity provisions like § 233 when it enacted the Westfall Act, see *United States* v. *Smith*, 499 U. S. 160, 173 (1991), it is telling that Congress declined to enact a similar exception to the immunity provided by § 233(a).

B

In advocating a contrary reading of § 233(a), respondents rely heavily on our opinion in *Carlson*, as did the Court of Appeals. *Carlson*, however, is inapposite to the issue in this case. There are two separate inquiries involved in determining whether a *Bivens* action may proceed against a federal agent: whether the agent is amenable to suit, and whether a damages remedy is available for a particular constitutional violation absent authorization by Congress. See *United States* v. *Stanley*, 483 U. S. 669, 684 (1987) ("[T]he availability of a damages action under the Constitution for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*"). Even in circumstances in which a *Bivens* remedy is generally available, an action under *Bivens* will be defeated if the defendant is immune from suit. See, *e. g.*, 403 U. S., at 397–398 (remanding for determination of respondents' immunity after implying a cause of action under the Fourth Amendment).

Because petitioners in *Carlson* invoked no official immunity, the Court did not address that question. Instead, it considered whether a remedy was available under the Eighth Amendment for alleged violations of the Cruel and Unusual Punishments Clause notwithstanding that a federal remedy was also available under the FTCA. 446 U. S., at 16–17. Many of our subsequent *Bivens* decisions likewise addressed only the existence of an implied cause of action for an alleged constitutional violation. See, *e. g.*, *Wilkie* v. *Robbins*, 551 U. S. 537, 549 (2007) (declining "to devise a new *Bivens* damages action for retaliating against the exercise of ownership rights"); *Bush* v. *Lucas*, 462 U. S. 367, 368 (1983) (declining to "authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors").

This case presents the separate question whether petitioners are immune from suit for the alleged violations. To determine a defendant's amenability to suit, we consider whether he or she may claim the benefits of official immunity for the alleged misconduct. Because petitioners invoke only the immunity provided by § 233(a), the question in this case is answered solely by reference to whether that provision gives petitioners the immunity they claim.[6]

As noted, the text of § 233(a) plainly indicates that it precludes a *Bivens* action against petitioners for the harm alleged in this case. Respondents offer three arguments in support of their claim that it does not. None persuades us that § 233(a) means something other than what it says.

Respondents first contend that § 233(a) incorporates the entirety of the FTCA, as amended by the Westfall Act, through its reference to § 1346(b).[7] Section 1346(b) in turn

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[6] We express no opinion as to whether a *Bivens* remedy is otherwise available in these circumstances, as the question is not presented in this case.

[7] Section 1346(b) provides in pertinent part that, "[s]ubject to the provisions of chapter 171 of [Title 28], the district courts . . . shall have exclusive

refers to "the provisions of chapter 171," which constitute the FTCA, including the Westfall Act's exception for claims "brought for a violation of the Constitution of the United States," § 2679(b)(2)(A). Through this series of cross-references, respondents would read that exception for *Bivens* actions into § 233(a).

Section 233(a) is not susceptible of this reading. As petitioners observe, that provision refers only to "[t]he *remedy* against the United States provided by sections 1346(b) and 2672." § 233(a) (emphasis added). Thus, only those portions of chapter 171 that establish the FTCA remedy are incorporated by § 233(a)'s reference to § 1346. Section 2679(b) is not such a provision. Section 233(a)'s reference to § 2672[8]—which is codified in chapter 171—also belies respondents' theory. If § 233(a)'s reference to § 1346(b) served to incorporate all the provisions of chapter 171, the separate reference to § 2672 would be superfluous.

Respondents next argue that the Westfall Act's *Bivens* exception, § 2679(b)(2)(A), directly preserves a *Bivens* action against PHS officers and employees. That § 2679(b)(2)(A) by its terms applies only to the specific immunity set forth in "[p]aragraph (1)" belies respondents' claim. Moreover, if § 233(a) forecloses a *Bivens* action against PHS personnel, respondents' reading of § 2679(b)(2)(A) would effect an implied repeal of that more specific provision. Although we

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jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."

[8] Section 2672 authorizes agency heads and their designees to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

noted in *Smith* that § 2679(b) applies to all federal employees, see 499 U. S., at 173, we had no occasion to consider whether the *Bivens* exception in § 2679(b)(2)(A) impliedly repealed pre-existing immunity provisions to the extent of any inconsistency. "As we have emphasized, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hawaii* v. *Office of Hawaiian Affairs*, 556 U. S. 163, 175 (2009) (internal quotation marks and alteration omitted). Respondents have pointed to nothing in § 2679(b)'s text or drafting history that suggests that Congress intended to repeal the more comprehensive immunity provided by § 233(a).

Finally, respondents contend that other features of § 233 show that subsection (a) does not make the remedy under the FTCA exclusive of all other actions against PHS personnel. Respondents first note § 233's lack of a procedure for "scope certification" in federal-court actions. Under the FTCA, "certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose" transforms an action against an individual federal employee into one against the United States. § 2679(d)(1). Because § 233 does not provide a similar mechanism for scope certification in federal-court actions,[9] respondents contend that PHS defendants seeking to invoke the immunity provided by § 233(a) must rely on the FTCA's scope certification procedure, set forth in § 2679(d). Section 2679(d), respondents note, is in turn subject to the "limitations and exceptions" applicable to actions under the FTCA—including the

[9] Section 233(c) includes such a provision for state-court actions, authorizing removal to federal court "[u]pon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose," but unlike § 2679(d) it does not prescribe a particular mechanism for substituting the United States in federal-court actions.

exception for *Bivens* actions provided by § 2679(b)(2). See § 2679(d)(4).

We agree with petitioners that there is no reason to think that scope certification by the Attorney General is a prerequisite to immunity under § 233(a). To be sure, that immunity is contingent upon the alleged misconduct having occurred in the course of the PHS defendant's duties, but a defendant may make that proof pursuant to the ordinary rules of evidence and procedure. As petitioners observe, proof of scope is in most § 233(a) cases established by a declaration affirming that the defendant was a PHS official during the relevant time period. See Reply Brief for Petitioner Hui 6–7, and n. 1. Thus, while scope certification may provide a convenient mechanism for establishing that the alleged misconduct occurred within the scope of the employee's duties, the procedure authorized by § 2679(d) is not necessary to effect substitution of the United States. Finally, that the FTCA's scope certification procedure was enacted almost two decades after § 233(a) confirms that Congress did not intend to make that procedure the exclusive means for PHS personnel to invoke the official immunity provided by § 233(a).

Respondents' argument based on § 233(f) is similarly unavailing. That subsection authorizes the Secretary of Health and Human Services to "hold harmless or provide liability insurance" for a PHS officer or employee for personal injuries caused by conduct occurring "within the scope of his office or employment . . . if such employee is assigned to a foreign country . . . and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b)." Noting that the FTCA precludes recovery against the United States for "[a]ny claim arising in a foreign country," § 2680(k), respondents urge that § 233(f)'s authorization of insurance or indemnification in those circumstances anticipates that an in-

jured party without a remedy under the FTCA may sue a PHS official directly.[10] Accordingly, respondents contend, § 233(a) cannot be read to make the remedy under the FTCA truly exclusive. Even if that reading of § 233(f) were correct, it would not benefit respondents because an FTCA remedy is unquestionably available for the misconduct alleged in this case.

For the foregoing reasons, respondents' arguments do not undermine our conclusion that the immunity provided by § 233(a) precludes *Bivens* actions against individual PHS officers or employees for harms arising out of conduct described in that section.

* * *

In construing § 233(a) in petitioners' favor, we are mindful of the confines of our judicial role. Respondents' *amici* caution that providing special immunity for PHS personnel is contrary to the public interest.[11] Respondents likewise contend that allowing *Bivens* claims against PHS personnel is necessary to ensure an adequate standard of care in federal detention facilities, and they further urge that permitting such actions would not endanger PHS' institutional interests as it would simply place PHS personnel in the same position as other federal employees who perform similar functions. See Brief for Respondents 52–55, 60–61. We are required, however, to read the statute according to its text. Because

[10] As respondents note, the Westfall Act substantially limited the effect of § 233(f). See Brief for Respondents 32 (citing *United States* v. *Smith*, 499 U. S. 160, 166–167 (1991)). But because the Act does not weaken any inference about the meaning of § 233(a) that might be drawn from § 233(f), the changes effected by the Act are not relevant to the instant inquiry.

[11] See Brief for American Civil Liberties Union as *Amicus Curiae* 25–28; Brief for National Experts on Health Services for Detained Persons as *Amici Curiae* 17–24; Brief for National Immigrant Justice Center as *Amicus Curiae* 20–21; Brief for Rep. John Conyers, Jr., et al. as *Amici Curiae* 25–31.

§ 233(a) plainly precludes a *Bivens* action against petitioners for the harms alleged in this case, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 813 and 901 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 JANUARY 25 THROUGH
MAY 12, 2010

JANUARY 25, 2010

Certiorari Granted—Vacated and Remanded

No. 08–1484. ANAYA-AGUILAR *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kucana* v. *Holder*, 558 U. S. 233 (2010). Reported below: 302 Fed. Appx. 481.

No. 09–6785. AGUILAR *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009).

Vacated and Remanded After Certiorari Granted. (See No. 07–11191, *ante*, p. 32.)

Certiorari Dismissed

No. 09–8094. VIEUX *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 09M65. NORIEGA-QUIJANO *v.* POTTER, POSTMASTER GENERAL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09M66. MORRIS *v.* SUPREME COURT OF THE UNITED STATES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 139, Orig. MISSISSIPPI *v.* CITY OF MEMPHIS, TENNESSEE, ET AL. Motion for leave to file bill of complaint denied without

prejudice. See *Virginia* v. *Maryland*, 540 U. S. 56, 74, n. 9 (2003); *Colorado* v. *New Mexico*, 459 U. S. 176, 187, n. 13 (1982).

No. 08–1521. McDonald et al. *v.* City of Chicago, Illinois, et al. C. A. 7th Cir. [Certiorari granted, 557 U. S. 965.] Motion of Texas et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. Motion of respondents National Rifle Association, Inc., et al. for divided argument granted. Motion of Law Professor and Students for leave to file a brief as *amici curiae* granted.

No. 08–1569. United States *v.* O'Brien et al. C. A. 1st Cir. [Certiorari granted, 557 U. S. 966.] Motion of respondents for divided argument denied.

No. 08–9972. In re Lopez Ortiz. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [557 U. S. 933] denied.

No. 08–10169. Ortiz, aka Lopez Ortiz *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, et al. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 983] denied.

No. 09–329. Chase Bank USA, N. A. *v.* McCoy, Individually and on Behalf of All Others Similarly Situated. C. A. 9th Cir.; and

No. 09–438. Providence Hospital et al. *v.* Moses, Personal Representative of the Estate of Moses-Irons, Deceased. C. A. 6th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 09–5630. Oduok *v.* Ferro et al. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 807] denied.

No. 09–6750. Davis *v.* Bay Area Rapid Transit District. Ct. App. Cal., 1st App. Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1043] denied.

No. 09–6768. Staley *v.* Hall, Warden. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1073] denied.

No. 09–6938. MICHALSKI *v.* LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1087] denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion.

No. 09–6969. GOSSETT *v.* ADMINISTRATION OF GEORGE W. BUSH ET AL. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1074] denied.

No. 09–7699. HOFFMAN *v.* HOFFMAN. Super. Ct. N. J., App. Div.; and

No. 09–7741. PIK *v.* INSTITUTE OF INTERNATIONAL EDUCATION, INC., ET AL. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until February 16, 2010, 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. 09–8352. IN RE JACKSON; and

No. 09–8361. IN RE TUBBS. Petitions for writs of habeas corpus denied.

No. 09–8031. IN RE NORTON; and

No. 09–8188. IN RE NORTON. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8

Certiorari Granted

No. 09–479. ABBOTT *v.* UNITED STATES. C. A. 3d Cir.; and

No. 09–7073. GOULD *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner in No. 09–7073 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 09–479, 574 F. 3d 203; No. 09–7073, 329 Fed. Appx. 569.

Certiorari Denied

No. 08–1596. RHINE *v.* DEATON ET UX. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 250 S. W. 3d 486.

No. 08–10584. MCKAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 3d 519.

No. 09–21. POWELL *v.* KELLY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 3d 656.

No. 09–271. EM *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied. Reported below: 171 Cal. App. 4th 964, 90 Cal. Rptr. 3d 264.

No. 09–289. MISSISSIPPI *v.* CITY OF MEMPHIS, TENNESSEE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 3d 625.

No. 09–418. WIECHMANN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 67 M. J. 456.

No. 09–476. PATENT ENFORCEMENT TEAM, L. L. C. *v.* DICKSON INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 333 Fed. Appx. 514.

No. 09–480. HENSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 574 F. 3d 384.

No. 09–493. FRANK C. MINVIELLE, LLC *v.* ATLANTIC REFINING CO., FKA ATLANTIC RICHFIELD CO., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 429.

No. 09–510. DILLON *v.* MOUNTAIN COAL CO., L. L. C., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 569 F. 3d 1215.

No. 09–610. HENRI-DUVAL WINERY, L. L. C. *v.* ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 26 So. 3d 1149.

No. 09–611. IKOSSI-ANASTASIOU *v.* BOARD OF SUPERVISORS OF THE LOUISIANA STATE UNIVERSITY. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 3d 546.

No. 09–613. MCGEE *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–615. PEREZ-ESPINOSA ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 09–620. ROSE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSE *v.* MOUNT SINAI MEDICAL

CENTER ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 17 So. 3d 292.

No. 09–629. THREET *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–656. ZADRIMA *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 337 Fed. Appx. 42.

No. 09–667. YIQING FENG *v.* SABIC AMERICAS, INC. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 09–668. GREEN *v.* SERVICE CORPORATION INTERNATIONAL. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 9.

No. 09–672. RODRIGUEZ *v.* MCCAULEY, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 09–684. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–694. RODRIGUEZ-BERRIOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 573 F. 3d 55.

No. 09–699. ARTS4ALL, LTD. *v.* HANCOCK. Ct. App. N. Y. Certiorari denied. Reported below: 12 N. Y. 3d 846, 909 N. E. 2d 83.

No. 09–703. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 3d 604.

No. 09–704. CORNWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 679.

No. 09–711. GUPTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 572 F. 3d 878.

No. 09–714. DU BOIS, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, A. E. W. *v.* WARNE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS JUDGE, DISTRICT COURT OF TEXAS, 257TH DISTRICT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 407.

No. 09–721. ROGERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–741. SALAZAR-ESPINOSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 686.

No. 09–744. METTKE *v.* KAPPOS, DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 570 F. 3d 1356.

No. 09–5120. RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 562 F. 3d 1.

No. 09–5401. MUHAMMAD, FKA KNIGHT *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 554 F. 3d 949.

No. 09–5407. FORD *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 546 F. 3d 1326.

No. 09–6034. MESSER *v.* RUNNELS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 102.

No. 09–6125. HARRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 324 Fed. Appx. 668.

No. 09–6429. PALMER *v.* VALDEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 560 F. 3d 965.

No. 09–6795. N. L. W. *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 09–6907. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 860.

No. 09–7012. HATTEN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 3d 595.

No. 09–7158. PATTERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 3d 431.

No. 09–7172. MONACELLI *v.* FIFTH THIRD BANK ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7276. SNEED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 563.

No. 09–7428. FARLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 4th 1053, 210 P. 3d 361.

No. 09–7624. SMITH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 09–7628. SONNTAG *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–7629. RIVA *v.* FICCO. C. A. 1st Cir. Certiorari denied.

No. 09–7633. CURTIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–7637. MCCARTHY *v.* GOLDMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 320 Fed. Appx. 518.

No. 09–7638. MILLS *v.* WILSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7640. WHITE *v.* FRANCIS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 325 Fed. Appx. 214.

No. 09–7646. KINCADE *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 324 Fed. Appx. 482.

No. 09–7647. JOHNSON *v.* ZAVALA ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–7649. JONES *v.* FELKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–7653. SIMMONS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 19 So. 3d 323.

No. 09–7654. CONLIN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7657. CASTLEBERRY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–7658. CALDERON-LOPEZ *v.* PINTO-LUGO ET AL. C. A. 1st Cir. Certiorari denied.

No. 09–7660. ULRICH *v.* BUTLER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ASSOCIATE CIRCUIT JUDGE OF THE 11TH CIRCUIT OF ILLINOIS, WOODFORD COUNTY. C. A. 7th Cir. Certiorari denied.

No. 09–7661. WRIGHT *v.* DECKER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7665. JOHNSON *v.* CSX TRANSPORTATION, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 138.

No. 09–7666. LEWIS *v.* RIO GRANDE SUN. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 357.

No. 09–7670. MORTLAND *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 09–7672. MONROE *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–7677. ROE *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–7678. CASTILLO OLGUIN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7683. TREAT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 357.

No. 09–7685. CANNON *v.* JUDICIAL COUNCIL OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 525.

No. 09–7686. CUMMINGS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 09–7692. MAY *v.* AARSAND MANAGEMENT. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 877.

No. 09–7693. LENNON *v.* SHEPHERD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–7706. FULTON *v.* LAPE, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 3d 1227, 876 N. Y. S. 2d 665.

No. 09–7707. HASTINGS *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 09–7711. LINGEFELT *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–7714. MURRAY *v.* WALKER-MURRAY. Ct. App. Ga. Certiorari denied.

No. 09–7722. PRICE *v.* KLOPOTOSKI, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 692.

No. 09–7724. POPAL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 62 App. Div. 3d 912, 879 N. Y. S. 2d 185.

No. 09–7725. WRIGHT *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–7728. WARD *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 134.

No. 09–7729. LASKEY *v.* AT&T. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7730. LASKEY *v.* FIDELITY INVESTMENTS. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7731. LASKEY *v.* AT&T. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7733. JACKSON *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 338 Fed. Appx. 898.

No. 09–7734. OATES *v.* HENSE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–7735. MURPHY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–7736. BANKES *v.* PERRY COUNTY CHILDREN AND YOUTH SERVICES. C. A. 3d Cir. Certiorari denied.

No. 09–7737. PASLEY *v.* DOE ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–7740. ROOKS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–7742. WATERLOO *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–7749. PARKER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 291 S. W. 3d 647.

No. 09–7753. LASKEY *v.* CORNING CABLE SYSTEMS. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7759. LASKEY *v.* SHILOH GROUP, LLC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7760. LASKEY *v.* SUN MICROSYSTEMS, INC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7763. MAJOR-DAVIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7764. JONES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 09–7769. BARKER *v.* SWEETEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 346.

No. 09–7770. BOGER *v.* SOLORIA. Sup. Ct. Va. Certiorari denied.

No. 09–7773. DUNKLE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 09–7774. MELENDEZ ESTRADA *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 436.

No. 09–7786. BELL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 3d 624.

No. 09–7797. SHERIDAN *v.* CONWAY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–7808. MENEFIELD *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 09–7811. WILLIAMS *v.* BARROW, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–7818. JENKINS *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 322 Fed. Appx. 531.

No. 09–7838. ARROYO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 292 Conn. 558, 973 A. 2d 1254.

No. 09–7846. RANKINS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 127.

No. 09–7865. BLACKMER *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 09–7868. ISHOLA *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 254.

No. 09–7877. FRANCIS *v.* JOINT FORCE HEADQUARTERS NATIONAL GUARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–7891. SCOTT, AKA THOMAS *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 896.

No. 09–7903. DANIEL *v.* LONG ISLAND HOUSING PARTNERSHIP, INC., OF HAUPPAUGE ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–7910. CRAINSHAW *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 09–7914. O'NEAL *v.* KENNY, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 3d 915.

No. 09–7929. PAGE *v.* BRADT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 331 Fed. Appx. 883.

No. 09–7932. UYKHENG NGY *v.* YOU SONG SECK. Super. Ct. Pa. Certiorari denied. Reported below: 972 A. 2d 570.

No. 09–7939. ALBRIGHT-LAZZARI ET VIR *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 116 Conn. App. 83, 976 A. 2d 707.

No. 09–7940. ALBRIGHT-LAZZARI ET VIR *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied.

No. 09–7941. ALBRIGHT-LAZZARI ET VIR *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied.

No. 09–7946. BRINSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 339 Fed. Appx. 171.

No. 09–7948. BURGETT *v.* GEITHNER, SECRETARY OF THE TREASURY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–7949. PERRYMAN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied.

No. 09–7959. HERRON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–7976. HILDEBRAND *v.* STECK MANUFACTURING CO., INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 333 Fed. Appx. 507.

No. 09–7981. WRIGHT *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 40 Kan. App. 2d xxviii, 199 P. 3d 188.

No. 09–7992. ROZENBLAT *v.* KAPPOS, DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 345 Fed. Appx. 601.

No. 09–8002. TORRES *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 924.

No. 09–8007. WADLEY *v.* GAETZ, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 148.

No. 09–8011. BEDFORD *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied.

No. 09–8018. SCOTT *v.* HERMAN ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8020. DELOGE *v.* ABBOTT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 521.

No. 09–8026. BRUNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 363.

No. 09–8029. BINDUS *v.* HUDSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8055. PEREZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 965 A. 2d 300.

No. 09–8057. BILBREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8067. MCCULLOUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 29.

No. 09–8070. HANSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8076. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8077. HOGG'S *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 625.

No. 09–8082. MOSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 368.

No. 09–8083. STRONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8084. RHETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 158.

No. 09–8086. RIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 436.

No. 09–8092. MATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 303.

No. 09–8097. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–8098. THOMAS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 350 Fed. Appx. 448.

No. 09–8101. VIRAMONTES-GALAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 981.

No. 09–8102. KALILIKANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 404.

No. 09–8105. RANGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 931.

No. 09–8106. RIASCOS-RIASCOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 153.

No. 09–8109. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 3d 607.

No. 09–8111. ARROYO-ROSARIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8112. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 555.

No. 09–8113. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 769.

No. 09–8115. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 576 F. 3d 1149.

No. 09–8116. BATTISTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 962.

No. 09–8117. ANTHONY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 459.

No. 09–8118. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8120. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 869.

No. 09–8121. RODRIGUEZ-BANUELOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 31.

No. 09–8127. RUBIO-MARCHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 997.

No. 09–8130. FRANKLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 559.

No. 09–8131. HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 569 F. 3d 893.

No. 09–8141. GORDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 588.

No. 09–8142. HUFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8148. CHADHA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 191.

No. 09–8153. STULTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 3d 834.

No. 09–8160. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 991.

No. 09–8161. HARDNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 977.

No. 09–8163. ASKEW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–8167. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 714.

No. 09–8171. GREGORY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 325 Fed. Appx. 238.

No. 09–8183. HUDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 3d 883.

No. 09–8196. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 535.

No. 09–8201. HAIRSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 865.

No. 09–8204. LACASSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 567 F. 3d 763.

No. 09–8205. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 948.

No. 09–8209. REES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8211. WENCES-ADAME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 952.

No. 09–8215. ALVIAR ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 3d 526.

No. 09–8216. BACH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 220.

No. 09–8217. ARMAS-CALVILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 95.

No. 09–8219. MCNEALY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 440.

No. 09–8220. ORDONEZ-MENDOZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 367.

No. 09–8223. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 959.

No. 09–8224. OROZCO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 3d 745.

No. 09–8226. OCAMPO-GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8227. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 772.

No. 09–8231. SYLVESTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 3d 285.

No. 09–8233. FALLS *v.* FONDREN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–8236. MORRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 3d 661.

No. 09–8243. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 3d 1147.

No. 09–8246. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 620.

No. 09–8247. POTOCKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8252. VILLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 100.

No. 09–8254. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 343 Fed. Appx. 830.

No. 09–8256. ENAMORADO-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 979.

No. 09–8257. EZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 623.

No. 09–8261. WICKERSHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 155.

No. 09–8264. KAPORDELIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 569 F. 3d 1291.

No. 09–8281. BOREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 485.

No. 09–8321. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 896.

No. 09–8324. ALSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 907.

No. 09–8326. CARVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 290.

No. 09–35. NORIEGA *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 564 F. 3d 1290.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

"[I]n our tripartite system of government," it is the duty of this Court to "say 'what the law is.'" *Boumediene* v. *Bush*, 553 U. S. 723, 765 (2008) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). This duty is particularly compelling in cases that

present an opportunity to decide the constitutionality or enforceability of federal statutes in a manner "insulated from the pressures of the moment," and in time to guide courts and the political branches in resolving difficult questions concerning the proper "exercise of governmental power." *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 637 (2006) (KENNEDY, J., concurring in part); see generally *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 353–354 (2006); *Hamdan*, *supra*, at 588 (quoting *Ex parte Quirin*, 317 U. S. 1, 19 (1942)). This is such a case.

The questions presented are, in the Solicitor General's words: "1. Whether Section 5 of the Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2631, precludes petitioner from invoking the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, as a source of rights in a habeas corpus proceeding"; and "2. Whether, assuming petitioner can assert a claim based on the Geneva Convention, his extradition to France would violate the Convention." Brief in Opposition (I) (some citations omitted).[1] Answering just the first of these questions would provide much-needed guidance on two important issues with which the political branches and federal courts have struggled since we decided *Boumediene*. The first is the extent, if any, to which provisions like § 5 affect 28 U. S. C. § 2241 in a manner that implicates the constitutional guarantee of habeas corpus. The second is whether the Geneva Conventions are self-executing and judicially enforceable.

It is incumbent upon us to provide what guidance we can on these issues now. Whatever conclusion we reach, our opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation. These considerations alone justify review. That petitioner was convicted in federal court (rather than in a military commission) in criminal proceedings uncomplicated by classified information or issues relating to extraterritorial detention is an additional reason to grant certiorari. It is our duty to say what the law is on important matters within our jurisdiction. That is what we should do.

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[1] We routinely grant certiorari on questions the Solicitor General presents in a brief in opposition, see, *e. g.*, *Weyhrauch* v. *United States*, 557 U. S. 934 (2009), or in an *amicus* brief, see, *e. g.*, *Hamilton* v. *Lanning*, 558 U. S. 989 (2009); *Republic of Philippines* v. *Pimental*, 552 U. S. 1061 (2007).

I

Petitioner General Manuel Noriega is the former head of the Panamanian Defense Forces. In 1988, a federal grand jury indicted Noriega, and the U. S. military thereafter brought him to Florida. A federal jury convicted him of various federal narcotics-related offenses, and the District Court sentenced him to a 30-year prison term. In response to Noriega's concerns about the type of care he would receive in the custody of the Bureau of Prisons, the District Court designated Noriega a prisoner of war (POW) entitled to the protections of the Geneva Conventions. See *United States* v. *Noriega*, 808 F. Supp. 791 (SD Fla. 1992).[2] Noriega's conviction and sentence were affirmed in proceedings not relevant here. See *United States* v. *Noriega*, 117 F. 3d 1206 (CA11 1997), cert. denied, 523 U. S. 1060 (1998).

In July 2007, two months before Noriega was scheduled to be released on parole, he filed a habeas corpus petition under 28 U. S. C. § 2255. Relying on the District Court's POW designation, Noriega alleged that the United States violated the Geneva Conventions when it acquiesced in the French Government's request to extradite him to France so he could face criminal charges there upon his release from U. S. custody. See *United States* v. *Noriega*, No. 88–0079–CR, 2007 WL 2947572 (SD Fla., Aug. 24, 2007). The District Court agreed with Noriega that his POW status entitled him to the conventions' protection until his "final

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[2] Citing International Red Cross and academic commentary in support of its "belie[f] [that the Third] Geneva [Convention] is self-executing and provides General Noriega with a right of action in a U. S. court for violation of its provisions," the District Court addressed Noriega's status under the treaty. 808 F. Supp., at 794. The District Judge found that the hostilities in Panama constituted an "'armed conflict'" within the meaning of Article 2 of the Third Geneva Convention, that Noriega was a member of the armed forces of a party to the conflict under Article 4 of the Third Convention, and that the District Court was a "'competent tribunal'" to determine Noriega's POW status under Article 5 of the Third Convention. See *id.*, at 793–796. Accordingly, the court concluded that, notwithstanding various separation-of-powers and justiciability concerns, "Noriega is in fact a prisoner of war as defined by Geneva III, and as such must be afforded the protections established by the treaty" while in federal custody. *Id.*, at 796. The court then identified convention rights that it believed would govern Noriega's confinement, see *id.*, at 799–803, and observed that "[w]hether or not those rights can be fully provided in a maximum security penitentiary setting is open to serious question," *id.*, at 803.

release and repatriation," but dismissed his § 2255 petition on the ground that his extradition challenge was not directed to "any defect in [his] sentence," and thus was not cognizable under § 2255. *Id.*, at *1 (internal quotation marks omitted). Noriega then filed the same claims under 28 U. S. C. § 2241, and the District Court ultimately[3] stayed his extradition pending appeal on the ground that his challenge rested on "credible arguments . . . , particularly with regard to the interpretation of certain provisions of the Geneva Convention[s]," on which "no other federal court has ruled." No. 07–CV–22816–PCH, 2008 WL 331394, *3 (SD Fla., Jan. 31, 2008).

On appeal, Noriega argued that his extradition to France would violate several provisions of the Third Convention and that the District Court erred in concluding otherwise. In response, the Government asserted that the court lacked jurisdiction over Noriega's claims because § 5(a) of the Military Commissions Act of 2006 (MCA) establishes that "[t]he Geneva Conventions are not self-executing" or judicially enforceable in habeas corpus actions. Brief for United States in No. 08–11021–FF (CA11), p. 13 (hereinafter Brief for United States).[4] MCA § 5(a) provides:

> "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories." 120 Stat. 2631, note following 28 U. S. C. § 2241.[5]

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[3] The District Court dismissed Noriega's initial § 2241 petition because the court concluded that it lacked jurisdiction to consider the petition's extradition challenge in Noriega's criminal case as opposed to a separate action challenging his certificate of extraditability. See *United States* v. *Noriega*, No. 88–0079–CR, 2007 WL 2947981, *1 (SD Fla., Sept. 7, 2007) (dismissing the petition without prejudice but reiterating the merits concerns with Noriega's Geneva Convention claims that the court articulated in dicta in dismissing his § 2255 petition).

[4] The Government also challenged Noriega's claims as meritless and outside the scope of habeas review under Circuit precedent.

[5] Recent amendments to the Military Commissions Act of 2006, collectively titled the Military Commissions Act of 2009, see National Defense Authorization Act for Fiscal Year 2010, see §§ 1801–1807, 123 Stat. 2574–2614, do not affect MCA § 5(a). The 2009 amendments principally update provisions relevant to the Guantanamo habeas corpus cases pending in the U. S. District

Emphasizing that a non-self-executing treaty "'addresses itself to the political, not the judicial department,'" the Government observed that "[n]o court of appeals has held that the provisions of the Geneva Conventions are judicially enforceable in any context." Brief for United States 13, 14 (quoting *Medellín* v. *Texas*, 552 U. S. 491, 516 (2008)). The Government then argued that "confirmation of this [view] can be found in the enactment of [MCA § 5(a)], which "codifie[d] the principle that the Geneva Conventions [a]re not judicially enforceable by private parties," but did so in a narrow way that does not purport to strip courts of habeas jurisdiction, and thus does "not implicate" the Suspension Clause analysis in *Boumediene*. Brief for United States 14, n. 6.[6]

The Eleventh Circuit accepted the District Court's designation of Noriega as a POW, but agreed with the Government's interpretation of MCA § 5(a):

> "We affirm and hold that § 5 of the [MCA] precludes Noriega from invoking the Geneva Convention as a source of rights in a habeas proceeding and therefore deny Noriega's habeas petition.
>
> . . . . .
>
> "The issues present in *Boumediene* v. *Bush* concerning the constitutionality of § 7 of the MCA, are not presented by § 5 . . . . In *Boumediene*, the Supreme Court found § 7 of the MCA, which explicitly removed the jurisdiction of courts to consider habeas actions by enemy combatants, to be unconstitutional. . . . Section 5, in contrast, as discussed more fully, *infra*, at most changes one substantive provision of law upon which a party might rely in seeking habeas relief. We are [thus] not presented with a situation in which potential petitioners are effectively banned from seeking habeas relief because any constitutional rights or claims are made

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Court for the District of Columbia and clarify the due process protections available in those and other noncitizen detainee cases to which the constitutional and treaty issues in this case relate. See *ibid.;* see also J. Elsea, CRS Report for Congress, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court, pp. 2–4 (Nov. 19, 2009).

[6] Although the Government distinguishes MCA § 5(a) from the jurisdiction-stripping provision the Court invalidated in *Boumediene* v. *Bush*, 553 U. S. 723 (2008), it stops short of asserting that § 5(a) is constitutional. See Brief in Opposition 8, n.

unavailable." 564 F. 3d 1290, 1292, 1294 (CA11 2009) (citations and parenthetical omitted).[7]

Noriega's petition challenges both the Eleventh Circuit's interpretation of MCA § 5(a) and the provision's constitutionality. Noriega begins by asserting that the Court of Appeals erred in holding "that [MCA § 5(a)] absolutely and unambiguously prohibits persons from raising any claim based upon the four Geneva Conventions" in a habeas corpus action. Pet. for Cert. 10; see also *id.*, at 12 ("At best, the statutory scheme is ambiguous"). Noriega next asserts that, if the Eleventh Circuit's interpretation of § 5(a) is correct, the provision violates the Supremacy Clause, see *id.*, at 11–12, and the Suspension Clause, see Reply to Brief in Opposition 2. Noriega's Supremacy Clause argument is that, to the extent MCA § 5(a) governs his Geneva Convention claims, the provision impermissibly effects a "complete repudiation" of the treaty. Pet. for Cert. 11. The Government responds that this argument suffers from two fatal flaws. First, this Court has held that a treaty, which is "'primarily a compact between independent nations,'" remains in force as the supreme law of the land even where its enforcement is left to "international negotiations" rather than "domestic courts." Brief in Opposition 7 (quoting *Head Money Cases*, 112 U. S. 580, 598 (1884)); see *Medellín*, *supra*, at 505, and n. 3. Second, "[w]hatever the domestic effect of the Third Geneva Convention before the enactment of the MCA," this Court has held that "'it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty.'" Brief in Opposition 7 (quoting 564 F. 3d, at 1295–1296); see also *Medellín*, *supra*, at 509, n. 5. Accordingly, the Government agrees with the Eleventh Circuit that MCA § 5(a) "does not change the international obligations of the United States under the Geneva Conventions," but does "supersed[e] whatever domestic effect the Geneva Conventions may have had in actions such as this." Brief in Opposition 7–8 (internal quotation marks omitted). That brings Noriega to his Suspension Clause argument. He replies that, if MCA § 5(a) operates in the manner the Government describes and the Eleventh Circuit held,

[7] The Court of Appeals also concluded that, "assuming arguendo" Noriega is correct that "§ 5 of the MCA does not preclude [his] claim," 564 F. 3d, at 1297, the Third Geneva Convention does not bar his extradition to France and the "United States has fully complied with" the treaty, *id.*, at 1298.

the provision is unconstitutional under *Boumediene* because it "effectively works a suspension of the writ." Reply to Brief in Opposition 2 (asserting that "to divorce the writ from the law is to destroy the writ").

II

As the Eleventh Circuit's opinion makes clear, the threshold question in this case is whether MCA § 5(a) is valid. Answering that question this Term would provide courts and the political branches with much needed guidance on issues we left open in *Boumediene*. See 553 U. S., at 793–795, 796–798. Providing that guidance in this case would allow us to say what the law is without the unnecessary delay and other complications that could burden a decision on these questions in Guantanamo or other detainee litigation arising out of the conflict with Al Qaeda.

Boumediene invalidated MCA § 7's attempt to strip federal courts of habeas jurisdiction over claims by a specified class of noncitizen detainees ("unlawful enemy combatants"), but did not determine the "content of the law that governs petitioners' detention," *id.*, at 798, or the extent to which § 2241's substantive provisions affect the constitutional "procedural protections of habeas corpus," *ibid.* Section 2241 broadly confers jurisdiction over a habeas corpus action by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." See *Rasul* v. *Bush*, 542 U. S. 466, 473 (2004). MCA § 5(a) eliminates the Geneva Conventions as a source of rights upon which § 2241 petitioners may rely in challenging their detentions. Statutory amendments to an existing law ordinarily involve nothing more than a valid exercise of Congress' Article I authority. See, *e. g.*, *Chew Heong* v. *United States*, 112 U. S. 536, 562–563 (1884). Noriega asserts that the difference in this case is that the statutory amendment narrows the scope of § 2241. Assuming that is correct, the indeterminate interplay between the constitutional and statutory guarantees of habeas corpus under our precedents permits Noriega to argue that the manner in which MCA § 5(a) affects § 2241 proceedings implicates the Suspension Clause. Only we can determine whether the Eleventh Circuit correctly rejected that argument.

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. Because the Clause addresses only

the suspension—not the content or existence—of the "Privilege of the Writ," *ibid.*, we have long recognized the "obligation" the first Congress "must have felt" to "provid[e] efficient means by which this great constitutional privilege should receive life and activity," *Ex parte Bollman*, 4 Cranch 75, 95 (1807). But we have also steadfastly declined to adopt a date of reference by which the writ's constitutional content, if any, is to be judged, see *Boumediene*, *supra*, at 746–747, and thus have left open the question whether statutory efforts to limit § 2241 implicate the Suspension Clause, see, *e. g.*, *INS* v. *St. Cyr*, 533 U. S. 289, 300–301 (2001). This question, which has already divided the Court in other contexts, see *ibid.*,[8] is clearly presented here. Noriega asserts that MCA § 5(a) is unconstitutional because it "effectively works a suspension of the writ" by imposing the same type of statutory limitation the Court addressed in *St. Cyr*. Reply to Brief in Opposition 2 (implicitly equating the constitutional scope of the writ with § 2241's grant of habeas corpus jurisdiction over individuals allegedly held "in violation of the Constitution or laws or treaties of the United States"). The Eleventh Circuit, however, saw no constitutional problem with the statute and upheld it as valid and distinguishable from the provision deemed unconstitutional in *Boumediene*. See 564 F. 3d, at 1294.

Addressing Noriega's challenge to the Eleventh Circuit's decision would resolve the important statutory and constitutional

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[8] Compare *St. Cyr*, 533 U. S., at 300–301 (declining to identify a specific date of reference for judging the constitutional scope of the writ, but concluding that the Court nonetheless should construe the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to allow § 2241 jurisdiction over certain habeas petitions because doing so would avoid the Suspension Clause question that otherwise would arise), with *id.*, at 335–341 (SCALIA, J., dissenting) (emphasizing that, although IIRIRA displaces § 2241 jurisdiction unambiguously and thus renders the canon of constitutional avoidance inapplicable, there is no constitutional question to avoid, because the Suspension Clause is addressed only to suspension (*i. e.*, temporary withholding of the operation) of the writ on the terms authorized by the habeas corpus statute, not to Congress' power to alter the substance of the habeas rights the statute confers), and *id.*, at 340–341, n. 5 ("If, as the Court concedes, the writ could not be suspended within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet" (internal quotation marks and citations omitted)).

questions here and would guide courts and the political branches in addressing the same and similar issues in other detainee cases. See, *e. g.*, *Al-Bihani* v. *Obama*, 590 F. 3d 866, 870 (CADC 2010) ("The Supreme Court has provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion"). Recent court decisions, as well as recent Executive Branch court filings and policy determinations, specifically invoke the Geneva Conventions as part of the law that governs detainee treatment in the United States and abroad. For example, in September 2009, the U. S. District Court for the District of Columbia issued a redacted version of a classified memorandum opinion in which it granted habeas corpus relief in the oldest of the pending Guantanamo cases because the petitioner's indefinite detention was based "almost exclusively" on unreliable "'confessions'" obtained "using abusive techniques that violated the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War." Classified Memorandum Opinion in *Al Rabiah* v. *United States*, No. 02–828 (CKK) (Sept. 17, 2009), pp. 1–2, 43.

Several recent D. C. Circuit decisions, one of which is now pending before us, similarly implicate the importance of the Geneva Convention and MCA § 5(a) questions in this case. In *Kiyemba* v. *Obama*, 555 F. 3d 1022 *(Kiyemba I)*, cert. granted, 558 U. S. 969 (2009), the petitioners, Guantanamo detainees who prevailed on their habeas corpus claims in federal court but cannot return to their home country, rely on the Geneva Conventions in claiming a right to be released in the territorial United States, see Pet. for Cert. in No. 08–1234, pp. i, 34. Although the D. C. Circuit did not address MCA § 5(a) in rejecting this claim, the Government contends before this Court that MCA § 5(a) bars the petitioners' reliance on the conventions, see Brief in Opposition in No. 08–1234, pp. 23–24, and Judge Rogers' opinion concurring in the D. C. Circuit's judgment relies upon the same repatriation language in Article 118 of the Third Convention that Noriega raises here, see 555 F. 3d, at 1033, n. 2. In *Al-Bihani*, the D. C. Circuit directly invokes MCA § 5(a) in rejecting a Guantanamo detainee's claim that he was entitled to habeas corpus relief because his detention violated, *inter alia*, the Third Geneva Convention, see 590 F. 3d, at 875 (stating that MCA § 5(a), "a provision not altered by the MCA of 2009, explicitly precludes detainees

from claiming the Geneva Conventions—which include criteria to determine who is entitled to P. O. W. status—as a source of rights"). Finally, the D. C. Circuit's decision in *Kiyemba* v. *Obama*, 561 F. 3d 509 (2009) *(Kiyemba II)*, implicates the issues here in holding, contrary to several recent District Court decisions,[9] that another MCA provision (MCA § 7(a)(2), codified at 28 U. S. C. § 2241(e)(2)), does not deprive federal habeas corpus courts of jurisdiction to consider claims in which certain classes of detainees challenge their conditions of confinement under the Geneva Conventions. See 561 F. 3d, at 512–513.

The extent to which noncitizen detainees may rely on the Geneva Conventions as a source of rights against the United States has also been the subject of increasing debate in the political branches. Recent Executive Branch Orders and court filings cite the conventions in articulating the legal standards that govern detainee treatment. See, *e. g.*, Exec. Order No. 13491, § 3, 74 Fed. Reg. 4894 (2009) (making "Common Article 3 Standards" the "[m]inimum [b]aseline" for the treatment of any individual who, in the course of "any armed conflict," comes into the "custody or under the effective control of an officer, employee, or other agent of the United States" or is "detained within a facility owned, operated, or controlled by a department or agency of the United States"); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay in Misc. No. 08–442 (TFH) (CADC), p. 1 (apprising the court of the Government's decision to treat detainees formerly designated as "unlawful enemy combatants" under new standards that draw on the "laws of war," as those laws have "developed over time and have periodically been codified in treaties such as the Geneva Conventions").[10] Congress, in turn, is considering new

[9] See *Khadr* v. *Bush*, 587 F. Supp. 2d 225, 235 (DC 2008) (Bates, J.); *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 312, 314 (DC 2008) (Hogan, J.); *In re Guantanamo Bay Detainee Litigation*, 570 F. Supp. 2d 13, 18 (DC 2008) (Urbina, J.).

[10] This standard presumably will control the Government's position in habeas corpus actions that arise in other circuits pursuant to the President's recent decision to prosecute or imprison (or both) certain Guantanamo detainees in New York and Illinois. See Oversight of the U. S. Dept. of Justice, Hearing before the Senate Committee on the Judiciary, 111th Cong., 1st Sess., Testimony of Attorney General Eric Holder (Nov. 18, 2009), available at LEXIS, CQ Transcriptions, pp. 8–9; Remarks by Former Attorney General Michael Mukasey (Nov. 13, 2009), available at LEXIS, Federal News Service; Presidential Memorandum of Dec. 15, 2009, Closure of Detention

legislation that would further clarify the extent to which detainees can enforce Geneva Convention obligations against the United States in federal courts, but progress on these proposals has been complicated by uncertainty over the statutory and constitutional questions in this case.[11]

As noted, addressing these questions now,[12] if only the statutory issues, would avoid years of litigation and uncertainty no matter what we conclude on the merits. A decision upholding MCA § 5(a) would obviate the need for detainees, the Government, and federal courts to struggle (as they did here) with Geneva Convention claims in habeas corpus proceedings.[13] And, it would give the political branches a clearer sense of the constitutional limits

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Facilities at the Guantanamo Bay Naval Base, 75 Fed. Reg. 1015 (2010); Dept. of Defense, Am. Forces Press Serv., Some Guantanamo Detainees to Move to Illinois Prison (Dec. 15, 2009); Letter from the Attorney General, the Secretaries of State, Defense, and Homeland Security, and the Director of National Intelligence to Pat Quinn, Governor of Illinois, p. 2 (Dec. 15, 2009).

[11] See, *e. g.*, J. Elsea, K. Thomas, & M. Garcia, CRS Report for Congress, Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court 36, 41–43 (Sept. 15, 2009).

[12] Because the D. C. Circuit's majority opinion in *Kiyemba I* does not address MCA § 5(a), the provision's validity is not squarely presented in that case. See *Kiyemba I*, 555 F. 3d 1022, cert. granted, 558 U. S. 969 (2009). And granting review of the D. C. Circuit's decision in *Al-Bihani* v. *Obama*, 590 F. 3d 866 (CADC 2010), which does address MCA § 5(a), would not guarantee a decision on the statute's validity. See *ibid.* *Al-Bihani* addresses MCA § 5(a) in rejecting only one of many claims for habeas corpus relief, so it is not clear that the Court would need to address the statute's validity in deciding the case. And even if the Court were to address § 5(a), the decision would come next Term, thus providing no guidance to courts that must adjudicate pending habeas corpus actions this spring and summer. In contrast, addressing MCA § 5(a)'s validity in this case would timely provide such guidance. Doing so could also aid our disposition of *Kiyemba I* because answering the questions presented here could clarify the constitutional scope of the writ of habeas corpus in a manner that could affect the *Kiyemba I* petitioners' argument about the inherent remedial power of habeas corpus courts. See Pet. for Cert. in No. 08–1234, pp. 14–16, 22–23; see generally *Kiyemba I*, *supra*, at 1026–1027; *INS* v. *St. Cyr*, 533 U. S. 289, 335–340 (2001) (SCALIA, J., dissenting).

[13] MCA § 5(a) applies not only to individuals who, like Noriega, have (rightly or not) been designated POWs, but also to "any person" who invokes the conventions as a source of rights in any "habeas or other civil action" to which the United States is a party, see 120 Stat. 2631, note following 28 U. S. C. § 2241.

to which new legislative or policy initiatives must adhere. The latter benefit would also follow if we were to invalidate MCA § 5(a). In addition, such a ruling could well allow us to reach the question we left open in *Hamdan*—whether the Geneva Conventions are self-executing and judicially enforceable—because this case is not governed by the Uniform Code of Military Justice provisions on which the *Hamdan* majority relied in holding Common Article III applicable to the proceedings in that case. See *Hamdan*, 548 U. S., at 627–628; see also *id.*, at 637, 642–643 (KENNEDY, J., concurring in part). Finally, if the Court were to conclude that the conventions are self-executing and judicially enforceable in habeas corpus proceedings, this case would present two additional questions relevant to noncitizen detainee litigation: whether federal courts may classify such detainees as POWs under the Third Convention, and whether any of the conventions requires the United States immediately to repatriate detainees entitled to release from U. S. custody.[14]

Against these considerations, the Government provides no compelling reason to decline review.[15] Accordingly, I would take the

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[14] Both questions are subsumed in the second question in the Solicitor General's brief: "[w]hether, assuming petitioner can assert a claim based on the Geneva Convention, his extradition to France would violate the Convention." Brief in Opposition (I).

[15] The Solicitor General's principal ground for opposing certiorari is that the Eleventh Circuit's decision does not conflict with the decision of any other circuit. See *id.*, at 6. That is true but not surprising. The original version of the MCA is only three years old and, as the Solicitor General is careful to note, Noriega is "the only person *currently* detained by the United States as a prisoner of war." *Ibid.* (emphasis added). Accordingly, the lack of a circuit split on the question whether MCA § 5(a) bars POWs in federal custody in the United States from invoking the Geneva Conventions in habeas proceedings does not negate the compelling reasons to grant review. Indeed, the Court has taken cases in this area without the benefit of any opinion from a court of appeals, see *Ex parte Quirin*, 317 U. S. 1 (1942), and in splitless cases involving rare facts and ongoing diplomatic negotiations, see *Kiyemba I*, 558 U. S. 969. The Court has also granted review of separation-of-powers and other important legal questions on records far less developed than that here, see, *e. g.*, *Robertson* v. *United States ex rel. Watson*, 558 U. S. 1090 (2009); *Christian Legal Soc. Chapter of Univ. of Cal. Hastings College of Law* v. *Martinez*, 558 U. S. 1076 (2009); on petitions that have required us to reformulate the questions presented, see, *e. g.*, *Robertson*, *supra*; *Reed Elsevier, Inc.* v. *Muchnick*, 555 U. S. 1211 (2009); and even on petitions we initially denied, see *Boumediene* v. *Bush*, 551 U. S. 1160

case and decide the questions presented in the Solicitor General's brief.[16]

No. 09–548. WOOD *v.* APPLIED RESEARCH ASSOCIATES, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 328 Fed. Appx. 744.

No. 09–612. KING *v.* PFEIFFER. Sup. Ct. Va. Motion of Stop Family Violence et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

No. 09–619. ARISTA RECORDS, LLC, ET AL. *v.* LAUNCH MEDIA, INC. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 578 F. 3d 148.

No. 09–663. BEST PAYPHONES, INC. *v.* VERIZON NEW YORK INC. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 331 Fed. Appx. 25.

No. 09–7754. LASKEY *v.* INTEL CORP. Ct. App. Cal., 1st App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 09–7767. BARCLAY *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

(2007). The Solicitor General also claims (again based on the fact that Noriega is "currently" the only POW in U. S. custody) that review is not warranted because the Eleventh Circuit's decision is of "limited ongoing significance." Brief in Opposition 6. This assertion is not persuasive for the reasons set forth above.

[16] As noted, the Solicitor General's first question presented is whether MCA § 5(a) "precludes petitioner from invoking" the Third Geneva Convention "as a source of rights in a habeas corpus proceeding." *Id.*, at (I). Such statutory questions do not automatically, or even typically, require a court to consider the statute's constitutionality. Here, however, Noriega has consistently argued that, if the statute precludes him from invoking the Geneva Conventions in the manner the Solicitor General's question describes and the Eleventh Circuit held, the statute would violate the Suspension Clause. See *supra*, at 922–923. Thus, the Suspension Clause issue may in this case fairly be viewed as implicit in the statutory question presented.

No. 09–8021. WHITE *v.* MCGRADY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 09–8085. ROMERO-PADILLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 583 F. 3d 126.

No. 09–8125. RUSSELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 354 Fed. Appx. 547.

No. 09–8186. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 348 Fed. Appx. 636.

Rehearing Denied

No. 09–331. HARPER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HARPER, DECEASED, ET AL. *v.* UNITED SERVICES AUTOMOBILE ASSN. ET AL., 558 U. S. 1049;

No. 09–496. BROWN *v.* UNITED STATES, 558 U. S. 1051;

No. 09–5144. RISLEY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 558 U. S. 993;

No. 09–5515. QUINN *v.* UNITED STATES, 558 U. S. 1077;

No. 09–6397. CHRISTIAN *v.* CALIFORNIA ET AL., 558 U. S. 1027;

No. 09–6488. JUDD *v.* NEW MEXICO, 558 U. S. 1029;

No. 09–6593. SMITH *v.* UNITED STATES, 558 U. S. 977;

No. 09–6594. SKINNER *v.* OKLAHOMA, 558 U. S. 1053;

No. 09–6617. NITSCHKE *v.* COASTAL TANK CLEANING ET AL., 558 U. S. 1053;

No. 09–6674. MILLEN *v.* FLORIDA, 558 U. S. 1054;

No. 09–6694. ROSS *v.* VIRGINIA, 558 U. S. 1015;

No. 09–6772. FOBBS *v.* POTTER, POSTMASTER GENERAL, 558 U. S. 1032;

No. 09–6806. MCCALL *v.* CROSTHWAIT ET AL., 558 U. S. 1056;

No. 09–6862. KUPERMAN *v.* GERRY, WARDEN, 558 U. S. 1079;

No. 09–6893. BARKER *v.* TEXAS, 558 U. S. 1080;

No. 09–7050. In re Dantzler, 558 U. S. 1047;
No. 09–7229. In re Walshe, 558 U. S. 1047;
No. 09–7337. Johnson *v.* United States, 558 U. S. 1062; and
No. 09–7346. Bryant *v.* United States, 558 U. S. 1063. Petitions for rehearing denied.

February 4, 2010

Certiorari Denied

No. 09–8937 (09A728). Brown *v.* Strickland, Governor of Ohio, et al. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Certiorari denied. Reported below: 363 Fed. Appx. 394.

No. 09–8938 (09A729). Brown *v.* Ohio. Sup. Ct. Ohio. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Certiorari denied. Reported below: 124 Ohio St. 3d 1467, 920 N. E. 2d 993.

February 12, 2010

Miscellaneous Order

No. 08–1234. Kiyemba et al. *v.* Obama, President of the United States, et al. C. A. D. C. Cir. [Certiorari granted, 558 U. S. 969.] The parties are directed to file letter briefs addressing the following question: "What should be the effect, if any, of the developments discussed in the letters submitted by the parties on February 3 and 5 on the Court's grant of certiorari in this case?" Briefs, limited to eight pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 19, 2010.

February 16, 2010

*Miscellaneous Order**

No. 09A736. McComish et al. *v.* Bennett, Secretary of State of Arizona, et al. C. A. 9th Cir. Application to vacate the stay, presented to Justice Kennedy, and by him referred to

*For revisions to the Rules of this Court effective this date, see 558 U. S. 1161.

the Court, denied without prejudice to a renewed application on June 1, 2010, or when the Court of Appeals has issued its decision on the merits of the case, whichever date is earlier.

Certiorari Denied

No. 09–8975 (09A739). GROSSMAN *v.* FLORIDA. Sup. Ct. Fla. 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: 29 So. 3d 1034.

FEBRUARY 19, 2010

Miscellaneous Orders

No. 08–974. LEWIS ET AL. *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. [Certiorari granted, 557 U. S. 965.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1470. BERGHUIS, WARDEN *v.* THOMPKINS. C. A. 6th Cir. [Certiorari granted, 557 U. S. 965.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1529. HUI ET AL. *v.* CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CASTANEDA, ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Migliaccio* v. *Castaneda*, 557 U. S. 966.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1555. SAMANTAR *v.* YOUSUF ET AL. C. A. 4th Cir. [Certiorari granted, 557 U. S. 965.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 09–38. HEALTH CARE SERVICE CORP. *v.* POLLITT ET AL. C. A. 7th Cir. [Certiorari granted, 558 U. S. 945.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

FEBRUARY 22, 2010

Certiorari Granted—Reversed and Remanded. (See No. 08–10914, *ante*, p. 34; and No. 09–273, *ante*, p. 43.)

Certiorari Dismissed

No. 09–7785. ALBERT *v.* DAKOTA COMMUNITIES, INC., ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 331 Fed. Appx. 431.

No. 09–7925. HILL *v.* HILLIER. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 331 Fed. Appx. 250.

No. 09–8048. ELINE *v.* HAWAII DEPARTMENT OF PUBLIC SAFETY. 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. 09–8453. MCCARTHY *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8646. JEFFUS *v.* DREW, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 09M67. NEELY *v.* MARSHALL, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09M68. MURRELL *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS; and

No. 09M69. THOMPSON *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. Motions for leave to proceed as veterans denied.

No. 09M70. WILLIAMS *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. Motion for

leave to proceed *in forma pauperis* with declaration of indigency under seal denied.

No. 08–998. HAMILTON, CHAPTER 13 TRUSTEE *v.* LANNING. C. A. 10th Cir. [Certiorari granted, 558 U. S. 989.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1394. SKILLING *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 558 U. S. 945.] Motion of petitioner for leave to file a supplemental volume of the joint appendix under seal granted.

No. 09–338. RENICO, WARDEN *v.* LETT. C. A. 6th Cir. [Certiorari granted, 558 U. S. 1047.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 09–520. CSX TRANSPORTATION, INC. *v.* ALABAMA DEPARTMENT OF REVENUE ET AL. C. A. 11th Cir.; and

No. 09–654. ORTHO BIOTECH PRODUCTS, L. P. *v.* UNITED STATES EX REL. DUXBURY. C. A. 11th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 09–7260. REYNOSO *v.* ROCK, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1088] denied.

No. 09–8074. PARKER *v.* ASRC OMEGA NATCHIQ. C. A. 5th Cir.;

No. 09–8472. STEPHENS *v.* FOURTH JUDICIAL DISTRICT COURT ET AL. C. A. 5th Cir.; and

No. 09–8583. WALKER *v.* POTTER, POSTMASTER GENERAL. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 15, 2010, 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. 09–8455. IN RE BUSH;

No. 09–8464. IN RE WALCK; and

No. 09–8632. IN RE CASEY. Petitions for writs of habeas corpus denied.

No. 09–7885. IN RE WADDELL;

No. 09–7982. IN RE TOWNSEND; and

No. 09–8198. IN RE SANCHO. Petitions for writs of mandamus denied.

No. 09–8014. IN RE ALPINE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Certiorari Granted

No. 09–350. LOS ANGELES COUNTY, CALIFORNIA *v.* HUMPHRIES ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition.

No. 09–587. HARRINGTON, WARDEN *v.* RICHTER. C. A. 9th Cir. Certiorari granted. In addition to the question presented, the parties are directed to brief and argue the following question: "Does Antiterrorism and Effective Death Penalty Act of 1996 deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?" Reported below: 578 F. 3d 944.

Certiorari Denied

No. 08–1520. CITY OF DALLAS, TEXAS *v.* GOULD, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.; and

No. 08–1524. TEXAS WATER DEVELOPMENT BOARD *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 3d 712.

No. 08–10932. BATEKREZE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 09–287. WESTON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 67 M. J. 390.

No. 09–342. ROSE ACRE FARMS, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 559 F. 3d 1260.

No. 09–357. SMITH *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 324.

No. 09–394. SAUDI AMERICAN BANK *v.* SWE&C LIQUIDATING TRUST, SUCCESSOR IN INTEREST TO STONE & WEBSTER ENGINEERING CORP. C. A. 3d Cir. Certiorari denied. Reported below: 335 Fed. Appx. 202.

No. 09–420. LEWIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEWIS, DECEASED *v.* CITY OF WEST PALM BEACH, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 561 F. 3d 1288.

No. 09–426. EKLUND *v.* WHEATLAND COUNTY, MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 351 Mont. 370, 212 P. 3d 297.

No. 09–435. NEW WEST, L. P., ET AL. *v.* CITY OF JOLIET, ILLINOIS, ET AL.; and

No. 09–445. DAVIS ET AL. *v.* CITY OF JOLIET, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 3d 830.

No. 09–491. CITY OF LONG BEACH, CALIFORNIA *v.* LONG BEACH AREA PEACE NETWORK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 574 F. 3d 1011.

No. 09–532. FRY *v.* EXELON CORPORATION CASH BALANCE PENSION PLAN. C. A. 7th Cir. Certiorari denied. Reported below: 571 F. 3d 644.

No. 09–533. CROPLIFE AMERICA ET AL. *v.* BAYKEEPER ET AL.; and

No. 09–547. AMERICAN FARM BUREAU FEDERATION ET AL. *v.* BAYKEEPER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 553 F. 3d 927.

No. 09–542. KAY ET AL. *v.* GONZALEZ. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 3d 600.

No. 09–564. CITY COUNCIL OF THE CITY OF ALBUQUERQUE *v.* ALBUQUERQUE COMMONS PARTNERSHIP. Ct. App. N. M. Certiorari denied. Reported below: 146 N. M. 568, 212 P. 3d 1122.

No. 09–569. BYLIN ET UX. *v.* BILLINGS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 3d 1224.

No. 09–621. Minneapolis Taxi Owners Coalition, Inc. *v.* City of Minneapolis, Minnesota, et al. C. A. 8th Cir. Certiorari denied. Reported below: 572 F. 3d 502.

No. 09–623. Moody et al. *v.* Allegheny Valley Land Trust et al. Sup. Ct. Pa. Certiorari denied. Reported below: 601 Pa. 655, 976 A. 2d 484.

No. 09–630. Benson et al. *v.* St. Joseph Regional Health Center et al. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 3d 542.

No. 09–632. Dominguez *v.* Price Okamoto Himeno & Lum. Int. Ct. App. Haw. Certiorari denied. Reported below: 120 Haw. App. 384, 205 P. 3d 649.

No. 09–637. School Board of Beauregard Parish *v.* Honeywell International, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 973.

No. 09–639. Eilender *v.* Michigan Department of Human Services. Ct. App. Mich. Certiorari denied.

No. 09–641. Vining *v.* Applied Power Technology et al. C. A. 3d Cir. Certiorari denied. Reported below: 317 Fed. Appx. 196.

No. 09–642. Young et ux., Individually and as Next Friends of Young *v.* Memorial Hermann Hospital System, dba Memorial Hermann Hospital, et al. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 3d 233.

No. 09–643. Brown *v.* Marriott International, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 27.

No. 09–657. Birmingham Board of Education *v.* McCord-Baugh. Sup. Ct. Ala. Certiorari denied. Reported below: 65 So. 3d 493.

No. 09–659. Speights *v.* City of Oceanside, California, et al. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–660. Nair *v.* Superior Court of California, Placer County, et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–661. KASHARIAN *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–662. CHHUN ENG *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 297.

No. 09–670. LOCAL #46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 3d 81.

No. 09–673. SEA HAWK SEAFOODS, INC., ET AL. *v.* LOCKE, SECRETARY OF COMMERCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 3d 757.

No. 09–675. BUTTE COUNTY, CALIFORNIA, ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, BUTTE COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 175 Cal. App. 4th 729, 96 Cal. Rptr. 3d 421.

No. 09–677. KRISTINA S. *v.* CHARISMA R. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 175 Cal. App. 4th 361, 96 Cal. Rptr. 3d 26.

No. 09–679. PARKERSON *v.* MCMURTREY ET AL. Ct. App. Ark. Certiorari denied.

No. 09–680. ARKANSAS *v.* OSBURN. Sup. Ct. Ark. Certiorari denied. Reported below: 2009 Ark. 390, 326 S. W. 3d 771.

No. 09–682. BOSACK ET AL. *v.* SOWARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 3d 1096.

No. 09–688. POPE *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–689. HUNSBERGER ET UX. *v.* WOOD, DEPUTY SHERIFF, BOTETOURT COUNTY, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 570 F. 3d 546.

No. 09–690. CHAUDHARY *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 340 Fed. Appx. 736.

No. 09–693. KYLE ET AL. *v.* LEBOVITS ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 58 App. Div. 3d 521, 870 N. Y. S. 2d 360.

No. 09–695. U. S. Motors et al. *v.* General Motors Europe. C. A. 6th Cir. Certiorari denied. Reported below: 551 F. 3d 420.

No. 09–696. John J. Kane Regional Centers-Glen Hazel *v.* Grammer, Administratrix of the Estate of Daniels, Deceased. C. A. 3d Cir. Certiorari denied. Reported below: 570 F. 3d 520.

No. 09–698. McKinney *v.* Board of Medical Examiners of Colorado. Ct. App. Colo. Certiorari denied.

No. 09–701. Allrite Sheetmetal, Inc. *v.* Bank of Commerce et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1130, 982 N. E. 2d 283.

No. 09–702. Acushnet Co. *v.* Callaway Golf Co. C. A. Fed. Cir. Certiorari denied. Reported below: 576 F. 3d 1331.

No. 09–706. Tusini *v.* Potter, Postmaster General, et al. C. A. 1st Cir. Certiorari denied.

No. 09–710. Hall *v.* Tennison. Super. Ct. Cobb County, Ga. Certiorari denied.

No. 09–716. Teruya Brothers, Ltd. & Subsidiaries *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 3d 1038.

No. 09–718. Mattison *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 09–719. Konar *v.* Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 327 Fed. Appx. 638.

No. 09–730. Holtzer *v.* Davis, Warden. C. A. 6th Cir. Certiorari denied.

No. 09–731. Mount *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 569.

No. 09–732. Pelkey *v.* Supreme Court of Arizona. Sup. Ct. Ariz. Certiorari denied.

No. 09–734. Ames *v.* Washington State Health Department Medical Quality Health Assurance Commission.

Sup. Ct. Wash. Certiorari denied. Reported below: 166 Wash. 2d 255, 208 P. 3d 549.

No. 09–743. JONES ET AL. *v.* BRYANT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 575 F. 3d 1281.

No. 09–748. RADMORE *v.* AEGIS COMMUNICATIONS GROUP, INC. C. A. 3d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 835.

No. 09–752. PENNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 576 F. 3d 297.

No. 09–757. ASHBY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 68 M. J. 108.

No. 09–762. CLAVILLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 910.

No. 09–764. MOWER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 515.

No. 09–773. LERMAN ET AL. *v.* CITY OF FORT LAUDERDALE, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 500.

No. 09–780. PEDELEOSE *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 343 Fed. Appx. 605.

No. 09–789. UNISYS CORP. *v.* ADAIR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 579 F. 3d 220.

No. 09–801. WESCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 3d 347.

No. 09–802. NITSCHKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 173.

No. 09–811. HYATT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 823.

No. 09–832. THOMAS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 09–844. WOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 910.

No. 09–5887. SCOTT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 8 So. 3d 855.

No. 09–6097. ROLLINS *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–6103. AUGUSTIN *v.* CHASE HOME FINANCE LLC. C. A. 1st Cir. Certiorari denied.

No. 09–6255. TIEWLOH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 319 Fed. Appx. 178.

No. 09–6384. MARTE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 12 N. Y. 3d 583, 912 N. E. 2d 37.

No. 09–6492. JACKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 162.

No. 09–6598. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 3d 827.

No. 09–6627. CONROY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 3d 174.

No. 09–6664. RESTREPO-MEJIA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 323 Fed. Appx. 338.

No. 09–6732. ROGERS *v.* KBR TECHNICAL SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 967.

No. 09–6832. JONGEWAARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 3d 336.

No. 09–6915. FALLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 323 Fed. Appx. 836.

No. 09–6928. ANDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 4th 92, 211 P. 3d 584.

No. 09–7019. GRANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 3d 385.

No. 09–7066. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–7257. IRICK *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 565 F. 3d 315.

No. 09–7370. AGUIRE-JARQUIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 9 So. 3d 593.

No. 09–7446. WOODS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 09–7450. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 30.

No. 09–7486. SIGALA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 338 Fed. Appx. 388.

No. 09–7547. AHMED *v.* GATES, SECRETARY OF DEFENSE. C. A. D. C. Cir. Certiorari denied.

No. 09–7564. EGGLESTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–7780. KENNEDY *v.* LOCKETT ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7789. YARBOROUGH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7791. TANI *v.* CEDAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 846.

No. 09–7794. RAMEY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 21 So. 3d 80.

No. 09–7795. SELF *v.* DEVON ENERGY PRODUCTION CO., LP. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 09–7796. SMITH *v.* DELAWARE ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 981 A. 2d 1173.

No. 09–7798. RUSSELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–7801. RATTIS *v.* JACKSON, SUPERINTENDENT, BROWN CREEK CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 872.

No. 09–7802. HANSEN *v.* INDUSTRIAL CLAIM APPEALS OFFICE OF COLORADO ET AL. Ct. App. Colo. Certiorari denied.

No. 09–7809. MOORE *v.* CURRIE MOTORS OF FOREST PARK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 387 Ill. App. 3d 1175, 981 N. E. 2d 535.

No. 09–7813. PHILLIPS *v.* MIKE MURDOCK EVANGELISTIC ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 775.

No. 09–7815. PALMER *v.* CITY OF TALLAHASSEE, FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 18 So. 3d 528.

No. 09–7817. LEWIS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 420.

No. 09–7820. JONES *v.* MILLIGAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–7821. LEAKE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 767 N. W. 2d 5.

No. 09–7822. JORDAN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 13 So. 3d 1059.

No. 09–7823. TARSHIK *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 327 Fed. Appx. 56.

No. 09–7824. OZENNE *v.* CHASE MANHATTAN BANK ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–7835. JAMES *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–7837. BECK *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–7840. WASHINGTON *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL FACILITY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–7842. WILLIAMS *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–7844. LEE *v.* WOUGHTER, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 327 Fed. Appx. 253.

No. 09–7856. ANDERSON ET UX. *v.* INDIAN SPRINGS LAND INVESTMENT, LLC, ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 147 Idaho 737, 215 P. 3d 457.

No. 09–7858. POWERS *v.* MESABA AVIATION, INC., DBA MESABA AIRLINES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 344.

No. 09–7860. ANDRUS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7862. SORLIEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–7863. WARREN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7867. GARRAWAY *v.* FISCHER, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 324 Fed. Appx. 98.

No. 09–7874. GOFF *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 14 So. 3d 625.

No. 09–7878. DENNIS *v.* KELLER MEYER BUILDING SERVICES. C. A. 11th Cir. Certiorari denied.

No. 09–7883. BLACKSHEAR *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7887. MCDUFFIE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 15 So. 3d 583.

No. 09–7890. ROCHA *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 09–7892. KINNARD *v.* METROPOLITAN POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–7894. LIGGON-REDDING *v.* WILLINGBORO TOWNSHIP, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 351 Fed. Appx. 674.

No. 09–7896. WEATHERSPOON *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–7897. SCHOOR *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied. Reported below: 279 S. W. 3d 844.

No. 09–7900. MCNEELY *v.* COUNTY OF SACRAMENTO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 317.

No. 09–7902. D'ARY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–7905. COOPER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7915. MORALES *v.* BOATWRIGHT, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 3d 653.

No. 09–7916. A. H. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 974 A. 2d 1182.

No. 09–7917. C. G. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 974 A. 2d 1180.

No. 09–7918. LEWIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 4th 1255, 210 P. 3d 1119.

No. 09–7920. BOWMAN *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 707.

No. 09–7922. PALMER *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–7924. K. E. H. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 974 A. 2d 1182.

No. 09–7928. HENSLEY *v.* COLVILLE SCHOOL DISTRICT. Ct. App. Wash. Certiorari denied. Reported below: 148 Wash. App. 1032.

No. 09–7931. PYE *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 09–7933. JAMES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 174 Cal. App. 4th 662, 94 Cal. Rptr. 3d 576.

No. 09–7934. RODRIGUEZ LINAREZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 155 Cal. App. 4th 1393, 66 Cal. Rptr. 3d 762.

No. 09–7935. JENNINGS *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–7937. MAYER *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 562.

No. 09–7938. MANNING *v.* PALMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–7945. WIMBERLY *v.* ROYAL ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7947. BAKARICH *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–7951. HENRY *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied. Reported below: 122 Ohio St. 3d 1481, 910 N. E. 2d 479.

No. 09–7953. CASTILLO VILLASANA *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 09–7955. MUHAMMAD *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–7956. BRADFORD *v.* SUBIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–7966. JAMES *v.* RICHARDSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 982.

No. 09–7967. JONES *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 998 So. 2d 173.

No. 09–7968. KING *v.* MAYBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 802.

No. 09–7969. MCFARLAND *v.* CHANDLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–7970. MURPHY *v.* HAGAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 854.

No. 09–7977. SPEER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 221 Ariz. 449, 212 P. 3d 787.

No. 09–7978. BLAXTON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–7979. BRANTLEY *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 384.

No. 09–7986. GRIFFIN *v.* TOWN OF WHITEFIELD, NEW HAMPSHIRE, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 341 Fed. Appx. 655.

No. 09–7991. HY THI NGUYEN *v.* CHRISTIANSON. Sup. Ct. Va. Certiorari denied.

No. 09–7993. LANCE *v.* MORROW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–7995. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 387 Ill. App. 3d 1178, 981 N. E. 2d 537.

No. 09–7998. GARZA TAMEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 897.

No. 09–8000. THOMPSON *v.* GONZALEZ, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8001. TAYLOR ET UX. *v.* JACOBS ET AL. Ct. App. Ind. Certiorari denied.

No. 09–8005. RIDENER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 320 Wis. 2d 484, 769 N. W. 2d 878.

No. 09–8006. SANTOS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 454 Mass. 245, 909 N. E. 2d 1.

No. 09–8012. BATES *v.* DAVIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 983.

No. 09–8015. AGUADO-GUEL *v.* LARKIN ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–8023. BAEZ *v.* JAMES, JUDGE, SUPERIOR COURT OF GEORGIA, DOUGLAS COUNTY. Sup. Ct. Ga. Certiorari denied.

No. 09–8024. CAILLOT *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 454 Mass. 245, 909 N. E. 2d 1.

No. 09–8034. GRIGGS *v.* CULLIVER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–8037. FENTON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8039. GALVAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 09–8041. GONZALES *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8042. HOELSCHER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8043. SMITH, AKA WESLEY-SMITH *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8044. SORROW *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8046. HETT *v.* WADE ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8049. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 993 So. 2d 1119.

No. 09–8050. DEDRICK *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 09–8053. BOWERSOCK *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8061. SODERSTROM *v.* NICHOLAS ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8065. DAVIS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8068. GARY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 5 So. 3d 713.

No. 09–8069. GREEN *v.* SULLIVAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8072. DUNG NGOC HUYNH *v.* BAZE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 397.

No. 09–8078. FELGAR *v.* BURKETT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 328 Fed. Appx. 107.

No. 09–8079. GRANT *v.* WHEELER, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 09–8080. MCDOWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8089. KLAT *v.* MITCHELL REPAIR INFORMATION CO., LLC, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8091. KOCH *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 372.

No. 09–8093. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8095. VENTRY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2009 Ark. 300, 318 S. W. 3d 576.

No. 09–8099. WOOLRIDGE *v.* ANWAR. C. A. 9th Cir. Certiorari denied.

No. 09–8100. UKAWABUTU *v.* RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8103. LEE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–8104. LASKEY *v.* PLATT ELECTRIC SUPPLY, INC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–8107. PATTERSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–8108. PARMER *v.* IDAHO CORRECTIONAL CORPORATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8110. SHAW *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8114. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1140, 982 N. E. 2d 288.

No. 09–8119. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 624.

No. 09–8122. PARMELEE *v.* MCCOLLUM, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8123. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8133. HANNAH *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 23 So. 3d 125.

No. 09–8134. GRAY *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 09–8137. LEGGETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8144. FIGUEROA *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8157. COLEMAN *v.* BAZZLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 794.

No. 09–8165. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8166. GRAY *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–8175. SMITH *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 09–8187. RHETT *v.* POWER. C. A. 3d Cir. Certiorari denied.

No. 09–8191. HESTER *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 09–8197. TILLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 387 Ill. App. 3d 1182, 981 N. E. 2d 538.

No. 09–8199. BOLLS *v.* STREET, SECRETARY, VIRGINIA BOARD OF BAR EXAMINERS. Sup. Ct. Va. Certiorari denied.

No. 09–8208. PADGETT *v.* BRAMBLETT, PROTHONOTARY, SUPERIOR COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 09–8212. REESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 329 Fed. Appx. 324.

No. 09–8218. PERDUE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 572 F. 3d 288.

No. 09–8222. GENEVIER *v.* DEMORE. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 152.

No. 09–8228. MONTAGUE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 278 Va. 532, 684 S. E. 2d 583.

No. 09–8248. NESTOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 574 F. 3d 159.

No. 09–8251. GILLESPIE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 757.

No. 09–8255. DRUMMOND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8258. RICHARDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 3d 824.

No. 09–8260. SOTOLONGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 482.

No. 09–8265. COOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 433.

No. 09–8269. SHMELEV *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 09–8272. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 461.

No. 09–8273. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 936.

No. 09–8274. SELLERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 814.

No. 09–8279. BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8280. BROWN *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8282. ACKER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8286. BLIGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8287. ARGUETA-FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8288. DALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–8289. DE LEON-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 3d 124.

No. 09–8290. ELLIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 891.

No. 09–8292. CREDELL *v.* SOUTH CAROLINA. Ct. Common Pleas of Orangeburg County, S. C. Certiorari denied.

No. 09–8295. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 435.

No. 09–8298. POPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8299. KRETSER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 987.

No. 09–8300. MCCRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 498.

No. 09–8302. WEST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 494.

No. 09–8309. VEGA-FIGUEROA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8310. WREN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8313. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 465.

No. 09–8314. RUFFIN *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8315. SHAFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 3d 267.

No. 09–8319. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 3d 787.

No. 09–8322. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8323. GAINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 369.

No. 09–8325. BELL *v.* SAMUELS ET AL. C. A. 10th Cir. Certiorari denied.

No. 09–8328. DAVIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 974 A. 2d 1179.

No. 09–8332. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 576.

No. 09–8336. RODRIGUEZ-PARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 3d 227.

No. 09–8337. SALAZAR-BASALDUA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 985.

No. 09–8339. MANN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 877.

No. 09–8340. LADOUCER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 3d 628.

No. 09–8341. MACK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 344 Fed. Appx. 623.

No. 09–8343. JARAMILLO-AVELINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 978.

No. 09–8344. OPARAJI *v.* NEW YORK MORTGAGE CO., LLC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 3d 429, 866 N. Y. S. 2d 69.

No. 09–8346. ORLANDO-MENA, AKA MENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 347 Fed. Appx. 690.

No. 09–8347. MEDINA-VILLA, AKA MEDINA-MAELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 567 F. 3d 507.

No. 09–8348. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 287.

No. 09–8359. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 938.

No. 09–8365. VERDUGO-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 287.

No. 09–8369. JUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8370. LEONARD *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 926, 911 N. E. 2d 403.

No. 09–8371. LEDEZMA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–8372. VENTRUELLA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 3d 1013.

No. 09–8374. SAAVEDRA-VELAZQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 3d 1103.

No. 09–8376. PERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 494.

No. 09–8380. BAKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 145.

No. 09–8382. CABRERA-ALEJANDRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 816.

No. 09–8383. MOHSEN *v.* UNITED STATES TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 321 Fed. Appx. 607.

No. 09–8384. PINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 584 F. 3d 972.

No. 09–8386. PENNANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8387. MILLER *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 325 Fed. Appx. 252.

No. 09–8392. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 377.

No. 09–8395. JAMES *v.* STANSBERRY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 865.

No. 09–8397. LATHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–8398. RIVERO LAZO *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 09–8399. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 555.

No. 09–8401. ATCHISON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 09–8405. PUCHALSKI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 378 Ill. App. 3d 1123, 955 N. E. 2d 185.

No. 09–8406. PATTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 532.

No. 09–8407. MILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 384.

No. 09–8408. PRICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 796.

No. 09–8409. JENKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 3d 745.

No. 09–8411. BANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 900.

No. 09–8413. ROGEL-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 892.

No. 09–8425. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 569 F. 3d 341.

No. 09–8431. PASSARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 3d 207.

No. 09–8433. BANKS *v.* OUTLAW, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–8435. VENEGAS-ZAMORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 395.

No. 09–8436. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 910.

No. 09–8438. VASQUEZ-ROSALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 3d 865.

No. 09–8439. PROCTOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 502.

No. 09–8440. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 895.

No. 09–8446. DAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 182.

No. 09–8447. CARVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 449.

No. 09–8449. MCCOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 582.

No. 09–8450. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8452. POWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8456. BEIRUTI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8457. DELVILLAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8458. ELIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–8459. DECKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 3d 528.

No. 09–8460. COOPER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 343 Fed. Appx. 830.

No. 09–8467. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 182.

No. 09–8468. ORDUNO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 144.

No. 09–8469. STOTTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 356.

No. 09–8471. SLADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 948.

No. 09–8477. QIAN CHEN *v.* MARTINEZ, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 564.

No. 09–8480. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 3d 1081.

No. 09–8483. BYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 840.

No. 09–8484. CLEAVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 728.

No. 09–8485. DERROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 962.

No. 09–8490. HARRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 F. 3d 1155.

No. 09–8491. FLORES-MERAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 961.

No. 09–8492. FAGAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 3d 10.

No. 09–8494. FULBRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 949.

No. 09–8495. HERNANDEZ-ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 277.

No. 09–8498. REYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–8499. FIGUEROA-TREJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 221.

No. 09–8500. GARCIA-ALCANTAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 277.

No. 09–8501. GARCIA-APARICIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 282.

No. 09–8503. TODD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–8505. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 825.

No. 09–8508. CHANEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 584 F. 3d 20.

No. 09–8509. GARCIA-GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 354 Fed. Appx. 434.

No. 09–8516. LONDONO-CARDONA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8518. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 739.

No. 09–8519. MARTINEZ-BLANCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 339.

No. 09–8520. AUSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 919.

No. 09–8523. VILLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 376.

No. 09–8524. MYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 584 F. 3d 1349.

No. 09–8531. TINDAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 357 Fed. Appx. 436.

No. 09–8532. STOVALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 3d 919.

No. 09–8534. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–8535. WINTERS *v.* UNITED STATES PAROLE COMMISSIONER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 320 Fed. Appx. 697.

No. 09–8537. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 873.

No. 09–8538. RODRIGUEZ *v.* UNITED STATES; and
No. 09–8612. GARI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 572 F. 3d 1352.

No. 09–8539. PERTIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 569.

No. 09–8540. DIAZ-GUTIERREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 774.

No. 09–8542. ARCHULETA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 380.

No. 09–8544. BERGARA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 150.

No. 09–8545. ALEXANDER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 3d 465.

No. 09–8547. BOCHICCHIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8549. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 335.

No. 09–8553. PALADINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8554. YODER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 123.

No. 09–8556. KIM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 586.

No. 09–8559. DALLUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–8562. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 276.

No. 09–8565. DRAKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8611. GARCIA-BERCOVICH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 582 F. 3d 1234.

No. 09–8614. HAMPTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 351 Fed. Appx. 723.

No. 09–8615. HAMMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 888.

No. 09–8617. GITARTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 935.

No. 09–8618. FRESHOUR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 849.

No. 09–8620. GOODWIN-BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 3d 1117.

No. 09–8621. GIESWEIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 293.

No. 09–8627. ZAMORA-LAINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 249.

No. 09–8629. HUI CHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 520.

No. 09–8631. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 3d 246.

No. 09–8633. EVANS *v.* RIVERA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 635.

No. 09–8635. PHILLIPS, AKA AARON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 3d 218.

No. 09–8636. MEDINA-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 271.

No. 09–8639. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 551.

No. 09–8647. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 306.

No. 09–8649. WIMBLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 54.

No. 09–8652. RICHARDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 38.

No. 09–8654. RICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 797.

No. 09–8655. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 587.

No. 09–8658. SALEAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 3d 1059.

No. 09–8661. ALEXANDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 941.

No. 09–8666. HUNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 920.

No. 09–8668. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 242.

No. 09–8670. GOPIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 495.

No. 09–8672. ACIERNO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 3d 694.

No. 09–8684. TORRES-MENCHACA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 880.

No. 09–8688. GARCIA HOLGUIN, AKA GARCIA OLGUIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 288.

No. 09–375. AMATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 306 Fed. Appx. 630.

No. 09–517. PACIFIC INVESTMENT MANAGEMENT CO. LLC ET AL. *v.* HERSHEY ET AL. C. A. 7th Cir. Motion of DRI-The Voice of the Defense Bar for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 571 F. 3d 672.

No. 09–570. DELAWARE *v.* COOKE. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 977 A. 2d 803.

No. 09–652. FRIERSON-HARRIS, AKA HARRIS *v.* HOUGH ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 328 Fed. Appx. 753.

No. 09–726. AMES DEPARTMENT STORES, INC., ET AL. *v.* ASM CAPITAL, L. P. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 582 F. 3d 422.

No. 09–6937. LAMAY *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTO-

MAYOR took no part in the consideration or decision of this petition. Reported below: 562 F. 3d 503.

No. 09–7800. RIZZO *v.* ROCK, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 09–7853. WENDELL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–7990. FORTE *v.* ROCK, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 354 Fed. Appx. 567.

No. 09–8124. PEEK *v.* CUMMINGS, ADMINISTRATIVE LAW JUDGE, NEW YORK STATE DEPARTMENT OF PAROLE, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–8294. AGOSTINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–8335. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–8476. KARRON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 348 Fed. Appx. 632.

No. 09–8482. PEREZ ALONSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 583 F. 3d 152.

Rehearing Denied

No. 08–1472. USA MOBILITY WIRELESS, INC. *v.* QUON ET AL., 558 U. S. 1091;

No. 08–10404. FULTZ *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 558 U. S. 838;

No. 08–10506. GARRETT *v.* MISSISSIPPI, 558 U. S. 842;

No. 09–325. ARONOV *v.* NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL., 558 U. S. 1147;

No. 09–405. UNITED STATES EX REL. DARIAN *v.* ACCENT BUILDERS, INC., ET AL., 558 U. S. 1076;

No. 09–406. UNITED STATES EX REL. DARIAN *v.* PASTERNAK ET AL., 558 U. S. 1077;

No. 09–5027. MCNEILL *v.* STAMPER ET AL., 558 U. S. 1051;

No. 09–5694. BOLDEN *v.* UNITED STATES, 558 U. S. 1077;

No. 09–5728. HOLLIS *v.* UNITED STATES, 558 U. S. 1051;

No. 09–5973. TORAIN *v.* AMERITECH ADVANCED DATA SERVICES, 558 U. S. 1093;

No. 09–6078. GWANJUN KIM *v.* PROGRESSIVE EXPRESS INSURANCE CO. ET AL., 558 U. S. 1078;

No. 09–6127. HAWTHORNE *v.* CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., 558 U. S. 995;

No. 09–6136. NESBITT *v.* CIRCUIT COURT OF ILLINOIS, COOK COUNTY, 558 U. S. 974;

No. 09–6203. MEREDITH *v.* ERATH ET AL., 558 U. S. 997;

No. 09–6382. ODOM *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 558 U. S. 1027;

No. 09–6453. ROACH *v.* ROCKINGHAM COUNTY BOARD OF EDUCATION ET AL., 558 U. S. 1078;

No. 09–6570. ADAMS *v.* HONDA ENGINEERING NORTH AMERICA, INC., 558 U. S. 1031;

No. 09–6864. LEWIS *v.* BURTT, WARDEN, 558 U. S. 1079;

No. 09–6946. HANSLEY, AKA HANSELY *v.* UNITED STATES, 558 U. S. 1018;

No. 09–6998. MACHADO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 558 U. S. 1096;

No. 09–7173. MONACELLI *v.* TARGET STORES ET AL., 558 U. S. 1120;

No. 09–7174. MONACELLI *v.* ENTERPRISE LEASING CO. ET AL., 558 U. S. 1120;

No. 09–7175. MONACELLI *v.* EDISON STATE COLLEGE ET AL., 558 U. S. 1120;

No. 09–7176. KING *v.* UNITED STATES, 558 U. S. 1058;

No. 09–7372. WELCH *v.* UNITED STATES, 558 U. S. 1082;

No. 09–7425. McGriggs *v.* Mississippi, 558 U. S. 1097; and No. 09–7688. In re Truax, 558 U. S. 1090. Petitions for rehearing denied.

February 23, 2010

Dismissal Under Rule 46

No. 09–685. Beard, Secretary, Pennsylvania Department of Corrections, et al. *v.* Simmons. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 590 F. 3d 223.

February 24, 2010

Dismissal Under Rule 46

No. 09–38. Health Care Service Corp. *v.* Pollitt et al. C. A. 7th Cir. [Certiorari granted, 558 U. S. 945.] Writ of certiorari dismissed under this Court's Rule 46.1.

March 1, 2010

Affirmed on Appeal

No. 09–906. Sibley *v.* Alito, Associate Justice, Supreme Court of the United States, et al. C. A. D. C. Cir. Because of this absence of a quorum, 28 U. S. C. § 1, and since the only qualified Justice is of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." The Chief Justice, Justice Stevens, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, and Justice Alito took no part in the consideration or decision of this petition.

Certiorari Granted—Vacated and Remanded

No. 08–1229. Florida *v.* Rigterink. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Powell*, *ante*, p. 50. Reported below: 2 So. 3d 221.

JUSTICE STEVENS, dissenting.

In my view, the judgment below rested upon an adequate and independent state ground, and the Court therefore lacks jurisdiction over this case. See *Florida* v. *Powell*, *ante*, at 65–71 (STEVENS, J., dissenting). Indeed, the independence of the state-law ground in this case is even clearer than in *Powell* because the Florida Supreme Court expressly acknowledged its obligation "'to give independent legal import to every phrase and clause contained'" in the State Constitution, 2 So. 3d 221, 241 (2009) (quoting *Traylor* v. *State*, 596 So. 2d 957, 962 (Fla. 1992)), and stated that "the federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart," 2 So. 3d, at 241. Because the independence of the state-law ground is "clear from the face of the opinion," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), we do not have power to vacate the judgment of the Florida Supreme Court.

I therefore respectfully dissent.

No. 08–7721. MACHADO ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in her brief for respondent filed August 26, 2009. Reported below: 293 Fed. Appx. 217.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

I dissent from the Court's decision to grant the petition, vacate the judgment, and remand the case. The Court does this in deference to the Government's suggestion that the Court of Appeals ignored petitioners' nonconstitutional claim of ineffective assistance of counsel. The Government does not, however, take the position that the judgment reached by the Court of Appeals was incorrect, and this Court has not independently examined the merits of that judgment. In such circumstances, there are insufficient grounds for vacating the judgment below. See *Nunez* v. *United States*, 554 U. S. 911, 912 (2008) (SCALIA, J., dissenting).

This disposition is especially inappropriate in this case, as petitioners do not appear to have raised—in the Court of Appeals or in their petition for certiorari—the claim that the Government

asserts was ignored by the Court of Appeals. Petitioners argued below that their counsel's poor performance deprived them of their *constitutional* right to the effective assistance of counsel. But they did not explicitly assert a right to effective assistance based on any source of law other than the Constitution. In their petition for certiorari, moreover, petitioners disclaimed any nonconstitutional basis for relief when they argued that, by denying the existence of a constitutional right to the effective assistance of counsel, the Fourth Circuit's decision "allow[s] *no recourse* for a particular alien against dishonest or corrupt immigration practitioners." Pet. for Cert. 11 (emphasis added). This sentence would make no sense if petitioners were advancing both constitutional and nonconstitutional grounds for relief on their claim.

Instead of granting, vacating, and remanding, I would deny the petition for certiorari.

No. 08–9723. MOORE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009).

No. 09–6208. D. G. *v.* LOUISIANA. Ct. App. La., 4th 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 *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009). Reported below: 11 So. 3d 548.

Vacated and Remanded After Certiorari Granted. (See No. 08–1234, *ante*, p. 131.)

Certiorari Dismissed

No. 09–8128. HAFED *v.* STATE OF ISRAEL ET AL. C. A. D. C. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 352 Fed. Appx. 448.

No. 09–8158. DANDAR *v.* KRYSEVIG ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8242. VIVONE *v.* SIMON, CLERK, SUPREME COURT OF MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8259. REDFORD *v.* GWINNETT COUNTY JUDICIAL CIRCUIT ET AL. C. A. 11th 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 350 Fed. Appx. 341.

No. 09–8604. DOERR *v.* WALKER ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 09A389 (09–8568). COOLEY *v.* KELLY ET UX. Sup. Ct. R. I. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 09M71. CRUZATA *v.* ALMAGER, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–2464. IN RE DISCIPLINE OF ARAGON. Manny M. Aragon, of Albuquerque, N. M., 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–2465. IN RE DISCIPLINE OF POPE. Eddie Michael Pope, of Austin, Tex., 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. 09–6338. DILLON *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 558 U. S. 1076.] Motion of petitioner for leave to file volume II of the joint appendix under seal granted.

No. 09–7060. ELINE *v.* LARA ET AL. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1105] denied.

No. 09–7275. JONES *v.* SHAW GROUP ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1109] denied.

No. 09–7307. ZANI *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1106] denied.

No. 09–7384. CLARK *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1106] denied.

No. 09–7550. JONES *v.* LIBERTY BANK & TRUST CO. ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1146] denied.

No. 09–7961. IN RE WAGNER. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1109] denied.

No. 09–8206. MERCER *v.* VIRGINIA. Sup. Ct. Va.;
No. 09–8342. KELLY *v.* DAY ET AL. C. A. 1st. Cir.; and
No. 09–8512. INGALLS *v.* AES CORP. C. A. 7th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 22, 2010, 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. 09–8824. IN RE SWEENEY. Petition for writ of habeas corpus denied.

No. 09–8154. IN RE TAYLOR; and

No. 09–8793. IN RE BELTON. Petitions for writs of mandamus denied.

Certiorari Granted

No. 09–150. MICHIGAN *v.* BRYANT. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 483 Mich. 132, 768 N. W. 2d 65.

Certiorari Denied

No. 08–1458. MISSOURI GAS ENERGY *v.* SCHMIDT, WOODS COUNTY, OKLAHOMA, ASSESSOR. Sup. Ct. Okla. Certiorari denied. Reported below: 234 P. 3d 938.

No. 09–293. OZUNA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 561 F. 3d 728.

No. 09–305. KERNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–347. DUTKA, GUARDIAN OF THE ESTATE OF T. M., A MINOR, ET AL. *v.* AIG LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 3d 210.

No. 09–389. FUSHENG LIU *v.* KONINKLIJKE PHILIPS ELECTRONICS, N. V. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 458.

No. 09–402. MCCANE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 3d 1037.

No. 09–461. WEST *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 550 F. 3d 542.

No. 09–531. HASKELL COUNTY BOARD OF COMMISSIONERS ET AL. *v.* GREEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 3d 784.

No. 09–601. VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC. *v.* ROSE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 388.

No. 09–602. BOYD *v.* GUIDANT SALES CORP. C. A. 5th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 972.

No. 09–606. JAVITCH, BLOCK & RATHBONE, LLP, ET AL. *v.* HARTMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 569 F. 3d 606.

No. 09–608. SINCERELY YOURS, INC., ET AL. *v.* COOPER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 577 F. 3d 479.

No. 09–687. UNC LEAR SERVICES, INC., ET AL. *v.* KINGDOM OF SAUDI ARABIA ET AL.; and

No. 09–845. KINGDOM OF SAUDI ARABIA ET AL. *v.* UNC LEAR SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 3d 210.

No. 09–705. MOLINA *v.* SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–707. JOHNSON *v.* KMART CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 322 Fed. Appx. 851.

No. 09–708. ST. LUKE'S OF THE MOUNTAINS ANGLICAN CHURCH IN LA CRESCENTA ET AL. *v.* EPISCOPAL CHURCH ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied. Reported below: 175 Cal. App. 4th 663, 96 Cal. Rptr. 3d 346.

No. 09–712. FELDERHOF *v.* JENKINS & GILCHRIST, P. C., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 293.

No. 09–713. WOODRING *v.* MICHIGAN. Cir. Ct. Muskegon County, Mich. Certiorari denied.

No. 09–715. SMITH *v.* FRIEDMAN ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 168 Md. App. 767, 777.

No. 09–720. RANSFORD ET AL. *v.* GRIFFIN WHEEL CO., INC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–722. GREEN *v.* CLEARY WATER, SEWER AND FIRE DISTRICT. Sup. Ct. Miss. Certiorari denied. Reported below: 17 So. 3d 559.

No. 09–735. ALEXANDER *v.* SMITH ET AL. Sup. Ct. Va. Certiorari denied.

No. 09–738. PHILIPPS *v.* CITY OF OAKLAND, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 14.

No. 09–739. PENNMONT SECURITIES *v.* FRUCHER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 3d 242.

No. 09–746. BEVERLY ENTERPRISES-ILLINOIS, INC., DBA VIP MANOR *v.* MITCHELL, EXECUTOR OF THE ESTATE OF MITCHELL, DECEASED. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 385 Ill. App. 3d 1151, 970 N. E. 2d 138.

No. 09–747. BEVERLY ENTERPRISES-ILLINOIS, INC., DBA VIP MANOR *v.* BLAZIER, SPECIAL ADMINISTRATOR OF THE ESTATE OF REEDY, DECEASED. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 385 Ill. App. 3d 1151, 970 N. E. 2d 138.

No. 09–749. RATCLIFF *v.* LHR, INC. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 09–754. MIDWEST PIPE INSULATION, INC. *v.* MINNEAPOLIS PIPEFITTERS UNION, LOCAL 539. Sup. Ct. Minn. Certiorari denied. Reported below: 771 N. W. 2d 28.

No. 09–756. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF BOURGEOIS, ET AL. *v.* BOOMTOWN, L. L. C. OF DELAWARE, ET AL. Ct. App. La., 5th Cir. Certiorari denied.

No. 09–759. EXELON CORP. *v.* ILLINOIS DEPARTMENT OF REVENUE ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 234 Ill. 2d 266, 917 N. E. 2d 899.

No. 09–760. ALSOBROOK ET AL. *v.* UPS GROUND FREIGHT, INC. C. A. 6th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 1.

No. 09–761. HOFFART *v.* HERMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 972.

No. 09–765. POLAR EQUIPMENT, INC., DBA COOK INLET PROCESSING, INC., ET AL. *v.* BAKER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 338 Fed. Appx. 708.

No. 09–769. DIAMOND OFFSHORE DRILLING, INC. *v.* LEWIS. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 12 So. 3d 363.

No. 09–777. CITY OF SAN CLEMENTE, CALIFORNIA *v.* KLEIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 F. 3d 1196.

No. 09–782. MAGEE *v.* UNITED STATES, ACTING THROUGH THE FARM SERVICE AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 19.

No. 09–791. LEWIS *v.* BELL ATLANTIC/VERIZON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 321 Fed. Appx. 217.

No. 09–792. REMPFER *v.* HAMBURG, COMMISSIONER, FOOD AND DRUG ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 583 F. 3d 860.

No. 09–794. BEVERLY *v.* FEDERAL ELECTION COMMISSION. C. A. 9th Cir. Certiorari denied.

No. 09–796. NEUMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. Reported below: 176 Cal. App. 4th 571, 97 Cal. Rptr. 3d 715.

No. 09–829. DAVID *v.* MONSANTO CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 334 Fed. Appx. 326.

No. 09–831. MIHELICH *v.* ACTIVE PLUMBING SUPPLY CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 09–833. LEWIS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 535.

No. 09–853. FRIEDLANDER *v.* PORT JEWISH CENTER. C. A. 2d Cir. Certiorari denied. Reported below: 347 Fed. Appx. 654.

No. 09–855. FULSON *v.* MCCLATCHEY, TRUSTEE. C. A. 6th Cir. Certiorari denied.

No. 09–860. PRADIER *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 334 Fed. Appx. 327.

No. 09–867. MORRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 741.

No. 09–869. ANDERSON *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 9th Cir. Certiorari denied.

No. 09–874. WOODWORTH *v.* MABUS, SECRETARY OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 329 Fed. Appx. 281.

No. 09–878. UCCIFERRI *v.* CHANDLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 885.

No. 09–881. RTM MEDIA, L. L. C. *v.* CITY OF HOUSTON, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 3d 220.

No. 09–883. CEASAR *v.* NORD, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 98.

No. 09–891. NUCOR CORP. ET AL. *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 576 F. 3d 149.

No. 09–896. MILLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–898. WADHWA ET AL. *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–899. ASHQAR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 3d 819.

No. 09–902. GRIMM *v.* GRIMM, NKA LAMPP. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 09–905. SQUILLACOTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 174.

No. 09–5220. WHITNEY *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–6742. GOULD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 3d 459.

No. 09–6839. SMITH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–7132. DOE, A JUVENILE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 572 F. 3d 1162.

No. 09–7294. SOLOMON *v.* PIONEER ADULT REHABILITATION CENTER. C. A. 10th Cir. Certiorari denied.

No. 09–7306. ASBURY *v.* CITY OF ROANOKE, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 39.

No. 09–7385. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 3d 422.

No. 09–7414. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–7568. GOODEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 895.

No. 09–7577. PUGA-OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 323 Fed. Appx. 595.

No. 09–7674. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 297 S. W. 3d 260.

No. 09–7777. HARBISON *v.* LITTLE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 3d 531.

No. 09–7784. SKINNER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 3d 214.

No. 09–8052. HOWARD *v.* FLORES, WARDEN. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 14 So. 3d 1007.

No. 09–8129. GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–8132. GRAVES *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 09–8135. FULLER *v.* BURNETT ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–8136. HENDERSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8138. JOHNSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 09–8139. GREER *v.* NELSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–8140. FLORES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8143. HERNANDEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8145. MALPASS *v.* POWELSON. Ct. App. Colo. Certiorari denied.

No. 09–8146. MINTER *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 09–8149. COLE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1136, 982 N. E. 2d 286.

No. 09–8150. DAVIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8152. CALTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8155. WHITE *v.* STATE FARM INSURANCE CO. C. A. 7th Cir. Certiorari denied.

No. 09–8156. WEINBERG *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 18 So. 3d 1042.

No. 09–8164. BREWSTER *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8168. HALE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8169. GLASS *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 325 Fed. Appx. 752.

No. 09–8170. HORTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–8172. SCOTT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 186 Md. App. 739.

No. 09–8173. SMITH *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–8174. SMITH *v.* WORTHY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 12.

No. 09–8176. EZIKE *v.* MITTAL ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8177. CRAIN *v.* TUTOR ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8178. FRYBURGER *v.* CURRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 273.

No. 09–8179. HARRIS *v.* VIRGINIA EMPLOYMENT COMMISSION. Sup. Ct. Va. Certiorari denied.

No. 09–8180. GRINER, AKA HOWARD *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8181. ROOT *v.* CHUA. Ct. App. Wash. Certiorari denied. Reported below: 149 Wash. App. 147, 202 P. 3d 367.

No. 09–8182. NUNEZ *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8184. YOUNKER *v.* OHIO. Ct. App. Ohio, Highland County. Certiorari denied.

No. 09–8189. ROLLEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–8192. HINTON *v.* MCQUILLAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–8193. GRAYSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8194. HAYNES *v.* OREGON ET AL. Ct. App. Ore. Certiorari denied. Reported below: 225 Ore. App. 219, 200 P. 3d 641.

No. 09–8200. BLACKMER *v.* BLAISDELL, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 09–8203. MAXWELL *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 854.

No. 09–8210. SIMPSON *v.* CORRECTIONAL MEDICAL SERVICES ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–8213. THIBEAU *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 09–8221. SEMPLE *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 74 Mass. App. 1124, 909 N. E. 2d 557.

No. 09–8229. WILSON *v.* JACOBS. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 614.

No. 09–8230. WATSON *v.* NEIGHBORS CREDIT UNION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 150.

No. 09–8232. SKIPPER *v.* WORTHINGTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8234. HARRIS *v.* WHINNEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 100.

No. 09–8238. PRICE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 122 Ohio St. 3d 1506, 912 N. E. 2d 109.

No. 09–8239. MCCRAY *v.* HARRIS COUNTY, TEXAS, ET AL. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 09–8240. UPCHURCH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–8241. WEBER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–8244. BURNEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 4th 203, 212 P. 3d 639.

No. 09–8250. REYES *v.* OLIVER. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 329.

No. 09–8263. WALTERS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 20 So. 3d 859.

No. 09–8267. RAGAN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8268. SHELLING *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8270. SMITH *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 949.

No. 09–8271. SALERNO *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 09–8275. LUCAS *v.* UPTON, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 09–8276. ALFRED *v.* FORCHT-WADE CORRECTIONAL CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 58.

No. 09–8277. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1115, 982 N. E. 2d 986.

No. 09–8278. LOPEZ ALBADA *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 09–8283. BAUM *v.* RUSHTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 572 F. 3d 198.

No. 09–8284. ALEJO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8291. CHRISTIAN *v.* DINGLE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 3d 907.

No. 09–8293. ROGERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 4th 1136, 209 P. 3d 977.

No. 09–8296. BINGHAM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–8301. TATE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–8303. WOODSON *v.* RUNDLE-FERNANDEZ, STATE ATTORNEY. Sup. Ct. Fla. Certiorari denied. Reported below: 19 So. 3d 987.

No. 09–8304. TOMPSON *v.* TOWN OF SALEM, NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 09–8305. WOOTEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–8306. THRASHER *v.* UNKNOWN PRISON OFFICIAL. C. A. 8th Cir. Certiorari denied. Reported below: 327 Fed. Appx. 681.

No. 09–8307. TRUSS *v.* THOMAS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8308. MORRIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1139, 982 N. E. 2d 287.

No. 09–8311. TINKHAM *v.* KNIGHT, SUPERINTENDENT, PLAINFIELD CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 09–8312. WILLIAMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2009 Ark. 433, 373 S. W. 3d 237.

No. 09–8316. STAFFORD *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 13 So. 3d 1067.

No. 09–8317. TUCKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 09–8338. JALOWIEC *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8354. DAVIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 869, 904 N. E. 2d 149.

No. 09–8357. LEATH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8362. PAYAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 277 Neb. 663, 765 N. W. 2d 192.

No. 09–8373. SMITH *v.* NAPOLI, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 347 Fed. Appx. 695.

No. 09–8417. BECKFORD *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 09–8418. WATSON *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 19 So. 3d 747.

No. 09–8421. PARNIANI *v.* CARDINAL HEALTH, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 301.

No. 09–8426. JUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8428. ORANGE *v.* ELLIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 69.

No. 09–8432. NIKIFORAKIS *v.* STANEK. Ct. App. Minn. Certiorari denied.

No. 09–8437. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8442. KNOWLES *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8443. LEMON *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 298.

No. 09–8444. CLAYTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 459.

No. 09–8451. WILSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 18 So. 3d 530.

No. 09–8462. YOUNG *v.* CORBETT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8466. JAFFE *v.* BALTIMORE COUNTY LIBRARY BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 6.

No. 09–8478. PITCHFORD *v.* SOUTHLAND GAMING AND RACING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 138.

No. 09–8486. FOXWORTH *v.* ST. AMAND, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT CEDAR JUNCTION. C. A. 1st Cir. Certiorari denied. Reported below: 570 F. 3d 414.

No. 09–8487. HOLLAND *v.* HOLLAND. Ct. App. S. C. Certiorari denied.

No. 09–8488. SCROGGINS *v.* DAVIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 504.

No. 09–8493. GOLDSTON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 194 N. C. App. 373, 671 S. E. 2d 595.

No. 09–8496. HOPKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8504. WILLIAMS *v.* UNIVERSITY OF ALABAMA HOSPITAL AT BURLINGTON. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 397.

No. 09–8510. FRANKLIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1117, 982 N. E. 2d 987.

No. 09–8514. LEE *v.* GANSLER, ATTORNEY GENERAL OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 849.

No. 09–8522. TATUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 963.

No. 09–8541. CHAVIS-TUCKER *v.* HUDSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 125.

No. 09–8543. BLAKELY *v.* QUINN, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied.

No. 09–8552. PETE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8557. KIRK *v.* PHELPS, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 09–8596. WEBB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8602. GLASPER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 234 Ill. 2d 173, 917 N. E. 2d 401.

No. 09–8609. DOROSAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 874.

No. 09–8619. GRANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8622. PEACOCK *v.* COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 09–8624. JENNINGS *v.* SALLIE MAE, INC. C. A. 7th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 719.

No. 09–8641. MAYFIELD *v.* WEST VIRGINIA. Cir. Ct. Ohio County, W. Va. Certiorari denied.

No. 09–8645. JOHNSON *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 354 Fed. Appx. 516.

No. 09–8651. UNDERWOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8656. MANESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 3d 894 and 325 Fed. Appx. 595.

No. 09–8659. YORK *v.* CHAPMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8660. WHEELER *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 746.

No. 09–8675. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 894.

No. 09–8683. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8687. SANDOVAL-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 937.

No. 09–8689. SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 865.

No. 09–8692. HANKERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8693. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8694. FINLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 480.

No. 09–8696. ENGLISH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 F. 3d 1373.

No. 09–8702. LANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 184.

No. 09–8703. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 3d 1053.

No. 09–8704. KAPLAN *v.* MULLIGAN ET AL. App. Ct. Mass. Certiorari denied. Reported below: 74 Mass. App. 1104, 903 N. E. 2d 1144.

No. 09–8705. RUDZAVICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 3d 310.

No. 09–8707. MCKINNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 885.

No. 09–8710. PYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 765.

No. 09–8716. BARFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 348 Fed. Appx. 743.

No. 09–8724. CAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8727. DEITZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 3d 672.

No. 09–8728. Orosco-Ibarra *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 533.

No. 09–8731. Sanchez-Lugo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 911.

No. 09–8732. Serrano-Meza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 717.

No. 09–8738. Prewett *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 639.

No. 09–8740. Bush *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 317.

No. 09–8743. Vega-Cosme *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 09–8748. Mosca *v.* Artus, Superintendent, Clinton Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 09–8749. White *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 584 F. 3d 935.

No. 09–8750. Medina Castaneda *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 678.

No. 09–8753. Jackson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 4.

No. 09–8761. Haque *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 09–8763. Fuentes-Valdiva *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 889.

No. 09–8764. Hayford *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 354 Fed. Appx. 720.

No. 09–8767. Young *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 580 F. 3d 373.

No. 09–8768. Robinson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 77.

No. 09–8774. Peribian-Gonzalez *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 853.

No. 09–8778. McDaniels *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 886.

No. 09–8780. Castillo-Ramirez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 855.

No. 09–8783. Joost *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 09–8785. Jackson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 154.

No. 09–8789. Urbina-Acevedo et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 584 F. 3d 351.

No. 09–8790. Am *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 564 F. 3d 25.

No. 09–8795. Brown *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 754.

No. 09–8797. Sorrell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 44.

No. 09–8801. Quiroz-Mendez, aka Garcia-Moreno *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 853.

No. 09–8803. Fletcher *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 145.

No. 09–8804. Fredrick *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 727.

No. 09–8805. Howard *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 09–8806. Thomas *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 572 F. 3d 945.

No. 09–8807. Waithe *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 09–8808. Welch *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 155.

No. 09–8809. Warren *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 948.

No. 09–8811. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 199.

No. 09–8813. KING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 74.

No. 09–8814. MONGHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 831.

No. 09–8816. JIMENEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 503.

No. 09–8818. VALENCIA-TRUJILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 573 F. 3d 1171.

No. 09–8819. PETERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 278.

No. 09–8820. PUOK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 604.

No. 09–8821. ISHKHANIAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 351 Fed. Appx. 741.

No. 09–8828. CUPP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 252.

No. 09–8836. BERNARD *v.* CHAPMAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 929.

No. 09–8839. VICKERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 458.

No. 09–8840. REYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–8843. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 3d 900.

No. 09–8846. CRAWFORD *v.* FRIMEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 337 Fed. Appx. 211.

No. 09–8849. REVELS *v.* REYNOLDS ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–8851. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 601.

No. 09–8853. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 3d 900.

No. 09–625. LFP PUBLISHING GROUP, LLC, DBA HUSTLER MAGAZINE *v.* TOFFOLONI, ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF BENOIT. C. A. 11th Cir. Motions of The Reporters Committee for Freedom of the Press et al. and First Amendment Lawyers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 625 F. 3d 1201.

No. 09–723. AURELIUS CAPITAL PARTNERS, LP, ET AL. *v.* REPUBLIC OF ARGENTINA ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 584 F. 3d 120.

No. 09–8430. PAYNE *v.* SCARNATI, LIEUTENANT GOVERNOR AND CHAIRPERSON, PENNSYLVANIA BOARD OF PARDONS, ET AL. Sup. Ct. Pa. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 603 Pa. 74, 981 A. 2d 1287.

No. 09–8517. LASKEY *v.* CISCO TECHNOLOGY, INC. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 09–472. SPANN ET VIR *v.* COBB COUNTY SUPERIOR COURT JUDGES ET AL., 558 U. S. 1112;

No. 09–6043. SMITH *v.* UNITED STATES, 558 U. S. 1116;

No. 09–6811. DUMAS *v.* WONG, WARDEN, 558 U. S. 1079;

No. 09–6995. RIGGINS *v.* TEXAS, 558 U. S. 1095;

No. 09–7170. CARMONA *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, 558 U. S. 1096;

No. 09–7258. IN RE NEWMAN, 558 U. S. 1047;

No. 09–7357. SCHRADER *v.* TURNER ET AL., 558 U. S. 1124;

No. 09–7426. DAVIS *v.* CALIFORNIA WESTERN SCHOOL OF LAW ET AL., 558 U. S. 1125; and

No. 09–7523. WATSON *v.* UNITED STATES, 558 U. S. 1126. Petitions for rehearing denied.

MARCH 8, 2010

Certiorari Granted—Vacated and Remanded

No. 08–9538. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 305 Fed. Appx. 552; and

No. 09–5135. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 563 F. 3d 1239. 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. 133.

Certiorari Dismissed

No. 09–8353. JOHNSON *v.* MONACO ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8358. LASKEY *v.* ADOBE SYSTEMS INC. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8917. BATES *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. 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.

Miscellaneous Orders

No. 09M72. PATTERSON *v.* TRAVIS ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09M73. JONES *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 137, Orig. MONTANA *v.* WYOMING ET AL. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Surreplies, if any, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 558 U. S. 809.]

No. 08–1553. KAWASAKI KISEN KAISHA LTD. ET AL. *v.* REGAL-BELOIT CORP. ET AL.; and

No. 08–1554. UNION PACIFIC RAILROAD CO. *v.* REGAL-BELOIT CORP. ET AL. C. A. 9th Cir. [Certiorari granted, 558 U. S. 969.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 09–683. CARMICHAEL, INDIVIDUALLY AND AS GUARDIAN FOR CARMICHAEL *v.* KELLOGG, BROWN & ROOT SERVICE, INC., ET AL. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 09–784. AMARA ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* CIGNA CORP. ET AL.; and No. 09–804. CIGNA CORP. ET AL. *v.* AMARA ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 2d Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions.

No. 09–8355. IN RE MIERZWA;
No. 09–8375. SCHULTZ *v.* HALPIN ET AL. Sup. Ct. Ill.;
No. 09–8701. IN RE SPRINGER; and
No. 09–8909. TEMPLE *v.* WARMER, WARDEN. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 29, 2010, 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. 09–8479. IN RE WARREN. Petition for writ of mandamus denied.

No. 09–8402. IN RE ALPINE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 09–530. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ET AL. *v.* NELSON ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 530 F. 3d 865.

No. 09–751. SNYDER *v.* PHELPS ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 580 F. 3d 206.

No. 09–152. BRUESEWITZ ET AL. *v.* WYETH LLC, FKA WYETH, INC., ET AL. C. A. 3d Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 561 F. 3d 233.

Certiorari Denied

No. 09–263. FERGUSON *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 563 F. 3d 1254.

No. 09–451. SAULSBERRY ET AL. *v.* MYERS. C. A. 10th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 457.

No. 09–495. AMERICAN CHEMISTRY COUNCIL ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 551 F. 3d 1019.

No. 09–504. HAMMER *v.* ASHCROFT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 3d 798.

No. 09–513. PERKINS ET AL. *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 572 F. 3d 868.

No. 09–523. MALLOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 3d 166.

No. 09–543. LISANTI *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 573 F. 3d 1334.

No. 09–626. LOCH ET AL. *v.* EDWARDSVILLE COMMUNITY SCHOOLS DISTRICT NO. 7. C. A. 7th Cir. Certiorari denied. Reported below: 327 Fed. Appx. 647.

No. 09–638. HILL *v.* EMORY UNIVERSITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 390.

No. 09–647. SHIMER ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 572 F. 3d 150.

No. 09–768. STRALEY *v.* UTAH BOARD OF PARDONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 582 F. 3d 1208.

No. 09–770. Boston Teachers Union, Local 66, et al. *v.* Commonwealth Employment Relations Board et al. App. Ct. Mass. Certiorari denied. Reported below: 74 Mass. App. 500, 908 N. E. 2d 772.

No. 09–775. Kentucky *v.* Baker. Sup. Ct. Ky. Certiorari denied. Reported below: 295 S. W. 3d 437.

No. 09–776. Jim O'Neal Distributing, Inc. *v.* One Industries, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 3d 1154.

No. 09–778. Saint-Gobain Corp. *v.* Gemtron Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 572 F. 3d 1371.

No. 09–783. Brinkley *v.* Ozmint, Director, South Carolina Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 256.

No. 09–785. Corey *v.* Melnor, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 583 F. 3d 1249.

No. 09–786. Naythons *v.* Stradley, Ronon, Stevens & Young, LLP, et al. C. A. 3d Cir. Certiorari denied. Reported below: 339 Fed. Appx. 165.

No. 09–793. Janky *v.* Lake County Convention and Visitors Bureau. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 3d 356.

No. 09–795. Monroe *v.* City of Charlottesville, Virginia, et al. C. A. 4th Cir. Certiorari denied. Reported below: 579 F. 3d 380.

No. 09–798. Lal *v.* United States Life Insurance Co. C. A. 6th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 144.

No. 09–824. Smallwood *v.* Haseko (Ewa) Inc. et al. Int. Ct. App. Haw. Certiorari denied.

No. 09–890. Havens *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 330 Fed. Appx. 920.

No. 09–5661. Lehan *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 09–7007. BARNETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 324.

No. 09–7246. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 563.

No. 09–7368. LETOURNEAU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 24.

No. 09–7870. GARDNER *v.* GALETKA, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 3d 862.

No. 09–8207. PALMER *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 92.

No. 09–8329. SHAPIRO *v.* AGNER. Sup. Ct. Va. Certiorari denied.

No. 09–8330. STONE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8331. RITTER *v.* RITTER. Ct. Sp. App. Md. Certiorari denied. Reported below: 165 Md. App. 747, 905 A. 2d 843.

No. 09–8333. BOWMAN-GOONE *v.* GORDON, JUSTICE, APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 09–8334. MARTINEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 4th 399, 213 P. 3d 77.

No. 09–8345. NOBLES *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 439.

No. 09–8349. KELLEY *v.* TEXAS WORKFORCE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–8350. MARTINEZ *v.* UNKNOWN BUS DRIVER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 46.

No. 09–8351. JIRON *v.* SWIFT, JUDGE, DISTRICT COURT OF COLORADO, ALAMOSA COUNTY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 768.

No. 09–8356. LITTLE *v.* MCDONALD ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–8360. JONES *v.* POLLARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 896.

No. 09–8363. MEREDITH *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 174 Cal. App. 4th 1257, 95 Cal. Rptr. 3d 297.

No. 09–8364. PRYOR *v.* SHEETS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8366. WAGENER *v.* KENAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8368. MARTIN *v.* JENKINS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–8377. PATEL *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8378. SHORTZ *v.* CITY OF TUSKEGEE, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 355.

No. 09–8379. ALDRIDGE *v.* NOHE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 969.

No. 09–8381. BRADDEN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8385. MIJAREZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 22 So. 3d 538.

No. 09–8389. SABEDRA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8390. REED *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 23 So. 3d 729.

No. 09–8391. SAMPSON *v.* FRANCE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 384 Ill. App. 3d 1092, 973 N. E. 2d 1090.

No. 09–8393. RANDLE *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–8396. MAY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–8400. BREED *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8403. OWEN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8404. ROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1139, 982 N. E. 2d 287.

No. 09–8410. JOHNSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 89.

No. 09–8412. BAILEY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8414. BIBLE *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 3d 860.

No. 09–8415. BALDIZAN *v.* ALAMEIDA. C. A. 9th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 334.

No. 09–8419. TINSLEY *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8420. YOUNG *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 35.

No. 09–8423. PRENTISS *v.* AULT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 141.

No. 09–8424. MCCARTNEY ET AL. *v.* MCCORMICK ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 7 So. 3d 891.

No. 09–8573. MARTINEZ-ARELLANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 379.

No. 09–8577. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 995.

No. 09–8581. TYLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 200.

No. 09–8587. WIMBLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 54.

No. 09–8592. ALVAREZ PUENTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 76.

No. 09–8594. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 887.

No. 09–8595. CU-YANES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 940.

No. 09–8598. CASS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 684.

No. 09–8601. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 540.

No. 09–8606. BURNETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–8608. CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 874.

No. 09–8630. BROWN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–8662. BRACAMONTE *v.* SULLIVAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8679. DEMPSEY *v.* CARTLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 495.

No. 09–8726. CORBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 935.

No. 09–8735. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 915.

No. 09–8757. GILES *v.* VAN BOENING, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 09–8856. GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8866. HARRIS, AKA EL BEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 3d 512.

No. 09–8867. KENERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 3d 389.

No. 09–8872. GROVES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 559 F. 3d 637.

No. 09–8875. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 528.

No. 09–8876. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 832.

No. 09–8878. PAKAS-CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 144.

No. 09–8880. CORSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 579 F. 3d 804.

No. 09–8881. CASTILLEJA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 148.

No. 09–8889. VILLICANA-IBARRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 658.

No. 09–8890. BAREFOOT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 199.

No. 09–8897. PEREZ CARDENAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 569 F. 3d 1263.

No. 09–8899. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 3d 1121.

No. 09–8912. TIBBS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8916. AGUILERA-SOTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 899.

No. 09–8921. FRANKLIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 09–627. THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* MOORE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 342 Fed. Appx. 65.

No. 09–916. IVEZAJ *v.* UNITED STATES;
No. 09–917. COLOTTI *v.* UNITED STATES;
No. 09–918. RUDAJ *v.* UNITED STATES;
No. 09–919. DEDAJ *v.* UNITED STATES; and
No. 09–8885. NUCULOVIC *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions. Reported below: 568 F. 3d 88 and 336 Fed. Appx. 6.

No. 09–8873. IBIAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 330 Fed. Appx. 295.

No. 09–8877. GERONIMO *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. 09–509. JONES *v.* BURDETTE, 558 U. S. 1113;
No. 09–550. FESSLER ET UX. *v.* KIRK SAUER COMMUNITY DEVELOPMENT OF WILKES-BARRE ET AL., 558 U. S. 1148;
No. 09–667. YIQING FENG *v.* SABIC AMERICAS, INC., *ante*, p. 905;
No. 09–6241. VADDE *v.* GEORGIA, 558 U. S. 1117; and
No. 09–7761. LASKEY *v.* VISION INFOSOFT, 558 U. S. 1155. Petitions for rehearing denied.

MARCH 11, 2010

Dismissal Under Rule 46

No. 09–864. KBR TECHNICAL SERVICES, INC., ET AL. *v.* JONES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 583 F. 3d 228.

March 15, 2010

Dismissal Under Rule 46

No. 09–686. Ryan, Director, Arizona Department of Corrections *v.* Nash. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 581 F. 3d 1048.

Certiorari Denied

No. 09–9456 (09A821). Reynolds *v.* Strickland, Governor of Ohio, et al. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Certiorari denied. Reported below: 598 F. 3d 300.

March 19, 2010

Miscellaneous Orders

No. 08–1191. Morrison et al. *v.* National Australia Bank Ltd. et al. C. A. 2d Cir. [Certiorari granted, 558 U. S. 1047.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Justice Sotomayor took no part in the consideration or decision of this motion.

No. 08–6261. Robertson *v.* United States ex rel. Watson. Ct. App. D. C. [Certiorari granted, 558 U. S. 1090.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and the time is to be divided as follows: 30 minutes for petitioner, 10 minutes for the Solicitor General, and 30 minutes for respondent.

March 22, 2010

Certiorari Granted—Vacated and Remanded

No. 08–1264. Oberoi *v.* United States. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bloate* v. *United States*, *ante*, p. 196. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 547 F. 3d 436.

Certiorari Dismissed

No. 09–8429. Miller *v.* Georgia. Ct. App. Ga. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–8475. ODOM *v.* SMALLS 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: 348 Fed. Appx. 879.

No. 09–8563. BUNDRANT *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. 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.

No. 09–8590. PENK *v.* NICHOLS, PRESIDENT, COLORADO HISTORICAL SOCIETY. Sup. Ct. Colo. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–8634. COGGINS *v.* TALLAPOOSA COUNTY DEPARTMENT OF REVENUE. C. A. 11th 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–8638. PENK *v.* TAUER, MAYOR, AURORA, COLORADO, ET AL. Sup. Ct. Colo. Motion of petitioner for leave to proceed

in forma pauperis denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8690. MILES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–8713. CUESTA *v.* FENTON. Sup. Ct. Wis. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 321 Wis. 2d 50, 775 N. W. 2d 256.

No. 09–8714. CUESTA *v.* WISCONSIN. Ct. App. Wis. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 322 Wis. 2d 123, 779 N. W. 2d 177.

No. 09–8815. MOORE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 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: 351 Fed. Appx. 975.

No. 09–9067. SANTIAGO-LUGO *v.* UNITED STATES. C. A. 1st 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. D–2466. IN RE DISCIPLINE OF RODRIGUEZ. Isidoro Rodriguez, of Annandale, Va., 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–2467. IN RE DISCIPLINE OF SIBLEY. Montgomery Blair Sibley, 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–2468. IN RE DISCIPLINE OF MITRANO. Peter Paul Mitrano, of Merrifield, Va., 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. 09M74. YARCHESKI ET UX. *v.* TOWN OF NAPLES, MAINE. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 09M75. MILLER *v.* CALIFORNIA;
No. 09M76. MILLER *v.* CALIFORNIA;
No. 09M77. MILLER *v.* CALIFORNIA;
No. 09M79. RODABAUGH *v.* VAZQUEZ, WARDEN; and
No. 09M80. KALMAN *v.* FOX ROTHSCHILD, L. L. P., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09M78. BISHOP *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. Motion for leave to proceed *in forma pauperis* with the declaration of indigency under seal denied.

No. 1, Orig. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 2, Orig. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 3, Orig. NEW YORK *v.* ILLINOIS ET AL. Renewed motion of Michigan for preliminary injunction denied. [For earlier order herein, see, *e. g.*, 558 U. S. 1145.]

No. 09–350. LOS ANGELES COUNTY, CALIFORNIA *v.* HUMPHRIES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 935.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 09–367. DOLAN *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 558 U. S. 1104.] Motion of petitioner for leave to proceed *in forma pauperis* and for appointment of counsel granted. Pamela S. Karlan, Esq., of Stanford, Cal., is appointed to serve as counsel for petitioner in this case.

No. 09–7147. MUNIZ *v.* MARSHALL, WARDEN. Sup. Ct. N. M. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1105] denied.

No. 09–7266. PARKER *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1105] denied.

No. 09–7282. KARNOFEL *v.* BECK ET AL. Ct. App. Ohio, Trumbull County. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1106] denied.

No. 09–7461. GHEE *v.* TARGET NATIONAL BANK. Ct. App. Ga. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [558 U. S. 1144] denied.

No. 09–7560. REDZIC *v.* UNITED STATES. C. A. 8th Cir.;
No. 09–8579. JAUREGUI *v.* KUTINA. Ct. App. Cal., 4th App. Dist., Div. 1;
No. 09–8745. THOMAS *v.* HARMON FAMILY TRUST. C. A. 10th Cir.;

No. 09–8972. DALLAL *v.* NEW YORK TIMES CO. ET AL. C. A. 2d Cir.; and

No. 09–9137. CALDWELL *v.* UNITED STATES TAX COURT ET AL. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 12, 2010, 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. 09–8925. ZUCKERMAN *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 12, 2010, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. JUSTICE ALITO took no part in the consideration or decision of this motion.

No. 09–9056. IN RE PRUDHOMME;
No. 09–9096. IN RE WATKINS;
No. 09–9164. IN RE SCOTT;
No. 09–9240. IN RE MAYNARD; and
No. 09–9273. IN RE ALEXANDER. Petitions for writs of habeas corpus denied.

No. 09–8892. IN RE BOMBARDIERE; and
No. 09–9161. IN RE RAINEY. Petitions for writs of mandamus denied.

No. 09–8626. IN RE WOODS; and
No. 09–8715. IN RE DORSEY. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 09–834. KASTEN *v.* SAINT-GOBAIN PERFORMANCE PLASTICS CORP. C. A. 7th Cir. Certiorari granted. Reported below: 570 F. 3d 834.

No. 09–571. CONNICK, DISTRICT ATTORNEY, ET AL. *v.* THOMPSON. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 578 F. 3d 293.

No. 09–658. BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY *v.* MOORE. C. A. 9th Cir. Motion of respondent

for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 574 F. 3d 1092.

No. 09–5801. FLORES-VILLAR *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 536 F. 3d 990.

Certiorari Denied

No. 08–1174. HERSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 3d 743.

No. 09–392. MORAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 573 F. 3d 1132.

No. 09–446. CALABRESE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 572 F. 3d 362.

No. 09–581. KIYEMBA ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 561 F. 3d 509.

No. 09–592. MCCULLEN ET AL. *v.* COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 571 F. 3d 167.

No. 09–640. MOLINA-DE LA VILLA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 389.

No. 09–665. MARTINEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 557 F. 3d 1059.

No. 09–674. ALLIANCE SHIPPERS, INC. *v.* PENOBSCOT FROZEN FOODS, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–729. TOWNES *v.* JARVIS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 3d 543.

No. 09–736. HUDSON ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 575 F. 3d 1332.

No. 09–807. DENEAL *v.* SHAVER. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 09–808. BECK ET AL. *v.* KOPPERS INC., FKA KOPPERS INDUSTRIES INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–809. EAMES ET AL. *v.* NATIONWIDE MUTUAL INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 859.

No. 09–814. GORTHO, LTD. *v.* AUTO-OWNERS INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 3d 543.

No. 09–816. DOE *v.* DUNCAN ET AL. Ct. App. Tenn. Certiorari denied.

No. 09–818. ROMANIUK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1139, 982 N. E. 2d 287.

No. 09–822. CENTRA, INC., ET AL. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 3d 592.

No. 09–823. STINGLEY *v.* DEN-MAR INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 14.

No. 09–825. BURDICK *v.* PRITCHETT & BIRCH, PLLC, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 169.

No. 09–827. DAVEY ET UX. *v.* PRATT ET UX. Ct. App. Wash. Certiorari denied.

No. 09–828. KUHAR *v.* MARC GLASSMAN, INC. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 09–835. WILSON *v.* SAN LUIS OBISPO COUNTY DEMOCRATIC CENTRAL COMMITTEE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 175 Cal. App. 4th 489, 96 Cal. Rptr. 3d 332.

No. 09–836. POLLACK ET AL. *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 3d 736.

No. 09–838. FOTHERGILL ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 3d 248.

No. 09–839. HOOD ET AL. *v.* EDWARD D. JONES & CO., L. P., ET AL. (Reported below: 277 S. W. 3d 498); and HOOD *v.* JONES (277 S. W. 3d 505). Ct. App. Tex., 8th Dist. Certiorari denied.

No. 09–841. HOUSTON INDEPENDENT SCHOOL DISTRICT *v.* V. P., BY NEXT FRIENDS JUAN P. ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 3d 576.

No. 09–842. HUSS ET VIR *v.* GAYDEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 3d 442.

No. 09–843. THANH VONG HOAI ET AL. *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 344 Fed. Appx. 620.

No. 09–847. LOOSE, TRUSTEE OF THE WILLIAM LOOSE FAMILY TRUST *v.* CADKIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 3d 1142.

No. 09–848. WILLIAMS *v.* THORSEN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 388 Ill. App. 3d 1142, 982 N. E. 2d 288.

No. 09–850. WRENCH TRANSPORTATION SYSTEMS, INC., ET AL. *v.* KENNEDY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 340 Fed. Appx. 812.

No. 09–851. BEXAR COUNTY, TEXAS, ET AL. *v.* LYTLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LYTLE, DECEASED. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 3d 404.

No. 09–854. FORTIS INSURANCE CO. *v.* MITCHELL. Sup. Ct. S. C. Certiorari denied. Reported below: 385 S. C. 570, 686 S. E. 2d 176.

No. 09–858. WOODWARD *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 09–863. RUSSO ET AL. *v.* O'NEAL ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. ——, 281 P. 3d 1215.

No. 09–886. STEIN ET UX. *v.* PARADIGM MIRASOL, LLC. C. A. 11th Cir. Certiorari denied. Reported below: 586 F. 3d 849.

No. 09–895. DEANGELIS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 3d 789.

No. 09–897. NARCISO-CABRERA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 09–903. SHREFFLER *v.* LEWIS. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 3d 467.

No. 09–904. SOUTH WEST SAND & GRAVEL, INC. *v.* CENTRAL ARIZONA WATER CONSERVATION DISTRICT. Ct. App. Ariz. Certiorari denied. Reported below: 221 Ariz. 309, 212 P. 3d 1.

No. 09–909. DAVIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 3d 646.

No. 09–921. ELMO GREER & SONS CONSTRUCTION CO., INC. *v.* GOFF ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 297 S. W. 3d 175.

No. 09–926. HARPER *v.* DART, SHERIFF, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 3d 511.

No. 09–927. HINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 585 F. 3d 1328.

No. 09–932. BETZ *v.* NAPOLITANO, SECRETARY OF HOMELAND SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 3d 929.

No. 09–933. MILLER ET AL. *v.* NICHOLS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 586 F. 3d 53.

No. 09–934. PROCTOR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 363 N. C. 656, 686 S. E. 2d 675.

No. 09–936. COUNCIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 726.

No. 09–941. DISRAELI *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 334 Fed. Appx. 334.

No. 09–954. RODRIGUEZ *v.* VIRGINIA EMPLOYMENT COMMISSION. Sup. Ct. Va. Certiorari denied.

No. 09–967. US INFRASTRUCTURE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 576 F. 3d 1195.

No. 09–6682. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 910.

No. 09–6823. THOMAS *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 570 F. 3d 105.

No. 09–6977. LAWRENCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 555 F. 3d 254.

No. 09–7018. GODINEZ-ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 3d 1022.

No. 09–7250. TUCKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 339 Fed. Appx. 150.

No. 09–7252. MAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 339 Fed. Appx. 149.

No. 09–7322. GRUBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 406.

No. 09–7519. ACOSTA-LARIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–7553. CURL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 4th 339, 207 P. 3d 2.

No. 09–7576. SVETE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 565 F. 3d 1363.

No. 09–7631. COLLIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 309.

No. 09–7699. HOFFMAN *v.* HOFFMAN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–7741. PIK *v.* INSTITUTE OF INTERNATIONAL EDUCATION, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–7757. BARTEE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVI-

SION. C. A. 5th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 429.

No. 09–7964. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8066. PHILMORE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 575 F. 3d 1251.

No. 09–8422. MEINHARD *v.* TURLEY, WARDEN. Ct. App. Utah. Certiorari denied.

No. 09–8427. JUDD *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 09–8434. ALEXANDER *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 282 S. W. 3d 143.

No. 09–8441. JACKSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 22 So. 3d 68.

No. 09–8448. MILLEN *v.* UPTON, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 09–8454. BELCHER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 9 So. 3d 665.

No. 09–8463. WHITE ET UX. *v.* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. C. A. 6th Cir. Certiorari denied.

No. 09–8465. KING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–8470. SANCHEZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 972 A. 2d 561.

No. 09–8473. SHAVERS *v.* BERGH, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–8481. BLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 57 So. 3d 212.

No. 09–8489. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–8497. GALINDO *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 278 Neb. 599, 774 N. W. 2d 190.

No. 09–8502. P. S. ET AL. *v.* FRANKLIN COUNTY CHILDREN SERVICES. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 09–8507. FLOYD *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 09–8513. HUNTER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 123 Ohio St. 3d 164, 915 N. E. 2d 292.

No. 09–8525. PRITCHARD *v.* FAYETTE COUNTY ELECTION BUREAU ET AL. Commw. Ct. Pa. Certiorari denied.

No. 09–8526. YOUNG *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 09–8527. MILLER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 19 So. 3d 328.

No. 09–8528. WESBROOK *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 3d 245.

No. 09–8529. WALLS *v.* PHILIPS. C. A. 7th Cir. Certiorari denied.

No. 09–8530. WINSTON *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8533. LAFAVORS *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8546. BOOTHE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 09–8550. WALKER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–8551. PARKER *v.* RANDLE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–8555. THOMAS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8558. MILLER *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8560. MCKINNEY *v.* PALAKOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 348 Fed. Appx. 711.

No. 09–8564. BEEDE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 461.

No. 09–8568. COOLEY *v.* KELLY ET UX. Sup. Ct. R. I. Certiorari denied.

No. 09–8570. DUNSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 770 N. W. 2d 546.

No. 09–8571. BEVERLEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 732.

No. 09–8572. ANAYA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–8574. SAHU *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 321 Fed. Appx. 529.

No. 09–8575. SCOTT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 57 So. 3d 206.

No. 09–8576. ROWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. ——, 281 P. 3d 1215.

No. 09–8578. JOHNSON *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 851.

No. 09–8580. KINCAID *v.* TEXAS (three judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 09–8582. TEAGUE *v.* NORTH CAROLINA DEPARTMENT OF TRANSPORTATION. C. A. 4th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 868.

No. 09–8584. MOLINA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8586. ANAYA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–8588. WALLACE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8593. PARKER *v.* ALBEMARLE COUNTY PUBLIC SCHOOLS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 111.

No. 09–8597. CARLILE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 289 Kan. viii, 217 P. 3d 985.

No. 09–8599. NATION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8600. SUTTON *v.* WARDEN, WEST CARROL DETENTION CENTER. C. A. 11th Cir. Certiorari denied.

No. 09–8605. BATAVITCHENE *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied.

No. 09–8607. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 10 So. 3d 1197.

No. 09–8623. LOPEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8625. PIERCE *v.* ILLINOIS DEPARTMENT OF HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 28.

No. 09–8628. REYNOSO *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8637. O'DANIEL *v.* OHIO. Ct. App. Ohio, Highland County. Certiorari denied.

No. 09–8648. WORLEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 09–8650. YOUNG *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 53.

No. 09–8657. WASHINGTON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied.

No. 09–8663. OQUBAEGZI *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 766.

No. 09–8664. PRINCE *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–8665. NGHIEM *v.* KERESTES, DISTRICT ATTORNEY, COUNTY OF DELAWARE, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8667. GODOWN *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 140.

No. 09–8669. HILL *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 485 Mich. 911, 773 N. W. 2d 257.

No. 09–8676. CAMPBELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 3d 754, 879 N. Y. S. 2d 729.

No. 09–8677. ERVIN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 09–8678. CANIDA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8680. FOSTER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8681. MATTHEWS *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 577 F. 3d 1175.

No. 09–8682. LOTTER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 278 Neb. 466, 771 N. W. 2d 551.

No. 09–8685. BARNES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–8686. RANKER *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–8695. CORYELL *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–8698. CALDERON-LOPEZ *v.* BUDET-RODRIGUEZ ET AL. C. A. 1st Cir. Certiorari denied.

No. 09–8699. DOANE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8711. DAMIANO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–8712. CROCKETT *v.* WOUGHTER, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–8720. SMITH *v.* SIMPSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8736. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–8737. MEHTA *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8756. HERNANDEZ *v.* SCHUETZLE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–8759. HALLMON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 19 So. 3d 413.

No. 09–8765. MARSDEN *v.* MCGRADY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8769. TARKOWSKI *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 352 Fed. Appx. 418.

No. 09–8770. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 359.

No. 09–8775. WESTERN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8782. KNIGHTEN *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1132, 982 N. E. 2d 994.

No. 09–8784. LEFEVRE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 3d 349.

No. 09–8792. WARRINGTON *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–8794. BOSS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 09–8796. RATHBUN *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 704.

No. 09–8800. SAPUTRA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 09–8810. WHITE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 17 So. 3d 1234.

No. 09–8817. JAMES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 09–8831. PRESTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 176 Cal. App. 4th 1109, 98 Cal. Rptr. 3d 340.

No. 09–8832. MOREHEAD *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 09–8834. BEACH *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 7.

No. 09–8835. ALEJO *v.* MALFI, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8838. MCNEILL *v.* RUFFIN. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 828.

No. 09–8841. O'NEAL *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 09–8842. LINDSEY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 19 So. 3d 311.

No. 09–8844. DEVANE *v.* BROWN, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–8850. ROSADO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 3d 351, 863 N. Y. S. 2d 386.

No. 09–8858. SPRINGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 3d 1142.

No. 09–8863. COLEMAN *v.* LATTIMORE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 338 Fed. Appx. 672.

No. 09–8891. BRYANT *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 09–8896. CONTRERAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–8903. MACKENZIE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 09–8905. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 54.

No. 09–8906. MILLAN *v.* SOUTHERN CALIFORNIA EDISON CO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8907. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 885.

No. 09–8910. VARNADO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8913. THOL *v.* PACHOLKE, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 452.

No. 09–8923. BICKETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–8924. CORREA-ALICEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 585 F. 3d 484.

No. 09–8927. TERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8929. WHEELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 92.

No. 09–8931. KING *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 983 A. 2d 1064.

No. 09–8933. SOLORIO-MUNIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 298 Fed. Appx. 627.

No. 09–8934. ROUSSOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 864.

No. 09–8936. BASSIL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 980 A. 2d 433.

No. 09–8940. NOBLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 325 Fed. Appx. 249.

No. 09–8941. NIEMI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 579 F. 3d 123.

No. 09–8944. HOPKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 3d 507.

No. 09–8945. GARCIA-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 288.

No. 09–8946. HOOPER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 389 Ill. App. 3d 1145, 976 N. E. 2d 1209.

No. 09–8950. LIVINGSTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8959. CRUMP *v.* EVANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–8962. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 351 Fed. Appx. 635.

No. 09–8963. WINTERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8964. SCHMIDT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 132.

No. 09–8966. GIVENS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 149 Wash. App. 1041.

No. 09–8969. PISKANIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8970. CERVANTEZ *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 737.

No. 09–8973. LEFTWICH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 299 Ga. App. 392, 682 S. E. 2d 614.

No. 09–8976. MCCRAY *v.* FRANCIS HOWELL SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–8978. MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 921.

No. 09–8979. JAMERSON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8982. CAMPOS-LAGUNAS, AKA CAMPOS-LAGUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 982.

No. 09–8984. SEBRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–8985. ROSE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 3d 695.

No. 09–8989. MCCOY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–8991. JENKINS-WATTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 3d 950.

No. 09–8993. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 807.

No. 09–8994. REBOLLA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 738.

No. 09–8995. SOLIS-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 919.

No. 09–8999. BRUNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 402.

No. 09–9003. OWENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9004. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 332 Fed. Appx. 801.

No. 09–9008. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 3d 197.

No. 09–9010. VALLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 77.

No. 09–9012. MIRANDA-RUIZ, AKA PERALTA-MORALES, AKA TORRES-GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 953.

No. 09–9013. OLIVAS-PORRAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 637.

No. 09–9015. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 592 F. 3d 1088.

No. 09–9017. TORRES-OLIVERAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 583 F. 3d 37.

No. 09–9018. VELAZQUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 339.

No. 09–9019. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 14.

No. 09–9024. LONGORIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 968.

No. 09–9025. NEWMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9027. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 336 Fed. Appx. 188.

No. 09–9030. ESPINOSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9034. McCartney *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 73.

No. 09–9037. Wright *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 3d 199.

No. 09–9038. Smith *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 709.

No. 09–9039. Shank *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 591 F. 3d 491.

No. 09–9043. Pena *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 586 F. 3d 105.

No. 09–9044. Ponce-Ponce, aka Dominguez-Aguilar *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 939.

No. 09–9048. Medrano Betancourt *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 3d 303.

No. 09–9052. Allen et ux. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 983.

No. 09–9057. McElroy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 191.

No. 09–9059. Robinson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 612.

No. 09–9060. Sparks *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 121.

No. 09–9061. Lopez-Pena *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 482.

No. 09–9065. Schaffer *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 3d 414.

No. 09–9070. Davis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 137.

No. 09–9072. Dillard *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 852.

No. 09–9076. Adams *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2009 Ark. 375, 326 S. W. 3d 764.

No. 09–9091. JAMES *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 09–9094. MELTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 479.

No. 09–9097. WORTHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 877.

No. 09–9098. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 983.

No. 09–9099. TULL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 127.

No. 09–9103. HARRISON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 356 Fed. Appx. 423.

No. 09–9104. GRUBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 F. 3d 793.

No. 09–9105. IBARRA-RAYA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 35.

No. 09–9107. HURT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 574 F. 3d 439.

No. 09–9111. FRIAS-CISNEROS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 718.

No. 09–9113. HAYES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 811.

No. 09–9116. HULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 359 Fed. Appx. 287.

No. 09–9120. CARVER *v.* CHAPMAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–9121. CELEDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 278.

No. 09–9123. CALLOWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9130. TORRES-OJEDA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9131. WYATT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 574 F. 3d 455.

No. 09–9133. LEONARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 231.

No. 09–9142. BERRIOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 354 Fed. Appx. 629.

No. 09–9153. ROBERTS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 983 A. 2d 1064.

No. 09–9156. SALLEY *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. C. A. 7th Cir. Certiorari denied.

No. 09–9158. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 837.

No. 09–9159. SCHULZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 268.

No. 09–9160. SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 586 F. 3d 918.

No. 09–9162. ROSBOROUGH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 238.

No. 09–9168. REDMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9171. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 3d 731.

No. 09–9172. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 3d 573.

No. 09–9177. THELISMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 217.

No. 09–9178. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9180. SAVAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9182. SANDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9183. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 901.

No. 09–9185. ALISIC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 778.

No. 09–9188. FLENORY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9189. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 3d 1062.

No. 09–9190. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 368.

No. 09–9198. NAHA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–9199. O'NEIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 859.

No. 09–9200. PEREZ-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 796.

No. 09–9201. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 335 Fed. Appx. 690.

No. 09–9203. LOYA-ROMERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 134.

No. 09–9204. MAKOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 256.

No. 09–9205. LOPEZ-TOVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 906.

No. 09–9212. POWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 942.

No. 09–9214. CAREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 3d 187.

No. 09–9216. COOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 3d 173.

No. 09–9249. SCHLOTZHAUER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 56.

No. 09–9250. ALVARADO-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 212.

No. 09–9251. BRAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 353 Fed. Appx. 446.

No. 09–9252. HOLGUIN DE LA CRUZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 353 Fed. Appx. 780.

No. 09–9256. HERNANDEZ-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 123.

No. 09–9257. HICKS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9259. GARCIA-VELAZCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 356 Fed. Appx. 571.

No. 09–9261. GRISEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 218.

No. 09–9262. FRENCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 177.

No. 09–9269. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 49.

No. 09–9276. BRETON-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 810.

No. 09–419. KENTUCKY *v.* CARDINE ET AL. Sup. Ct. Ky. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 283 S. W. 3d 641.

No. 09–527. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* THOMAS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 570 F. 3d 105.

No. 09–669. DIPLACIDO *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 364 Fed. Appx. 657.

No. 09–671. NURRE *v.* WHITEHEAD, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS THE SUPERINTENDENT OF EVERETT

SCHOOL DISTRICT NO. 2. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 3d 1087.

JUSTICE ALITO, dissenting.

The Ninth Circuit's decision in this case is not easy to square with our free speech jurisprudence. For this reason and because of the decision's important practical implications, I would grant the petition for a writ of certiorari.

I

At the time of the events at issue, petitioner, Kathryn Nurre, was a high school senior and a member of her school's wind ensemble. In keeping with a school tradition, the school's band director told the seniors in the ensemble that they could select a piece from their musical repertoire to be performed during their graduation ceremony. The 2006 graduates, including petitioner, chose Franz Biebl's "Ave Maria,"[1] a piece that they had previously performed and that "they believed showcased their talent and the culmination of their instrumental work." 580 F. 3d 1087, 1091 (CA9 2009). At the prior year's graduation ceremony, the student choir had performed "'Up Above My Head,' a vocal piece which included express references to 'God,' 'heaven,' and 'angels,'" and the school district claimed that this had resulted in "complaints from graduation attendees" and at least one angry letter to the editor of a local newspaper. *Ibid.; id.*, at 1101 (M. Smith, J., dissenting in part and concurring in judgment) (quoting lyrics); see also Brief in Opposition 7, and n. 28. Fearful that the performance of Biebl's "Ave Maria" would cause a similar reaction, even though the performance would not include the lyrics of the

[1] Many composers, including Schubert, Gounod, Verdi, Mozart, Elgar, Saint-Saëns, Rossini, Brahms, Stravinsky, Bruckner, and Rachmaninoff, composed music for the Ave Maria. See 22 The New Grove Dictionary of Music and Musicians 670, 718 (2d ed. 2001) (Schubert); 10 *id.*, at 215, 233 (Gounod); 26 *id.*, at 462 (Verdi); 17 *id.*, at 319 (Mozart); 8 *id.*, at 131 (Elgar); 22 *id.*, at 130 (Saint-Saëns); 21 *id.*, at 763 (Rossini); 4 *id.*, at 208 (Brahms); 24 *id.*, at 560 (Stravinsky); 4 *id.*, at 480 (Bruckner). See also R. Threlfall & G. Norris, A Catalogue of the Compositions of S. Rachmaninoff 119 (1982). Some of these compositions are well known, but Biebl's, which was brought to the United States in 1970 by the Cornell University Glee Club, see M. Slon, Songs from the Hill: A History of the Cornell University Glee Club 174 (1998), is relatively obscure.

piece, school district officials vetoed the ensemble members' choice "because the title and meaning of the piece had religious connotations—and would be easily identified as such by attendees merely by the title alone." 580 F. 3d, at 1091. The associate superintendent sent an e-mail to all the principals in the district instructing them that "musical selections for all graduations within the District should be purely secular in nature."[2] *Ibid.* As a result of the district's decision, the members of the wind ensemble "reluctantly elected to perform the fourth movement of Gustav Holst's 'Second Suite in F for Military Band.'" *Ibid.*

Petitioner then brought this action against the school superintendent in her official and individual capacities, claiming, among other things, that the district's decision had violated her right to freedom of speech. The District Court granted summary judgment for the superintendent, and a divided panel of the Ninth Circuit affirmed. 580 F. 3d 1087. The majority acknowledged that the performance of "an entirely instrumental" musical piece "is speech as contemplated by the First Amendment," and assumed, as the school district had conceded, that the school had created a "'limited public forum'" when it allowed the members of the wind ensemble to choose the piece that they wished to play. *Id.*, at 1093–1094. Nevertheless, the majority held that the

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[2] It is not clear that this e-mail accurately reflected either the district's past or then-current practice. According to the brief in opposition, the district approved the piece that the wind ensemble played at graduation prior to 2006, "On a Hymnsong of Philip Bliss." See Brief in Opposition 8; see also 580 F. 3d, at 1091. This song, which not only includes the term "hymn" in its title, is an arrangement of Philip Bliss' hymn "It is Well with My Soul" that has fervently religious lyrics, including the following:

"Though Satan should buffet, though trials should come,
Let this blest assurance control,
That Christ hath regarded my helpless estate,
And hath shed His own blood for my soul."

Spafford and Bliss, It is Well with My Soul, in Gospel Hymns No. 2, p. 78 (P. Bliss & I. Sankey 1876); D. Holsinger, On a Hymnsong of Philip Bliss (1989), http://trnmusic.com/pdfs/scorepdfs/onahymnsongofphilipbliss.pdf (as visited Mar. 19, 2010, and available in Clerk of Court's case file); see also R. Garofalo, On a Hymnsong of Philip Bliss: A Teaching/Learning Unit 9 (2000). Whatever distinction the district perceived between this piece and Biebl's "Ave Maria" is not revealed by the record.

vetoing of the ensemble members' selection had not violated their free speech rights because "it is reasonable for a school official to prohibit the performance of an obviously religious piece" "when there is a captive audience at a graduation ceremony, which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented." *Id.*, at 1095. Dissenting on the free speech issue, Judge Smith expressed concern that the panel's decision would encourage public school administrators to ban "musical and artistic presentations by their students in school-sponsored limited public fora where those presentations contain any trace of religious inspiration, for fear of criticism by a member of the public, however extreme that person's views may be." *Id.*, at 1099.

II

When a public school administration speaks for itself and takes public responsibility for its speech, it may say what it wishes without violating the First Amendment's guarantee of freedom of speech. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468 (2009). But when a public school purports to allow students to express themselves, it must respect the students' free speech rights. School administrators may not behave like puppeteers who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.

Our cases use the term "limited public forum" to describe a situation in which a public school purports to allow students to express their own views or sentiments. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995); *Widmar* v. *Vincent*, 454 U. S. 263, 272–273 (1981); see also *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–48 (1983). In such a forum, we have held, the State "must not discriminate against speech on the basis of viewpoint." *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106 (2001); see also *Rosenberger*, *supra*, at 829. Our cases also make it perfectly clear that discrimination against religious, as opposed to secular, expression is viewpoint discrimination. *Good News Club*, *supra*, at 107; *Rosenberger*, *supra*, at 830, 831; *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 393–394 (1993). And our cases categorically reject the proposition that speech may be censored simply because some in the audience may find

that speech distasteful. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 814–816 (2000); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 871–872 (1982) (plurality opinion); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 508–509 (1969).

In this case, however, the Court of Appeals held that a public school did not violate the free speech rights of a student when the school, after creating a limited public forum, banned the performance of "an obviously religious piece" because the piece might offend some members of the "captive audience at a graduation ceremony." 580 F. 3d, at 1095. The tension between this reasoning and the fundamental free speech principles noted above is unmistakable.

The Court of Appeals, in a footnote, acknowledged that the district's decision would have been impermissible if it had constituted viewpoint discrimination, but the court concluded that "this is not a case involving viewpoint discrimination" because petitioner "concede[d] that she was not attempting to express any specific religious viewpoint" but instead "sought only to 'play a pretty piece.' " *Id.*, at 1095, n. 6. This reasoning is questionable at best.

First, the Court of Appeals' holding, as set out in the body of its opinion, does not appear to depend in any way on petitioner's motivation in helping to select the Biebl piece. The court phrased its holding as follows: "[T]he District's action in keeping all musical performances at graduation 'entirely secular' in nature was reasonable in light of the circumstances surrounding a high school graduation." *Id.*, at 1095. Nothing in the body of the court's opinion suggests that its decision would have come out the other way if petitioner had favored the Biebl piece for religious rather than artistic reasons. Second, the school district did not veto the Biebl piece on viewpoint-neutral grounds. On the contrary, the district banned that piece precisely because of its perceived religious message—that is, because the district feared that members of the audience would view the performance of the piece as the district's sponsorship of a religious message. See Pet. for Cert. 7 (quoting letter to the editor criticizing 2005 graduation program). Banning speech because of the view that the speech is likely to be perceived as expressing seems to me to constitute viewpoint discrimination.

The decision below will have important implications for the nearly 10 million public school students in the Ninth Circuit. Even if the decision is read narrowly, it will restrict what is purportedly personal student expression at public school graduation ceremonies. And as Judge Smith noted, the Ninth Circuit's reasoning may be applied to almost all public school artistic performances. 580 F. 3d, at 1099 (opinion dissenting in part and concurring in judgment). The audience at such events, which generally consists overwhelmingly of relatives and friends of the performers, may be regarded as no less "captive" than graduation attendees. If the decision is applied to such performances, school administrators in some communities may choose to avoid "controversy" by banishing all musical pieces with "religious connotations." *Id.*, at 1095, 1091 (majority opinion).

The logic of the Ninth Circuit's decision has even broader implications. Why, for example, should the Ninth Circuit's reasoning apply only to musical performances and not to other forms of student expression, including student speeches at graduation ceremonies and other comparable school events? Moreover, unless discrimination against speech expressing a religious viewpoint is less objectionable than other forms of viewpoint discrimination, the Ninth Circuit's decision may provide the basis for wide-ranging censorship of student speech that expresses controversial ideas. A reasonable reading of the Ninth Circuit's decision is that it authorizes school administrators to ban any controversial student expression at any school event attended by parents and others who feel obligated to be present because of the importance of the event for the participating students. A decision with such potentially broad and troubling implications merits our review.

No. 09–806. WRIGHT ET AL. *v.* EASTMAN KODAK CO. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 328 Fed. Appx. 738.

No. 09–849. SHIPPING CORPORATION OF INDIA, LTD. *v.* JALDHI OVERSEAS PTE LTD. C. A. 2d Cir. Motion of Maritime Law Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 585 F. 3d 58.

No. 09–856. MONTGOMERY *v.* WYETH, FKA AMERICAN HOME PRODUCTS CORP., ET AL. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 580 F. 3d 455.

No. 09–937. DROZ *v.* MCCADDEN. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 580 F. 3d 106.

No. 09–972. SALAZAR ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 338 Fed. Appx. 75.

No. 09–6531. LUCKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 569 F. 3d 101.

No. 09–7319. FELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 531 F. 3d 197.

No. 09–7554. BROWN *v.* ROCK, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 577 F. 3d 107.

No. 09–7565. CORINES *v.* KILLIAN, WARDEN. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–8548. BROWN *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner to seal petition for writ of certiorari denied. Certiorari denied.

No. 09–8697. CHITOIU *v.* UNUM PROVIDENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 345 Fed. Appx. 625.

No. 09–9033. PRESCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 360 Fed. Appx. 209.

No. 09–9125. SATTAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 590 F. 3d 93.

No. 09–9135. MERCEDE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 354 Fed. Appx. 477.

No. 09–9267. SHARPLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 355 Fed. Appx. 488.

Rehearing Denied

No. 08–9156. WOOD *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., 558 U. S. 290;

No. 09–35. NORIEGA *v.* PASTRANA, WARDEN, *ante*, p. 917;

No. 09–506. CHILDREN'S FUND ET AL. *v.* SPRINGFIELD HOLDING CO. LTD. LLC ET AL., 558 U. S. 1113;

No. 09–585. HARVEST INSTITUTE FREEDMAN FEDERATION ET AL. *v.* UNITED STATES, 558 U. S. 1149;

No. 09–655. WADE *v.* UNITED STATES, 558 U. S. 1150;

No. 09–6577. MITCHELL *v.* O'BRIEN, 558 U. S. 1150;

No. 09–6673. BOWLING *v.* KENTUCKY, 558 U. S. 1117;

No. 09–6701. RUNGE *v.* MINNESOTA, 558 U. S. 1054;

No. 09–6755. SKRZYPEK ET UX. *v.* UNITED STATES, 558 U. S. 1117;

No. 09–6986. ALSTON *v.* COURT OF APPEALS OF WISCONSIN, DISTRICT I, 558 U. S. 1056;

No. 09–7033. SMITH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 558 U. S. 1118;

No. 09–7134. MILLER *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 558 U. S. 1119;

No. 09–7172. MONACELLI *v.* FIFTH THIRD BANK ET AL., *ante*, p. 906;

No. 09–7218. AUSTIN *v.* MCCANN, WARDEN, 558 U. S. 1121;

No. 09–7302. BRZOWSKI *v.* TRISTANO ET AL., 558 U. S. 1123;

No. 09–7347. ABBOTT *v.* DEKALB ET AL., 558 U. S. 1123;

No. 09–7490. WARFIELD *v.* GRAMS, WARDEN, 558 U. S. 1126;

No. 09–7557. PERRY *v.* VIRGINIA, 558 U. S. 1153;

No. 09–7566. ERICKSON *v.* MASSACHUSETTS, 558 U. S. 1153;

No. 09–7571. CLEVELAND *v.* ABERNATHY, MAYOR, CLEMSON, SOUTH CAROLINA, ET AL., 558 U. S. 1154;

No. 09–7610. DILLEHAY *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., 558 U. S. 1154;

No. 09–7684. DAVIS *v.* UNITED STATES ET AL., 558 U. S. 1129;

No. 09–7729. LASKEY *v.* AT&T, *ante,* p. 909;

No. 09–7730. LASKEY *v.* FIDELITY INVESTMENTS, *ante,* p. 909;

No. 09–7731. LASKEY *v.* AT&T, *ante,* p. 909;

No. 09–7753. LASKEY *v.* CORNING CABLE SYSTEMS, *ante,* p. 910;

No. 09–7759. LASKEY *v.* SHILOH GROUP, LLC, *ante,* p. 910;

No. 09–7760. LASKEY *v.* SUN MICROSYSTEMS, INC., *ante,* p. 910;

No. 09–7876. HOLMAN *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, 558 U. S. 1134;

No. 09–7886. WILSON *v.* UNITED STATES, 558 U. S. 1134;

No. 09–7932. UYKHENG NGY *v.* YOU SONG SECK, *ante,* p. 911;

No. 09–8002. TORRES *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante,* p. 912;

No. 09–8019. IN RE SINGLETON, 558 U. S. 1109;

No. 09–8163. ASKEW *v.* UNITED STATES, *ante,* p. 915; and

No. 09–8264. KAPORDELIS *v.* UNITED STATES, *ante,* p. 917. Petitions for rehearing denied.

No. 09–5490. MIDDLETON *v.* SCHULT, WARDEN, 558 U. S. 1100; and

No. 09–7188. AGRON *v.* COLUMBIA UNIVERSITY, 558 U. S. 1138. Petitions for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions.

No. 09–7754. LASKEY *v.* INTEL CORP., *ante,* p. 929. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

MARCH 24, 2010

Miscellaneous Order

No. 09–9000 (09A743). SKINNER *v.* SWITZER, DISTRICT ATTORNEY. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending disposition of the 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 sending down of the judgment of this Court.

March 29, 2010

Certiorari Granted—Vacated and Remanded

No. 09–8367. Welton *v.* United States. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals for the Seventh Circuit for further consideration in light of that court's en banc opinion in *United States* v. *Corner*, 598 F. 3d 411 (2010). Reported below: 583 F. 3d 494.

Certiorari Dismissed

No. 09–8742. Albright-Lazzari et vir *v.* Connecticut (two judgments). App. Ct. Conn. Motion of petitioners for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8776. Taylor *v.* Brashears et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8781. Kalski *v.* Antonovich et al. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8799. Sabedra *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. 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.

No. 09–8802. Spuck *v.* McVey, Chairwoman, Pennsylvania Board of Probation and Parole, et al. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–8871. Hafed *v.* Supreme Court of the United States et al. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. The Chief Justice took no part in the consideration or decision of this motion and this petition. Reported below: 352 Fed. Appx. 447.

No. 09–9064. JACKSON *v.* MINNESOTA. Ct. App. Minn. 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).* JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. D–2457. IN RE DISBARMENT OF SICILIANO. Disbarment entered. [For earlier order herein, see 558 U. S. 1043.]

No. D–2459. IN RE DISBARMENT OF PASSMORE. Disbarment entered. [For earlier order herein, see 558 U. S. 1043.]

No. D–2460. IN RE DISBARMENT OF BERMAN. Disbarment entered. [For earlier order herein, see 558 U. S. 1044.]

No. D–2461. IN RE DISBARMENT OF FINNERTY. Disbarment entered. [For earlier order herein, see 558 U. S. 1044.]

No. D–2462. IN RE DISBARMENT OF SHEEHAN. Disbarment entered. [For earlier order herein, see 558 U. S. 1044.]

No. D–2463. IN RE DISBARMENT OF SACHAR. Disbarment entered. [For earlier order herein, see 558 U. S. 1044.]

No. 09M81. DOE *v.* DUNCAN ET AL. Motion for leave to proceed *in forma pauperis* with the declaration of indigency under seal denied.

No. 09M82. GRANDOIT *v.* MURRAY ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09–8048. ELINE *v.* HAWAII DEPARTMENT OF PUBLIC SAFETY. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 933] denied.

No. 09–8700. WHITE *v.* FAIRFAX COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 19, 2010, within which to pay the docketing fee required by Rule 38(a) and

to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 09–9394. IN RE GASTON;
No. 09–9460. IN RE YORK; and
No. 09–9523. IN RE PARKER. Petitions for writs of habeas corpus denied.

No. 09–9534. IN RE MILLER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–9021. IN RE TANGIRALA. Petition for writ of mandamus denied.

No. 09–9300. IN RE TAYLOR. 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.

No. 09–8744. IN RE THOMAS. Petition for writ of mandamus and/or prohibition denied.

No. 09–8862. IN RE CUTAIA. Petition for writ of prohibition denied.

Certiorari Denied

No. 09–742. ROSENBERG *v.* HUALAPAI INDIAN NATION. Ct. App. Ariz. Certiorari denied.

No. 09–815. FREQUENT FLYER DEPOT, INC., ET AL. *v.* AMERICAN AIRLINES, INC. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 281 S. W. 3d 215.

No. 09–857. DOYLE *v.* GRASKE;
No. 09–888. GRASKE *v.* DOYLE ET UX.; and
No. 09–990. GRASKE *v.* DOYLE. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 3d 898.

No. 09–859. WINDSOR *v.* MAID OF THE MIST CORP. ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–865. MONUMENTAL LIFE INSURANCE CO., SUCCESSOR IN INTEREST TO COMMONWEALTH LIFE INSURANCE CO. *v.* KENTUCKY DEPARTMENT OF REVENUE, FKA REVENUE CABINET, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY, ET AL. Ct. App. Ky. Certiorari denied. Reported below: 294 S. W. 3d 10.

No. 09–872. CASEY ET AL. *v.* NORTH AMERICAN SAVINGS, F. S. B., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 3d 586.

No. 09–879. WAESCHLE *v.* DRAGOVIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF OAKLAND COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 576 F. 3d 539.

No. 09–880. BIRKS *v.* PARK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 848.

No. 09–884. J. B. L. *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 09–887. E. H. ET AL., ON THEIR OWN BEHALF AND AS PARENTS AND NEXT FRIENDS OF C. H., A MINOR *v.* BOARD OF EDUCATION OF THE SHENENDEHOWA CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 156.

No. 09–892. SOUTHWICK *v.* CROWNOVER ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–924. YUN KYU YOOK ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 795.

No. 09–928. SANG KYU HAN ET UX. *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 802.

No. 09–966. WADHWA *v.* DEPARTMENT OF VETERANS AFFAIRS (two judgments). C. A. Fed. Cir. Certiorari denied. Reported below: 353 Fed. Appx. 434 (second judgment) and 435 (first judgment).

No. 09–969. BROWN *v.* INDIANA BOARD OF LAW EXAMINERS. Sup. Ct. Ind. Certiorari denied.

No. 09–973. SNIDER *v.* LEE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 3d 193.

No. 09–1019. MIKELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 218.

No. 09–1026. MONCIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 3d 593.

No. 09–1040. SANDLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 3d 749.

No. 09–1044. BRIONES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–7351. DEBERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 3d 708.

No. 09–7358. VAN DIVNER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 599 Pa. 617, 962 A. 2d 1170.

No. 09–7485. WATERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 554.

No. 09–7793. WARD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 903 N. E. 2d 946.

No. 09–7882. BRIGGS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 347 Fed. Appx. 750.

No. 09–8262. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 3d 714.

No. 09–8717. SHERIFF *v.* ACCELERATED RECEIVABLES SOLUTIONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 351.

No. 09–8718. SWAIN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–8719. ROSS *v.* YOUNG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 822.

No. 09–8721. ROCKETT *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 09–8723. DRIESSEN *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 355.

No. 09–8725. COTTON *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8739. ATHERTON *v.* DISTRICT OF COLUMBIA OFFICE OF THE MAYOR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 567 F. 3d 672.

No. 09–8746. TANI *v.* WASHINGTON POST ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 792.

No. 09–8747. O'BRIEN *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 09–8760. HOGG *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8771. COLLAZO *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 09–8772. RINGGOLD ET AL. *v.* SANKARY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8773. OWENS *v.* JONES, SUPERINTENDENT, HYDE CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 948.

No. 09–8777. NELSON *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 134.

No. 09–8779. COLLIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 3d 755.

No. 09–8786. ASHFORD *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 09–8787. BUYCKS *v.* CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8788. BLACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8798. SLACK *v.* JONES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 361.

No. 09–8812. LINARES *v.* ALBRITH ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–8823. MCNEILL *v.* GERMANY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 549.

No. 09–8825. DANIELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 527.

No. 09–8826. COPELAND *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8827. MINH PHOUC CHUNG *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8829. DONALD *v.* SCHULTZ ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–8830. STERHAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–8837. ANDERSON *v.* MCCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8845. CRINER *v.* BOUTON ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–8847. ROBINSON *v.* HINKLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 517.

No. 09–8848. SCROGGINS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8857. BROWN *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 352 Fed. Appx. 446.

No. 09–8860. RUTLEDGE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8865. HORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 889.

No. 09–8874. GROVES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 840.

No. 09–8908. BARBOUR *v.* WESTERN REGIONAL DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied.

No. 09–8926. WESSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 583 F. 3d 728.

No. 09–8932. JEFFERSON *v.* CARLTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–8943. FAJARDO-JIMENEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 16.

No. 09–8951. KABUI *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 835.

No. 09–8967. HAMILTON, AKA DOZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8977. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–8987. ARMSTRONG *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9016. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9053. DENEUI *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 775 N. W. 2d 221.

No. 09–9078. MARQUARDT *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 322 Wis. 2d 574, 776 N. W. 2d 288.

No. 09–9101. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 916.

No. 09–9102. FRANETICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 416.

No. 09–9108. HOLT *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 772 N. W. 2d 470.

No. 09–9114. WILLIAMS *v.* MARTINEZ, WARDEN, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 586 F. 3d 995.

No. 09–9122. DENNISON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 658.

No. 09–9126. SHELTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9141. BOGUES *v.* MACEACHERN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT SHIRLEY. C. A. 1st Cir. Certiorari denied.

No. 09–9154. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 441.

No. 09–9191. STIDHAM *v.* VARANO ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9209. WHITEFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9210. WRIGHT *v.* POTTER, POSTMASTER GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 898.

No. 09–9211. VINSON *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 09–9213. ELSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 571 F. 3d 1163.

No. 09–9217. BRANCH *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9218. BURRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 308.

No. 09–9219. BRANCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 970.

No. 09–9223. BREEDING *v.* DONAHUE, WARDEN. Ct. App. Ky. Certiorari denied.

No. 09–9228. PHILLIPS *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9232. GHELICHKHANI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9234. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 912.

No. 09–9236. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9238. LANE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 591 F. 3d 921.

No. 09–9241. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 281.

No. 09–9242. PARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 854.

No. 09–9244. WEBBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9253. DOWTHARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9254. HYATT *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 3d 162.

No. 09–9258. HAMMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 877.

No. 09–9260. HODGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 306.

No. 09–9263. GONZALEZ-AMBRIZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 155.

No. 09–9270. KIMOTO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 3d 464.

No. 09–9272. PAUYO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 955.

No. 09–9282. ROSELLE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 98.

No. 09–9284. CABELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 799.

No. 09–9291. NORDYKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9292. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 410.

No. 09–9295. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 900.

No. 09–9304. CARMENATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 941.

No. 09–9305. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 923.

No. 09–9306. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9308. BASU *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 358 Fed. Appx. 187.

No. 09–9314. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 890.

No. 09–9322. MILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–9328. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 584 F. 3d 1083.

No. 09–9330. EDISON *v.* WASHINGTON-ADDUCI, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 953.

No. 09–9334. PLACENCIA-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 161.

No. 09–9335. POLK *v.* MENIFEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9338. MASON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 781.

No. 09–9352. VASQUEZ-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–9355. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 481.

No. 09–9356. BRONNENBERG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 939.

No. 09–725. BEAVER ET AL. *v.* DANNEMANN. Dist. Ct. App. Fla., 1st Dist. Motion of Florida Defense Lawyers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 14 So. 3d 246.

No. 09–876. RODRIGUEZ *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–894. CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* ALI. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 584 F. 3d 1174.

No. 09–915. LEMUS-LEMUS *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 343 Fed. Appx. 643.

No. 09–9275. KRUG *v.* STEVENS, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 309 Fed. Appx. 423.

No. 09–9297. TISDOL *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. 09–7140. ROBENSON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 558 U. S. 1119;

No. 09–7199. BEAL *v.* LEVINE ET AL., 558 U. S. 1120;

No. 09–7233. PAYNE *v.* TINSLEY ET AL., 558 U. S. 1121;

No. 09–7435. HAYWOOD *v.* BEDATSKY ET AL., 558 U. S. 1151;

No. 09–7479. KETCHUM *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 558 U. S. 1152;

No. 09–7570. MAJOR-DAVIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 558 U. S. 1153;

No. 09–7606. TRAVALINE *v.* TRAVALINE, 558 U. S. 1154;

No. 09–7611. DIAZ *v.* TEXAS, 558 U. S. 1154;

No. 09–7682. ALDRIDGE ET UX. *v.* UNITED STATES, 558 U. S. 1129;

No. 09–7692. MAY *v.* AARSAND MANAGEMENT, *ante*, p. 908;

No. 09–7724. POPAL *v.* NEW YORK, *ante*, p. 909;

No. 09–7893. JOHNSON *v.* COOK INC., 558 U. S. 1155;

No. 09–7947. BAKARICH *v.* NEW JERSEY, *ante*, p. 946;

No. 09–8098. THOMAS *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 914; and

No. 09–8176. EZIKE *v.* MITTAL ET AL., *ante*, p. 977. Petitions for rehearing denied.

MARCH 31, 2010

Dismissal Under Rule 46

No. 09–873. DONALDSON CO., INC. *v.* BURROUGHS DIESEL, INC. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 581 F. 3d 726.

APRIL 5, 2010

Certiorari Granted—Vacated and Remanded

No. 08–9888. SANTOS-SANCHEZ *v.* UNITED STATES. C. A. 5th 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 *Padilla* v. *Kentucky*, *ante*, p. 356. Reported below: 548 F. 3d 327.

No. 09–163. AMERIPRISE FINANCIAL, INC., FKA AMERICAN EXPRESS FINANCIAL CORP., ET AL. *v.* GALLUS ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones* v. *Harris Associates L. P.*, *ante*, p. 335. Reported below: 561 F. 3d 816.

Certiorari Dismissed

No. 09–8902. JAMES *v.* JACKSON 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 350 Fed. Appx. 790.

No. 09–9165. REDFORD *v.* COLLIER HEIGHTS APARTMENTS ET AL. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 298 Ga. App. 116, 679 S. E. 2d 120.

No. 09–9225. BRANHAM *v.* BERGH ET AL.; and BRANHAM *v.* MALLOY ET AL. C. A. 6th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–9459. O'CONNOR *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 09M83. WIGGINS *v.* LOGAN ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09M84. CALVERT *v.* UNITED STATES. Motion for leave to proceed as a veteran denied.

No. 08–1332. CITY OF ONTARIO, CALIFORNIA, ET AL. *v.* QUON ET AL. C. A. 9th Cir. [Certiorari granted, 558 U. S. 1090.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of The Rutherford Institute for leave to file a brief as *amicus curiae* granted.

No. 09–8259. REDFORD *v.* GWINNETT COUNTY JUDICIAL CIRCUIT ET AL. C. A. 11th Cir. Motion of petitioner for reconsider-

ation of order denying leave to proceed *in forma pauperis* [*ante*, p. 968] denied.

No. 09–8954. In re Morton. Petition for writ of mandamus denied.

Certiorari Denied

No. 09–489. D'Jamoos, Executrix of the Estate of Weingeroff, et al. *v.* Pilatus Aircraft Ltd. et al. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 3d 94.

No. 09–498. John et al. *v.* United States; and
No. 09–499. People of Bikini *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 554 F. 3d 996.

No. 09–681. Bonvicino et al. *v.* Hopkins. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 3d 752.

No. 09–709. Reed *v.* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. C. A. 6th Cir. Certiorari denied. Reported below: 569 F. 3d 576.

No. 09–755. Marcantel, Individually and in His Official Capacity as Chief of Police of the Village of Turkey Creek, Louisiana *v.* Deville et vir; and
No. 09–817. Tarver *v.* Deville et vir. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 3d 156.

No. 09–779. Walters et al. *v.* American Coach Lines of Miami, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 575 F. 3d 1221.

No. 09–819. SAP AG et al. *v.* Sky Technologies LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 576 F. 3d 1374.

No. 09–922. Jordan *v.* Apache Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 992.

No. 09–952. Bradbury *v.* Idaho Judicial Council. Sup. Ct. Idaho. Certiorari denied. Reported below: 149 Idaho 107, 233 P. 3d 38.

No. 09–957. Patton *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1121, 982 N. E. 2d 989.

No. 09–959. HEATH *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 3d 122.

No. 09–1000. KRUTSINGER *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 219 P. 3d 1054.

No. 09–1001. AUSTIN *v.* DOUGLAS G. PETERSON & ASSOCIATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 09–1004. ILLINOIS DUNESLAND PRESERVATION SOCIETY *v.* ILLINOIS DEPARTMENT OF NATURAL RESOURCES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 3d 719.

No. 09–1015. STOYANOV *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 348 Fed. Appx. 558.

No. 09–1017. SUPERIOR HIGHWALL MINERS, INC., ET AL. *v.* FRYE. Cir. Ct. Boone County, W. Va. Certiorari denied.

No. 09–1018. SUPERIOR HIGHWALL MINERS, INC., ET AL. *v.* FRYE. Sup. Ct. App. W. Va. Certiorari denied.

No. 09–1024. WILLIAM DAWSON NURSING CENTER, INC. *v.* GLAVINSKAS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 392 Ill. App. 3d 347, 912 N. E. 2d 675.

No. 09–1034. FRYE *v.* EXCELSIOR COLLEGE. C. A. 9th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 241.

No. 09–1055. RIVERA-NEWTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–1058. VIERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–1072. BUENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 3d 847.

No. 09–7361. ZELAYA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 355.

No. 09–7373. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 575 F. 3d 164.

No. 09–7558. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 546.

No. 09–7592. ABDUL-AZIZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 375.

No. 09–7819. LUGO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–7826. BALBUENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 510.

No. 09–7833. DOCAMPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 573 F. 3d 1091.

No. 09–7952. GALLOWAY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 64.

No. 09–8472. STEPHENS *v.* FOURTH JUDICIAL DISTRICT COURT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 861.

No. 09–8583. WALKER *v.* POTTER, POSTMASTER GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 77.

No. 09–8864. HENRY *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8868. MANNIX *v.* PRATHER ET AL. Sup. Ct. Ill. Certiorari denied.

No. 09–8870. JENKINS *v.* HORNBEAK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8882. DALTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 860.

No. 09–8883. CHAUDRY *v.* WHISPERING RIDGE HOMEOWNERS ASSN. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–8884. FORKNER *v.* KAHO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–8886. VAN PELZ *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 104.

No. 09–8893. GALVIN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 603 Pa. 625, 985 A. 2d 783.

No. 09–8895. CRUMB *v.* KMART CORP. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8898. CAUDILL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 09–8904. MOORE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–8911. WILKE *v.* MEYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 944.

No. 09–8914. WARD *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 3d 925.

No. 09–8918. BENJAMIN *v.* WALLACE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 829.

No. 09–8920. BONDS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 182, 908 N. E. 2d 102.

No. 09–8922. BROWN *v.* HATHAWAY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–8928. WOODS *v.* SOUTH CAROLINA JUDICIAL BRANCH. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 868.

No. 09–8930. WINDOM *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 578 F. 3d 1227.

No. 09–8942. POMPEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 3d 612, 882 N. Y. S. 2d 66.

No. 09–8947. RICHARDS-JOHNSON *v.* AMERICAN EXPRESS CO. C. A. 7th Cir. Certiorari denied.

No. 09–8952. NUNEZ *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 338 Fed. Appx. 793.

No. 09–8953. PARADA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8955. CRAWLEY *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 09–8956. BARRAGAN CAMPA *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 09–8960. BASCOMB *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8961. ROBERTS *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–8965. THORNBLAD *v.* VUE-BENSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–8968. HARDING *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 180 Ohio App. 3d 497, 905 N. E. 2d 1289.

No. 09–8971. PETERKA *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8974. MANESS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 363 N. C. 261, 677 S. E. 2d 796.

No. 09–8990. PRATCHER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–8996. WARE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 23 So. 3d 724.

No. 09–9006. LEFEY-RIVERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 3d 532.

No. 09–9014. MUHAMMAD *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 371.

No. 09–9066. SIMONE *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9082. KWASNIK *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 09–9089. ADAMS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–9092. MANZUR *v.* MONTOYA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 692.

No. 09–9110. TAYLOR *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9112. MEIKLE *v.* DZURENDA, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 09–9127. PRESCOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 801.

No. 09–9148. CAL *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9155. SEMLER *v.* LUDEMAN ET AL. Ct. App. Minn. Certiorari denied.

No. 09–9157. SUTHERLAND *v.* GAETZ, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 3d 614.

No. 09–9166. SLACK *v.* JONES, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 09–9175. THOMAS *v.* MAROLA ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9202. LIPSCOMB *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9246. KASTNER *v.* MARTIN, DROUGHT & TORRES, ET AL. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 09–9268. REAL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 972 A. 2d 560.

No. 09–9271. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–9288. VAN NORMAN *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 597.

No. 09–9301. CARGILE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 505.

No. 09–9333. CISNEROS-MORA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9337. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 3d 1068.

No. 09–9348. STEWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 979.

No. 09–9349. WATKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9354. BANEY *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied.

No. 09–9358. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 3d 754.

No. 09–9360. CAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 169.

No. 09–9364. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9368. ULLOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 286.

No. 09–9372. LINDSEY *v.* DAIMLERCHRYSLER CORP. Ct. App. Mich. Certiorari denied.

No. 09–9374. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 973.

No. 09–9385. DIAS, AKA GUTHRIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 859.

No. 09–9388. MCCALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 811.

No. 09–9389. GARDNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9393. FLOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 339 Fed. Appx. 210.

No. 09–9395. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9401. MESSICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 831.

No. 09–9402. NEIDLINGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 357.

No. 09–9406. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9409. ROBLES-RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9410. TALIB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 934.

No. 09–9413. WELLONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9417. DELOATCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–9419. STANLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 69.

No. 09–9420. STYMIEST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 3d 759.

No. 09–9421. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 299.

No. 09–9428. RUVALCABA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9430. SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 3d 759.

No. 09–9431. BOOTH *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 224 W. Va. 307, 685 S. E. 2d 701.

No. 09–9433. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 513.

No. 09–9436. RINGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 210.

No. 09–9438. MORRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 884.

No. 09–9440. MOUZON, AKA GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 739.

No. 09–9443. CRUZ TORO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9448. GLINTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 453.

No. 09–9449. GAMBRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 896.

No. 09–9450. GRAGG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 543.

No. 09–9451. FORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 342.

No. 09–9452. GAITHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9454. GONZALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 446.

No. 09–9455. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 483.

No. 09–9457. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9461. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9462. DE LEON-QUINONES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 3d 748.

No. 09–9463. PAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9477. WESTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–9479. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 248.

No. 09–9486. BONILLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 579 F. 3d 1233.

No. 09–9489. LOPEZ-REYES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 589 F. 3d 667.

No. 09–9492. MARTINEZ-VELEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9496. NOSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 3d 624.

No. 09–9497. PARRISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 448.

No. 09–9510. BARNWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 240.

No. 09–9511. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9519. WATTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 784.

No. 09–9521. VARGAS-VICTORIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 307.

No. 09–631. ENCARNACION, ON BEHALF OF GEORGE, ET AL. *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 568 F. 3d 72.

No. 09–700. AL-TURKI *v.* COLORADO. Ct. App. Colo. Motions of National Association of Criminal Defense Lawyers et al. and Kingdom of Saudi Arabia for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 09–728. JENSEN ET UX. *v.* STOOT ET AL. C. A. 9th Cir. Motions of National Association of Police Organizations, Inc., and

City of Escondido for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 582 F. 3d 910.

No. 09–925. DEAN *v.* BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 577 F. 3d 60.

No. 09–8671. BEDFORD *v.* COLLINS, WARDEN. C. A. 6th Cir. Motion of petitioner for remand denied. Certiorari denied. Reported below: 567 F. 3d 225.

No. 09–8957. WEI CHEN *v.* LAPE, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–8958. CRUMP *v.* SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 09–9347. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 354 Fed. Appx. 518.

No. 09–9375. MADUKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 330 Fed. Appx. 295.

No. 09–9432. FARMER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 583 F. 3d 131.

No. 09–9447. FELICIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–9495. OWAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 363 Fed. Appx. 789.

Rehearing Denied

No. 09–7280. FARNSWORTH *v.* MCNEIL ET AL., 558 U. S. 1122;
No. 09–7367. RICHARDSON *v.* MICHIGAN STATE TREASURER, 558 U. S. 1124;
No. 09–7439. GRIGGS *v.* UNITED STATES, 558 U. S. 1084;
No. 09–7457. FULLER *v.* BERGH, WARDEN, 558 U. S. 1151;
No. 09–7587. VINNIE *v.* MASSACHUSETTS, 558 U. S. 1154;
No. 09–7676. STERNBERG *v.* MICHIGAN STATE UNIVERSITY ET AL., 558 U. S. 1128;
No. 09–7714. MURRAY *v.* WALKER-MURRAY, *ante*, p. 909;
No. 09–7877. FRANCIS *v.* JOINT FORCE HEADQUARTERS NATIONAL GUARD ET AL., *ante*, p. 911;
No. 09–7878. DENNIS *v.* KELLER MEYER BUILDING SERVICES, *ante*, p. 944;
No. 09–8096. IN RE WALLS, 558 U. S. 1146;
No. 09–8100. UKAWABUTU *v.* RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL., *ante*, p. 950;
No. 09–8104. LASKEY *v.* PLATT ELECTRIC SUPPLY, INC., *ante*, p. 950;
No. 09–8155. WHITE *v.* STATE FARM INSURANCE CO., *ante*, p. 976;
No. 09–8177. CRAIN *v.* TUTOR ET AL., *ante*, p. 977;
No. 09–8352. IN RE JACKSON, *ante*, p. 903;
No. 09–8458. ELIAS *v.* UNITED STATES, *ante*, p. 957; and
No. 09–8535. WINTERS *v.* UNITED STATES PAROLE COMMISSIONER ET AL., *ante*, p. 959. Petitions for rehearing denied.

APRIL 12, 2010

Dismissal Under Rule 46

No. 09–986. GREEN ET AL. *v.* CAMPBELL ET AL. Sup. Ct. S. C. Certiorari dismissed under this Court's Rule 46. Reported below: 385 S. C. 428, 685 S. E. 2d 163.

APRIL 16, 2010

Miscellaneous Orders

No. 08–1457. NEW PROCESS STEEL, L. P. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 558 U. S. 989.] Parties are directed to file supplemental briefs addressing the following question: "What should be the effect, if any, of the

developments discussed in the letter submitted by the Solicitor General on March 29, 2010, on the proper disposition of this case?" Briefs, in letter format, limited to eight pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, April 26, 2010.

No. 09–448. HARDT *v.* RELIANCE STANDARD LIFE INSURANCE CO. C. A. 4th Cir. [Certiorari granted, 558 U. S. 1142.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 09–475. MONSANTO CO. ET AL. *v.* GEERTSON SEED FARMS ET AL. C. A. 9th Cir. [Certiorari granted, 558 U. S. 1142.] Motion of the Solicitor General for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 09–559. DOE ET AL. *v.* REED, SECRETARY OF STATE OF WASHINGTON, ET AL. C. A. 9th Cir. [Certiorari granted, 558 U. S. 1142.] Motions of respondents Washington Coalition for Open Government and Washington Families Standing Together for divided argument denied.

APRIL 19, 2010

Certiorari Granted—Vacated and Remanded

No. 08–1307. HOLSTER *v.* GATCO, INC., DBA FOLIO ASSOCIATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, *ante*, p. 393. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JUSTICE SCALIA, concurring.

Petitioner Charles Holster filed this suit in federal court seeking actual and statutory damages—on behalf of himself and a class of others similarly situated—for alleged violations of the Telephone Consumer Protection Act of 1991, 47 U. S. C. § 227. The District Court dismissed the suit, holding that the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), applies to federal suits under the Act, and that N. Y. Civ. Prac. Law Ann. § 901(b) (West 2006)—which bars class actions in suits seeking statutory

damages—is "substantive" under *Erie*. 485 F. Supp. 2d 179, 184–186 (EDNY 2007). Federal Rule of Civil Procedure 23 had no bearing, it added, because "§ 901(b) is a matter not covered by [Rule] 23." *Id.*, at 185, n. 3.

The Second Circuit summarily affirmed on the basis of its decision (issued the same day by the same panel) in *Bonime* v. *Avaya, Inc.*, 547 F. 3d 497 (2008). *Bonime* held that § 901(b) applies to suits brought under the Act in federal court for two reasons. First, it read the Act to require that federal courts treat claims under the Act as though they arise under state law and therefore are subject to *Erie*. 547 F. 3d, at 501. Second, *Bonime* held that § 227(b)(3)'s text—which provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" a suit for actual and statutory damages—prohibits federal courts from hearing suits under the Act that would be barred in state court. *Id.*, at 502.

Shady Grove Orthopedic Associates, P. A. v. *Allstate Ins. Co.*, *ante*, p. 393, held that, irrespective of *Erie*, § 901(b) does not apply to state-law claims in federal court because it is validly preempted by Rule 23. *Ante*, at 398–406; *ante*, at 406–410 (plurality opinion); *ante*, at 429–436 (STEVENS, J., concurring in part and concurring in judgment). That holding assuredly affects—and in all likelihood eliminates—*Bonime*'s primary basis for applying § 901(b) in federal court. The dissent insists, however, that *Bonime*'s second ground remains unaffected. *Post*, at 1064 (opinion of GINSBURG, J.).

On one reading of *Bonime*'s opaque second ground, that is true: If the Second Circuit meant that § 227(b)(3) requires federal courts hearing claims under the Act to apply *all* state procedural rules that would effectively bar a suit, then *Shady Grove* has no bearing. That is, however, a highly implausible reading of the Act. Besides effecting an implied partial repeal of the Rules Enabling Act, 28 U. S. C. § 2072, it would require federal courts to enforce any prerequisite to suit state law makes mandatory—a state rule limiting the length of the complaint, for example, or specifying the color and size of the paper.

A more probable meaning of *Bonime*'s second ground is that when a State closes its doors to claims under the Act, § 227(b)(3) requires federal courts in the State to do so as well; but when such claims are allowed, the federal forum may apply its own

procedures in processing them. See 547 F. 3d, at 502 ("This statutory language is unambiguous—a claim under the [Act] cannot be brought if not permitted by state law"). Nothing in *Bonime* suggests, for example, that a federal court could not consolidate two suits under the Act for its own convenience, see Fed. Rule Civ. Proc. 42(a), even if the State's courts did not allow consolidation. Although that logic applies equally to Rule 23's method of combining claims, *Bonime* may simply have assumed—as the appellee urged it to conclude,[1] as a number of District Courts had held,[2] and as the Second Circuit itself held three weeks later[3]—that Rule 23 does not address whether class actions are available for specific claims. If that is what *Bonime* had in mind, *Shady Grove* will likely affect the Second Circuit's analysis.

Shady Grove would also affect the outcome if the *Bonime* court believed that even if Rule 23 would otherwise allow a federal court to entertain a class action, § 227(b)(3) supersedes Rule 23 by precluding suits that cannot be brought in state courts, including class actions barred by § 901(b). *Shady Grove* reveals the error in this analysis: Section 901(b) does not prevent a plaintiff from *bringing* "an action to recover a penalty, or minimum measure of recovery created or imposed by statute"—as would be necessary to implicate § 227(b)(3)—but only from "maintain[ing]" such a suit "*as a class action.*" (Emphasis added.) *Ante*, at 408 (plurality opinion); see also *ante*, at 398–402.

For these reasons, I concur in the Court's order.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

Petitioner Charles Holster filed this putative class action against Gatco, Inc., in federal court, invoking the court's jurisdiction under the Class Action Fairness Act of 2005, 28 U. S. C. § 1332(d). Holster sought statutory damages for Gatco's alleged violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U. S. C. § 227, which authorizes a "[p]rivate right of

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[1] Brief for Defendant-Appellee in No. 07–1136 (CA2), pp. 35–36.

[2] See, *e. g.*, *Leider* v. *Ralfe*, 387 F. Supp. 2d 283, 290 (SDNY 2005); *In re Relafen Antitrust Litigation*, 221 F. R. D. 260, 284–285 (Mass. 2004); *Dornberger* v. *Metropolitan Life Ins. Co.*, 182 F. R. D. 72, 84 (SDNY 1999).

[3] See *Shady Grove Orthopedic Assocs., P. A.* v. *Allstate Ins. Co.*, 549 F. 3d 137, 143–145 (2008).

action" when a person is "otherwise permitted by the laws or rules of court of a State" to bring the action. § 227(b)(3).

The District Court dismissed Holster's suit based on N. Y. Civ. Prac. Law Ann. (CPLR) § 901(b) (West 2006), the provision at issue in *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, *ante*, p. 393. That statute prescribes that, unless specifically permitted, "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." § 901(b). The District Court noted that, pursuant to § 901(b), New York courts had closed their doors to class actions seeking statutory damages under the TCPA. 485 F. Supp. 2d 179, 185 (EDNY 2007).

Adopting its prior decision in *Bonime* v. *Avaya, Inc.*, 547 F. 3d 497 (2008), the Second Circuit summarily affirmed. *Bonime* held that § 901(b) barred TCPA claims brought as class actions for two independent reasons. First, the Court of Appeals determined that § 901(b) governed because it qualified as "substantive" under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). 547 F. 3d, at 501–502.

As a "second, independent" ground for its holding, the *Bonime* panel stated:

> "The private right of action created by the TCPA allows a person or entity to, 'if *otherwise permitted by the laws or rules of court of a State*, bring . . . ' an action for a violation of the TCPA. *See* 47 U. S. C. § 227(b)(3) (emphasis added). This statutory language is unambiguous—a claim under the TCPA cannot be brought if not permitted by state law. 'In determining the proper interpretation of a statute, this court will look first to the plain language of a statute and interpret it by its ordinary, common meaning. If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.' *Tyler v. Douglas*, 280 F. 3d 116, 122 (2d Cir. 2001) (internal citations, quotation marks, and alteration omitted). This provision constitutes an express limitation on the TCPA which federal courts are required to respect." *Id.*, at 502.

Judge Calabresi concurred, joining only the second ground "identified by the majority for its conclusion." *Ibid.* As Judge Calabresi explained:

> "A state law that bars suit in state court, like [CPLR] 901(b), . . . effectively eliminates the cause of action created under the TCPA because it eliminates the 'may' and the rest of the phrase that follows ('bring . . . an action'). Federal law (the TCPA's cause of action) directs courts to look to 'the laws' and 'rules of court' of a state. Thus, when a state refuses to recognize a cause of action, there remains no cause of action to which any grant of federal court jurisdiction could attach." *Id.*, at 503.

Although *Shady Grove* may bear on the Second Circuit's *Erie* analysis,* nothing in *Shady Grove* calls for a reading of § 227(b)(3) that fails fully to honor "the laws [and] rules of court of [New York] State." The Second Circuit's interpretation of the TCPA's private-right-of-action authorization stands on its own footing as an adequate and independent ground for dismissing Holster's suit. I would spare the Court of Appeals the necessity of revisiting—and, presumably, reinstating—its TCPA-grounded ruling.

Certiorari Dismissed

No. 09–9042. LASKEY *v.* RCN CORP. 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. Reported below: 357 Fed. Appx. 139.

No. 09–9074. BLOOM *v.* RICE ET AL. Ct. App. Kan. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 41 Kan. App. 2d xi, 203 P. 2d 1282.

No. 09–9093. MOORE *v.* OWENS 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: 361 Fed. Appx. 587.

No. 09–9638. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied,

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*Holster, however, arguably forfeited the argument, accepted in *Shady Grove*, that Federal Rule of Civil Procedure 23 preempts § 901(b); the District Court concluded that Rule 23 and § 901(b) did not conflict and noted that Holster "d[id] not dispute" that point. 485 F. Supp. 2d 179, 185, n. 3 (EDNY 2007).

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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 09A839. NEW YORK *v.* WILLIAMS ET AL. Application for stay, addressed to JUSTICE ALITO and referred to the Court, denied.

No. 09M85. THOMPSON *v.* FLORIDA (two judgments). Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09–150. MICHIGAN *v.* BRYANT. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 970.] Motion of respondent for appointment of counsel granted. Peter Jon Van Hoek, Esq., of Detroit, Mich., is appointed to serve as counsel for respondent in this case.

No. 09–559. DOE ET AL. *v.* REED, SECRETARY OF STATE OF WASHINGTON, ET AL. C. A. 9th Cir. [Certiorari granted, 558 U. S. 1142.] Motion of American Business Media et al. for leave to file a brief as *amici curiae* out of time granted.

No. 09–944. PLACER DOME, INC., ET AL. *v.* PROVINCIAL GOVERNMENT OF MARINDUQUE, REPUBLIC OF THE PHILIPPINES. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 09–7073. GOULD *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 903.] Motion of petitioner for appointment of counsel granted. David L. Horan, Esq., of Dallas, Tex., is appointed to serve as counsel for petitioner in this case.

No. 09–8014. IN RE ALPINE. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 935] denied.

No. 09–8375. SCHULTZ *v.* HALPIN ET AL. Sup. Ct. Ill. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 990] denied.

No. 09–8604. DOERR *v.* WALKER ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 968] denied.

No. 09–8917. BATES *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 989] denied.

No. 09–9536. MIERZWA *v.* HACKENSACK UNIVERSITY MEDICAL CENTER. Super. Ct. N. J., App. Div.; and

No. 09–9686. ROBLES *v.* UNITED STATES. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 10, 2010, 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. 09–9664. IN RE HERRING;

No. 09–9750. IN RE MCCLAIN; and

No. 09–9867. IN RE CHRONISTER. Petitions for writs of habeas corpus denied.

No. 09–985. IN RE PATTERSON. Petition for writ of mandamus denied.

No. 09–8998. IN RE BIERS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 08–1423. COSTCO WHOLESALE CORP. *v.* OMEGA, S. A. C. A. 9th Cir. Certiorari granted. Reported below: 541 F. 3d 982.

No. 09–400. STAUB *v.* PROCTOR HOSPITAL. C. A. 7th Cir. Certiorari granted. Reported below: 560 F. 3d 647.

No. 09–846. UNITED STATES *v.* TOHONO O'ODHAM NATION. C. A. Fed. Cir. Certiorari granted. Reported below: 559 F. 3d 1284.

No. 09–907. RANSOM *v.* FIA CARD SERVICES, N. A., FKA MBNA AMERICA BANK, N. A. C. A. 9th Cir. Certiorari granted. Reported below: 577 F. 3d 1026.

Certiorari Denied

No. 08–11105. BARRITEAU ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 09–79. BELLEVUE *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 755.

No. 09–176. LAKESIDE-SCOTT *v.* MULTNOMAH COUNTY, OREGON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 556 F. 3d 797.

No. 09–440. SCHRAMM *v.* LAHOOD, SECRETARY OF TRANSPORTATION. C. A. 6th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 337.

No. 09–538. CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 554 F. 3d 1046.

No. 09–580. ZEPHIER ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 559 F. 3d 1228.

No. 09–583. BROWNING *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 567 F. 3d 1038 and 340 Fed. Appx. 353.

No. 09–590. PROGRAMMERS GUILD ET AL. *v.* NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 338 Fed. Appx. 239.

No. 09–604. NGUYEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 4th 1007, 209 P. 3d 946.

No. 09–628. VEZINA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 17 So. 3d 1226.

No. 09–664. ARAMBULA-MEDINA *v.* HOLDER, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 572 F. 3d 824.

No. 09–666. LITHIUM POWER TECHNOLOGIES, INC., ET AL. *v.* UNITED STATES EX REL. LONGHI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 3d 458.

No. 09–678. SIMON ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–717. BANKS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 3d 295.

No. 09–727. BRADLEY *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 997 So. 2d 694.

No. 09–763. TURNIPSEED ET AL. *v.* BROWN, CLERK, CIRCUIT COURT OF ILLINOIS, COOK COUNTY, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 88, 908 N. E. 2d 546.

No. 09–788. NORFOLK SOUTHERN RAILWAY CO. *v.* JORDAN ET AL. Ct. App. Tenn. Certiorari denied.

No. 09–790. ZAGORSKI *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 336.

No. 09–799. DAVIES ET UX. *v.* MOYSA ET UX. (Reported below: 121 Haw. 461, 220 P. 3d 1042); and DAVIES ET UX. *v.* DOI, JUDGE, DISTRICT COURT OF HAWAII, FIRST CIRCUIT, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 09–800. NORTH COUNTY COMMUNITY ALLIANCE, INC. *v.* SALAZAR, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 3d 738.

No. 09–810. GRAND RIVER ENTERPRISES SIX NATIONS, LTD. *v.* MCDANIEL, ATTORNEY GENERAL OF ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 3d 929.

No. 09–826. STONE ET AL. *v.* DEVON ENERGY PRODUCTION CO., L. P., ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 216 P. 3d 489.

No. 09–946. JASKOLSKI ET AL. *v.* DANIELS ET AL. Ct. App. Ind. Certiorari denied. Reported below: 905 N. E. 2d 1.

No. 09–947. KIM *v.* TARGA REAL ESTATE SERVICE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 426.

No. 09–950. BITTNER *v.* SNYDER COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 345 Fed. Appx. 790.

No. 09–961. HOLLANDER ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 354 Fed. Appx. 592.

No. 09–964. MCGOWAN *v.* DEERE & CO. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 3d 575.

No. 09–970. BOYLE *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied.

No. 09–971. MARSHALL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 15 So. 3d 811.

No. 09–974. RIOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–975. PETERSON *v.* PDQ FOOD STORES INC. ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–984. OWEN *v.* SANDS. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 176 Cal. App. 4th 985, 98 Cal. Rptr. 3d 167.

No. 09–995. TOLLE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 09–1002. DAVIS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 773 N. W. 2d 66.

No. 09–1003. FISENKO *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 504.

No. 09–1013. SORIANO-ARELLANO *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 09–1020. NEWTON *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 09–1043. ANGHEL *v.* SAINT FRANCIS HOSPITAL AND MEDICAL CENTER. App. Ct. Conn. Certiorari denied. Reported below: 118 Conn. App. 139, 982 A. 2d 649.

No. 09–1045. PALAND *v.* BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT BOARD OF DIRECTORS. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 179 Cal. App. 4th 1358, 102 Cal. Rptr. 3d 270.

No. 09–1049. RAYMOND *v.* SUPREME COURT OF OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 09–1068. COGSWELL *v.* UNITED STATES SENATE. C. A. 10th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 175.

No. 09–1084. KRATT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 3d 558.

No. 09–1093. HICKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 3d 922.

No. 09–1094. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–1096. FRESENIUS USA, INC., ET AL. *v.* BAXTER INTERNATIONAL, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 582 F. 3d 1288.

No. 09–1099. RUBASHKIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–1102. ROWLEY *v.* CITY OF NORTH MYRTLE BEACH, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 657.

No. 09–1107. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–1120. BILOTTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–1129. REHAK ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 3d 965.

No. 09–1133. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 589 F. 3d 861.

No. 09–1139. THOMPSON *v.* UNITED STATES; and
No. 09–1141. BOLGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 357 Fed. Appx. 406.

No. 09–1153. CARSWELL ET AL. *v.* HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES ET AL. Int. Ct. App. Haw. Certiorari denied. Reported below: 120 Haw. 417, 209 P. 3d 194.

No. 09–6845. KAMARA *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 701.

No. 09–7382. RANDOLPH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 974.

No. 09–7579. MEZA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–7697. FOOTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 969.

No. 09–7845. ADAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–7927. GRAYSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 155 Cal. App. 4th 1059, 66 Cal. Rptr. 3d 603.

No. 09–7950. CHRISTIAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 53.

No. 09–8022. TU *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–8087. QUEZADA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–8126. COLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 933.

No. 09–8147. NUREK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 3d 618.

No. 09–8185. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 253.

No. 09–8195. WOODWARD *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 3d 318.

No. 09–8206. MERCER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–8266. CARDENAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–8416. BALTAZAR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–8511. GUTIERREZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 09–8512. INGALLS *v.* AES CORP. C. A. 7th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 246.

No. 09–8589. BUCK *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 923.

No. 09–8591. YALDA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–8610. HOOD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–8613. HERON-SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 3d 898.

No. 09–8766. LAND *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 573 F. 3d 1211.

No. 09–8980. JOHNSON *v.* GODDARD, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 346.

No. 09–8981. DICK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 602 Pa. 180, 978 A. 2d 956.

No. 09–8983. LEWIS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–8986. OCHEI *v.* ALL CARE/ONWARD HEALTHCARE ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–8992. BARBER *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 564.

No. 09–8997. THOMAS *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9001. VEGA NORIEGA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9002. HOLLAND *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 3d 267.

No. 09–9005. LAVALLEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–9009. WINFIELD *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied. Reported below: 292 S. W. 3d 909.

No. 09–9020. VEGA *v.* MCVEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9022. JOHNSTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9023. LLOYD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 929 A. 2d 242.

No. 09–9026. MILLER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9028. CRUMMEL *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 219.

No. 09–9031. CANTU *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 55.

No. 09–9040. LYONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9045. NIEVES *v.* WORLD SAVINGS BANK, FSB, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9046. BALLARD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 976 A. 2d 1198.

No. 09–9047. ARMANT *v.* STALDER. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 958.

No. 09–9050. BYRD *v.* LEWIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 3d 855.

No. 09–9051. BOYER *v.* BOYER. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 295 S. W. 3d 556.

No. 09–9055. MUHAMMAD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1138, 966 N. E. 2d 605.

No. 09–9058. GREEN *v.* MAROULES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 868.

No. 09–9062. JENNINGS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 09–9063. LANG *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 23 So. 3d 712.

No. 09–9068. ZABRISKIE *v.* ORLANDO POLICE ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 23 So. 3d 126.

No. 09–9069. WILKERSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 363 N. C. 382, 683 S. E. 2d 174.

No. 09–9073. MOHAMMED *v.* WISCONSIN INSURANCE SECURITY FUND ET AL. Ct. App. Wis. Certiorari denied. Reported below: 321 Wis. 2d 477, 774 N. W. 2d 476.

No. 09–9075. BALL *v.* BALL ET AL.; and BALL *v.* BLUNT ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9077. BELL *v.* MYERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 837.

No. 09–9080. JUDD *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 09–9081. MCNEIL *v.* HOWARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 409.

No. 09–9083. KING *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 09–9084. JONES *v.* FISCHER, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 09–9086. WILKENS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 09–9087. BENEDICT *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 09–9088. BLAXTON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 27 So. 3d 31.

No. 09–9090. LISTON *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 09–9100. TREVINO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9109. HODGE *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 3d 627.

No. 09–9117. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 462.

No. 09–9119. WITHEROW *v.* CRAWFORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 785.

No. 09–9124. COMBS *v.* VOIGT ET AL. Ct. App. Wis. Certiorari denied.

No. 09–9128. PARKER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 09–9129. COLLIER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 387 Ill. App. 3d 630, 900 N. E. 2d 396.

No. 09–9132. JOHNSON *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 842.

No. 09–9134. MARDESICH *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 09–9138. COMBS *v.* PEDERSEN, SHERIFF, MONROE COUNTY, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 130.

No. 09–9139. DIXON *v.* PALM BEACH COUNTY PARKS AND RECREATION DEPARTMENT. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 500.

No. 09–9140. CRAIN *v.* CLARK COUNTY PUBLIC DEFENDER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 953.

No. 09–9147. CASEY *v.* HARVEY. Sup. Ct. N. J. Certiorari denied.

No. 09–9150. SMITH *v.* ESTES EXPRESS. C. A. 4th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 52.

No. 09–9151. SMITH *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied.

No. 09–9167. SEMLER *v.* FINCH. C. A. 8th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 156.

No. 09–9169. JOHNSTON *v.* OLLISON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9170. LINDSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 849.

No. 09–9207. WEBB *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 3d 383.

No. 09–9221. BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL.; BARBOUR *v.* LEGISLATION UPON VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* KEEFFEE COMMISSARIES AT VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* VIRGINIA

Department of Corrections; Barbour *v.* Virginia Department of Corrections; Barbour *v.* Virginia Department of Corrections; Barbour *v.* Virginia Department of Corrections et al.; Barbour *v.* Virginia Department of Corrections et al.; Barbour *v.* Virginia Department of Corrections; and Barbour *v.* Representative of the Persons Assistant Warden Harvey. C. A. 4th Cir. Certiorari denied.

No. 09–9224. Arana *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9231. Grandoit *v.* Cooperative for Human Services, Inc. C. A. 1st Cir. Certiorari denied.

No. 09–9237. Keesh et al. *v.* Smith, Superintendent, Shawangunk Correctional Facility, et al. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 3d 410 and 346 Fed. Appx. 741.

No. 09–9278. Rhodes *v.* Lee, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 09–9279. Ray *v.* Missouri. C. A. 8th Cir. Certiorari denied.

No. 09–9286. Richard *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 981 A. 2d 931.

No. 09–9289. Akinmulero *v.* Holder, Attorney General, et al. C. A. 5th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 58.

No. 09–9303. DeLeon *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 09–9310. Al'Shahid *v.* Hudson, Warden. C. A. 6th Cir. Certiorari denied.

No. 09–9312. Miles *v.* Makishima et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–9315. Crenshaw *v.* Klopotoski, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied.

No. 09–9327. PARHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 821.

No. 09–9339. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 09–9340. LEWIS *v.* DAVIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 839.

No. 09–9343. THURMOND *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9382. ALLEN *v.* BALLARD, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 827.

No. 09–9386. CROSS *v.* DES MOINES POLICE DEPARTMENT ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–9390. HALL *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 342 Fed. Appx. 603.

No. 09–9391. HALL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–9424. DULAURENCE *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. App. Ct. Mass. Certiorari denied. Reported below: 74 Mass. App. 1125, 909 N. E. 2d 558.

No. 09–9444. WEST VIRGINIA EX REL. FARMER *v.* MCBRIDE, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 224 W. Va. 469, 686 S. E. 2d 609.

No. 09–9467. HOWARD *v.* WEBSTER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 616.

No. 09–9473. GADDY *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 21 So. 3d 677.

No. 09–9475. GORBATY *v.* PORTFOLIO RECOVERY ASSOCIATES, LLC. C. A. 3d Cir. Certiorari denied. Reported below: 355 Fed. Appx. 580.

No. 09–9478. CARL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 593 F. 3d 115.

No. 09–9481. SIMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 F. 3d 348.

No. 09–9482. JORDAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 3d 1265.

No. 09–9503. BOBB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9504. WILLIAMS *v.* COOPER, ATTORNEY GENERAL OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 09–9512. SPYKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 864.

No. 09–9516. HUDSON *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9518. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9525. NESBIT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 984.

No. 09–9526. MORTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9527. ROUM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 985 A. 2d 463.

No. 09–9537. BINOYA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 383.

No. 09–9540. WARRINGTON *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9543. SAUNDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 714.

No. 09–9544. MCCORVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9546. MORELAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 376.

No. 09–9549. CORTES-MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9550. DORSEY, AKA REED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 518.

No. 09–9552. MONSALVE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 451.

No. 09–9554. WINSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 822.

No. 09–9556. BIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 162.

No. 09–9558. BELVADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 854.

No. 09–9560. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 590 F. 3d 847.

No. 09–9561. SCOGGINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9562. SUKUP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–9566. GALEOTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 110.

No. 09–9567. FOSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 523.

No. 09–9568. HICKMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9569. FERGUSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 826.

No. 09–9570. CERVANTES-GUZMAN *v.* UNITED STATES; and
No. 09–9590. BERNAL-BENITEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 594 F. 3d 1303.

No. 09–9571. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 943.

No. 09–9576. SANDERS *v.* O'BRIEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 791.

No. 09–9577. SIMMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 3d 582.

No. 09–9578. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 910.

No. 09–9581. MONTGOMERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 622.

No. 09–9582. MIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 88.

No. 09–9583. ALLEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9586. JEBURK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9588. LATHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 661.

No. 09–9589. BUTTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 850.

No. 09–9591. RAMOS-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 166.

No. 09–9592. RUMLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 3d 202.

No. 09–9593. DORVAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9595. CARROLL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 172.

No. 09–9596. DIEHL *v.* MORGAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 99.

No. 09–9597. CENICEROS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 498.

No. 09–9598. AGUILAR DISCUA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 78.

No. 09–9601. SCHLIEFSTEINER *v.* O'BRIEN. Ct. App. D. C. Certiorari denied. Reported below: 982 A. 2d 1149.

No. 09–9608. CEBALLOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 226.

No. 09–9610. ROANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 356 Fed. Appx. 564.

No. 09–9613. MURILLO-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 948.

No. 09–9615. BREON *v.* UNITED STATES; and
No. 09–9679. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 615.

No. 09–9621. PACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 656.

No. 09–9623. MIDKIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 3d 236.

No. 09–9624. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 928.

No. 09–9627. BOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 711.

No. 09–9628. MARTINEZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 584.

No. 09–9633. JENS *v.* JENKINS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–9641. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9644. PEIRCE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 357 Fed. Appx. 319.

No. 09–9645. OSUAGWU, AKA OKEREKE, AKA STANLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 158.

No. 09–9646. SILVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9648. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 F. 3d 625.

No. 09–9650. WILLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9656. LOVE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 982 A. 2d 1149.

No. 09–9657. LAWTHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 357.

No. 09–9663. VEGA-COLON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9666. DAVIS, AKA CALVIN, AKA ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 587 F. 3d 1300.

No. 09–9670. ACUNA GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 583.

No. 09–9671. NUNNALLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9672. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 493.

No. 09–9674. FELICIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 949.

No. 09–9681. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 84.

No. 09–9682. SALOM, AKA FALCON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 409.

No. 09–9684. REED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 523.

No. 09–9692. BRADBERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 508.

No. 09–9693. KETCHUP *v.* DRIVER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 869.

No. 09–9694. REYES-ECHEVARRIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9696. BASS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 664.

No. 09–9698. BERTRAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 934.

No. 09–9700. LOPEZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 587.

No. 09–9710. RUCKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 3d 713.

No. 09–9713. DORVILUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 239.

No. 09–9716. LUBO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9717. LAHERA *v.* WALT DISNEY CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9718. AYALA-RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 585.

No. 09–9719. ORTIZ-ARRIAGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 849.

No. 09–9722. ROJAS-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9727. COVARRUBIAS-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 507.

No. 09–9728. CALDERON-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 754.

No. 09–9732. VALVERDE-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 946.

No. 09–9733. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 3d 831.

No. 09–9734. ZUNIGA-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9737. OWDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 448.

No. 09–9739. JAQUEZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 725.

No. 09–9742. HERNANDEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 717.

No. 09–9748. MURPHY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9753. EDWARDS, AKA WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 773.

No. 09–9755. DESHOTELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 960.

No. 09–9759. LAWSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 357 Fed. Appx. 450.

No. 09–9760. LOEW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 3d 1136 and 364 Fed. Appx. 333.

No. 09–9763. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9765. SWAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 417.

No. 09–9766. RICHMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 841.

No. 09–9777. GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 869.

No. 09–9781. GUERRERO-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 525.

No. 09–9783. GILLIAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9785. GONZALEZ-GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9788. QUINTERO-CALLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9791. MENA-HIDALGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9792. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 679.

No. 09–579. WOLFCHILD ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Motion of Historic Shingle Springs Miwok for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 559 F. 3d 1228.

No. 09–781. MINNESOTA *v.* RUSSELL. Ct. App. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 09–805. D. D. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES EX REL. M. D. ET AL., MINORS. Super. Ct. N. J., App. Div. Motion of respondents M. D. and K. D. for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 09–813. GENNIMI *v.* TOWN OF LEWISBORO, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 333 Fed. Appx. 599.

No. 09–861. CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE ET AL. *v.* BROWNING, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 11th Cir. Motion of Marion B. Brechner First Amendment Project et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 572 F. 3d 1213.

No. 09–931. SMITH *v.* BENDER, ASSOCIATE JUSTICE, SUPREME COURT OF COLORADO, ET AL. C. A. 10th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 350 Fed. Appx. 190.

No. 09–939. PILLAY *v.* CISCO SYSTEMS, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 09–943. SALSBERG ET AL. *v.* TRICO MARINE SERVICES, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 340 Fed. Appx. 55.

No. 09–956. DOYLE *v.* AMERICAN HOME PRODUCTS CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR

took no part in the consideration or decision of this petition. Reported below: 583 F. 3d 167.

No. 09–1080. PORRAS *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 343 Fed. Appx. 710.

No. 09–9655. JASS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 569 F. 3d 47 and 331 Fed. Appx. 850.

No. 09–9715. DARBY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–9745. TUCKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 350 Fed. Appx. 512.

No. 09–9784. HESTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 589 F. 3d 86.

No. 09–10250 (09A972). DURR *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 602 F. 3d 789.

No. 09–10280 (09A979). DURR *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 602 F. 3d 788.

No. 09–10281 (09A980). DURR *v.* CORDRAY, ATTORNEY GENERAL OF OHIO, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 602 F. 3d 731.

Rehearing Denied

No. 08–1458. MISSOURI GAS ENERGY *v.* SCHMIDT, WOODS COUNTY, OKLAHOMA, ASSESSOR, *ante,* p. 970;

No. 09–273. THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* HAYNES, *ante*, p. 43;

No. 09–347. DUTKA, GUARDIAN OF THE ESTATE OF T. M., A MINOR, ET AL. *v.* AIG LIFE INSURANCE CO., *ante*, p. 970;

No. 09–402. MCCANE *v.* UNITED STATES, *ante*, p. 970;

No. 09–461. WEST *v.* BELL, WARDEN, *ante*, p. 970;

No. 09–661. KASHARIAN *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, *ante*, p. 938;

No. 09–689. HUNSBERGER ET UX. *v.* WOOD, DEPUTY SHERIFF, BOTETOURT COUNTY, VIRGINIA, *ante*, p. 938;

No. 09–715. SMITH *v.* FRIEDMAN ET AL., *ante*, p. 971;

No. 09–735. ALEXANDER *v.* SMITH ET AL., *ante*, p. 971;

No. 09–7257. IRICK *v.* BELL, WARDEN, *ante*, p. 942;

No. 09–7259. REDMAN *v.* POTOMAC PLACE ASSOCIATES, LLC, 558 U. S. 1121;

No. 09–7278. CAMILLO *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, 558 U. S. 1122;

No. 09–7365. SMITH *v.* BRIDGESTONE FIRESTONE TIRE CO. ET AL., 558 U. S. 1124;

No. 09–7453. SAIRRAS *v.* SCHLEFFER ET AL., 558 U. S. 1151;

No. 09–7506. BROWN *v.* KELLEY ET AL., 558 U. S. 1152;

No. 09–7542. GRUBER *v.* BUESCHER, SECRETARY OF STATE OF COLORADO, ET AL., 558 U. S. 1153;

No. 09–7628. SONNTAG *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL., *ante*, p. 907;

No. 09–7670. MORTLAND *v.* TEXAS, *ante*, p. 908;

No. 09–7733. JACKSON *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 909;

No. 09–7777. HARBISON *v.* LITTLE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL., *ante*, p. 975;

No. 09–7795. SELF *v.* DEVON ENERGY PRODUCTION CO., LP, *ante*, p. 942;

No. 09–7802. HANSEN *v.* INDUSTRIAL CLAIM APPEALS OFFICE OF COLORADO ET AL., *ante*, p. 943;

No. 09–7858. POWERS *v.* MESABA AVIATION, INC., DBA MESABA AIRLINES, ET AL., *ante*, p. 944;

No. 09–7922. PALMER *v.* SMITH, WARDEN, *ante*, p. 945;

No. 09–7945. WIMBERLY *v.* ROYAL ET AL., *ante*, p. 946;

No. 09–8089. KLAT *v.* MITCHELL REPAIR INFORMATION CO., LLC, ET AL., *ante*, p. 949;

No. 09–8119. BROWN *v.* UNITED STATES, *ante*, p. 950;
No. 09–8135. FULLER *v.* BURNETT ET AL., *ante*, p. 975;
No. 09–8198. IN RE SANCHO, *ante*, p. 935;
No. 09–8200. BLACKMER *v.* BLAISDELL, WARDEN, *ante*, p. 977;
No. 09–8222. GENEVIER *v.* DEMORE, *ante*, p. 951;
No. 09–8263. WALTERS *v.* FLORIDA, *ante*, p. 979;
No. 09–8309. VEGA-FIGUEROA *v.* UNITED STATES, *ante*, p. 953;
No. 09–8322. WILLIAMS *v.* UNITED STATES, *ante*, p. 953;
No. 09–8369. JUDD *v.* UNITED STATES, *ante*, p. 954;
No. 09–8393. RANDLE *v.* CALIFORNIA, *ante*, p. 995;
No. 09–8417. BECKFORD *v.* HOLDER, ATTORNEY GENERAL, *ante*, p. 981;
No. 09–8426. JUDD *v.* UNITED STATES, *ante*, p. 981;
No. 09–8432. NIKIFORAKIS *v.* STANEK, *ante*, p. 981;
No. 09–8451. WILSON *v.* FLORIDA, *ante*, p. 981;
No. 09–8477. QIAN CHEN *v.* MARTINEZ, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *ante*, p. 957; and
No. 09–8849. REVELS *v.* REYNOLDS ET AL., *ante*, p. 987. Petitions for rehearing denied.

No. 09–8517. LASKEY *v.* CISCO TECHNOLOGY, INC., *ante*, p. 988. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

APRIL 22, 2010

Miscellaneous Order

No. 09A995. BERKLEY *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

APRIL 26, 2010

Certiorari Granted—Vacated and Remanded

No. 09–724. REAL TRUTH ABOUT OBAMA, INC. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), and the Solicitor General's suggestion of mootness. Reported below: 575 F. 3d 342.

Certiorari Dismissed

No. 09–9196. SABEDRA *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. 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.

No. 09–9266. ODOM *v.* MT. PLEASANT MUNICIPAL COURT, SOUTH CAROLINA. 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: 358 Fed. Appx. 486.

No. 09–9280. SABEDRA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. 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.

No. 09–9342. CALDWELL *v.* FLORIDA PAROLE COMMISSION. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 25 So. 3d 1225.

No. 09–9780. GENEVIER *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–9873. FRAZIER *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 09A827 (09–1250). FINE *v.* BACA, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA. C. A. 9th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 09M86. DOSTER *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 09M87. TULL *v.* NEW YORK, NEW YORK, ET AL.; and
No. 09M88. DOBY *v.* BURTT, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 1, Orig. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 2, Orig. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 3, Orig. NEW YORK *v.* ILLINOIS ET AL. Motion of Michigan to reopen and for a supplemental decree denied. Alternative motion for leave to file a bill of complaint denied. [For earlier order herein, see, *e. g.*, *ante*, p. 1003.]

No. 09–960. HOGAN, COMMISSIONER, ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL. *v.* KALTAG TRIBAL COUNCIL ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 09–9137. CALDWELL *v.* UNITED STATES TAX COURT ET AL. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1004] denied.

No. 09–9281. SHAHIN *v.* DELAWARE ET AL. C. A. 3d Cir.; and
No. 09–9283. RUBINSTEIN ET UX. *v.* HAGENS BERMAN SOBOL SHAPIRO LLP. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 17, 2010, 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. 09–1078. IN RE ROSE;
No. 09–9255. IN RE HENDERSON;
No. 09–10019. IN RE MCMULLEN; and
No. 09–10039. IN RE BRUNER. Petitions for writs of habeas corpus denied.

No. 09–10031. IN RE BURNES. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 09–8701. IN RE SPRINGER; and
No. 09–9277. IN RE SANDERS. Petitions for writs of mandamus denied.

No. 09–9174. IN RE WARREN. 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.

Certiorari Granted

No. 08–1448. SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL. *v.* ENTERTAINMENT MERCHANTS ASSN. ET AL. C. A. 9th Cir. Motion of California State Senator Leland Y. Yee et al. for leave to file a brief as *amici curiae* out of time denied. Certiorari granted. Reported below: 556 F. 3d 950.

No. 09–737. ORTIZ *v.* JORDAN ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 316 Fed. Appx. 449.

Certiorari Denied

No. 08–10994. JEFFERS *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 09–753. MCGOWAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 338 Fed. Appx. 662.

No. 09–938. OGLE, LIQUIDATING TRUSTEE OF THE AGWAY LIQUIDATING TRUST *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 3d 143.

No. 09–968. CAFFEY *v.* ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied.

No. 09–997. DICKSON ET AL. *v.* SAN JUAN COUNTY, UTAH, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 243.

No. 09–1005. PUGLISI ET AL. *v.* PAVONE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 353 Fed. Appx. 622.

No. 09–1010. COLLARD *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 09–1032. TELECHECK SERVICES, INC., ET AL. *v.* BEAUDRY. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 3d 702.

No. 09–1037. WILSON *v.* ROBERT J. ADAMS & ASSOCIATES. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 389 Ill. App. 3d 1149, 976 N. E. 2d 1210.

No. 09–1041. SKENDAJ *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 343 Fed. Appx. 750.

No. 09–1046. HOOVER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 123 Ohio St. 3d 418, 916 N. E. 2d 1056.

No. 09–1060. THANEDAR *v.* TIME WARNER, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 891.

No. 09–1083. HAWKINS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 357 Fed. Appx. 295.

No. 09–1087. DAVID *v.* DAVID. Sup. Ct. Mont. Certiorari denied. Reported below: 354 Mont. 44, 221 P. 3d 1209.

No. 09–1089. ALLIED HOME MORTGAGE CAPITAL CORP. ET AL. *v.* CORRALES. Sup. Ct. Tex. Certiorari denied.

No. 09–1135. KRIEG *v.* DAWSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–1136. MAGDALIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied.

No. 09–1152. BRANDT, CHAPTER 7 TRUSTEE OF THE ESTATES OF PLASSEIN INTERNATIONAL CORP., ET AL. *v.* B. A. CAPITAL CO. LP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 590 F. 3d 252.

No. 09–5901. HARRISON *v.* LINDSAY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 09–7636. ORTIZ-COCA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 863.

No. 09–7639. AGUILAR-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 865.

No. 09–7643. GARCIA-QUIROZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 501.

No. 09–7644. MANCILLA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 864.

No. 09–7698. FOWLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 520.

No. 09–7829. BRADSHAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 3d 1129.

No. 09–7923. SCHWARTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 315 Fed. Appx. 412.

No. 09–8090. KINCANNON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 3d 893.

No. 09–8653. SYLVIA *v.* MADDOX ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 756.

No. 09–8673. BEARUP *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 221 Ariz. 163, 211 P. 3d 684.

No. 09–8754. KATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 902.

No. 09–8887. WILL *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 35.

No. 09–8900. CARRINGTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 4th 145, 211 P. 3d 617.

No. 09–8909. TEMPLE *v.* WARMER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–9136. SHIRLEY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 917 N. E. 2d 188.

No. 09–9145. SHOVE *v.* WONG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9149. REID *v.* FLINT CIVIL SERVICE COMMISSION. Ct. App. Mich. Certiorari denied.

No. 09–9152. YOUNG BOK SONG *v.* DOZIER. C. A. 6th Cir. Certiorari denied.

No. 09–9163. SHIELD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9173. LANDEROS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 09–9176. USHER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 09–9179. SPUCK *v.* RIDGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 347 Fed. Appx. 727.

No. 09–9184. STANKOWSKI *v.* ABRAMSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9192. SMITH *v.* YATES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9193. SWAIN *v.* WELCH, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 123 Ohio St. 3d 1521, 918 N. E. 2d 524.

No. 09–9194. ROWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 09–9195. RODRIGUEZ *v.* WALKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9206. BROWN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 246.

No. 09–9215. COLLADO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9220. BARBOUR *v.* SCHLOBOHM ET AL. C. A. 4th Cir. Certiorari denied.

No. 09–9222. BROWDER *v.* VINGLEMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9226. POWERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 392 Ill. App. 3d 1131, 984 N. E. 2d 209.

No. 09–9227. OSTOPOSIDES *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9229. WOOD *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 09–9230. GRANDOIT *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 1st Cir. Certiorari denied.

No. 09–9233. GONZALEZ ET UX. *v.* RIDDLE ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9235. WOODSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9239. MAYS *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9245. MCGORE *v.* LUTZ ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9265. KASTNER *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 980.

No. 09–9274. BARGHOUT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 09–9285. SLAMA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 09–9287. ROBINSON *v.* COHEN, WARDEN, ET AL. Sup. Ct. S. C. Certiorari denied.

No. 09–9290. WEBBER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 29 So. 3d 292.

No. 09–9293. MANNIX *v.* MADIGAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9294. KRUEGER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9296. TURNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 384 Ill. App. 3d 1091, 973 N. E. 2d 1089.

No. 09–9298. WADDELL-EL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–9299. WILLINGHAM *v.* DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY. Ct. App. D. C. Certiorari denied.

No. 09–9307. BEVINS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 09–9309. BROWN *v.* STATE CAPITOL OFFICE OF THE GOVERNOR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 358 Fed. Appx. 186.

No. 09–9313. RUSSELL *v.* KENNEDY ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–9316. DIMARIA *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–9326. NORTHON *v.* RULE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 905.

No. 09–9331. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1122, 982 N. E. 2d 989.

No. 09–9353. THREATT *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9383. BRANT *v.* VARANO ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9397. FLEWELLEN *v.* WALLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–9404. MANGUM *v.* CATO CORP. C. A. 5th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 947.

No. 09–9412. WESCOTT *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 981 A. 2d 1173.

No. 09–9416. HAYWARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 24 So. 3d 17.

No. 09–9437. QUINN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 392 Ill. App. 3d 1131, 984 N. E. 2d 209.

No. 09–9445. COOPER *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9471. FOSTER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 09–9484. BROWN *v.* MCCARTHY. C. A. D. C. Cir. Certiorari denied. Reported below: 368 Fed. Appx. 145.

No. 09–9517. PAYNE *v.* LEMASTER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 302.

No. 09–9530. CHAMBERS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 09–9535. PATTERSON *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9542. KING *v.* COLMERS ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 09–9555. MENTOR *v.* NEW YORK STATE DIVISION OF PAROLE ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 67 App. Div. 3d 1108, 886 N. Y. S. 2d 920.

No. 09–9575. SIMMONS *v.* THURMER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–9587. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 18 So. 3d 1046.

No. 09–9594. CASTRO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9600. DAVIS *v.* MICHIGAN. Cir. Ct. Berrien County, Mich. Certiorari denied.

No. 09–9616. AGUILAR *v.* SELMAN BREITZMAN, LLP, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9620. AMR *v.* VIRGINIA STATE UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 194.

No. 09–9622. MILLER *v.* ANHEUSER BUSCH, INC. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 547.

No. 09–9636. WALLER *v.* HAUCK, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9639. YOUNG *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied.

No. 09–9653. WARDLOW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 354.

No. 09–9660. SMILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 302.

No. 09–9691. BAUER *v.* MICHIGAN. Cir. Ct. Kent County, Mich. Certiorari denied.

No. 09–9723. RODRIGUEZ-MENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–9726. SMALL *v.* BODISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 516.

No. 09–9741. LEE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 320 Wis. 2d 536, 771 N. W. 2d 373.

No. 09–9771. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 456.

No. 09–9789. SMITH *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9796. CONNOLLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 349 Fed. Appx. 754.

No. 09–9799. IRONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9801. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–9805. HARDEMAN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 67 M. J. 372.

No. 09–9806. GUZMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9807. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 3d 394.

No. 09–9809. GONZALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 597.

No. 09–9810. HUBER, AKA HUBERT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 322 Fed. Appx. 608.

No. 09–9811. HORDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 970.

No. 09–9812. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9814. CARLTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 864.

No. 09–9815. SUTTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 780.

No. 09–9816. SEGURA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 557.

No. 09–9817. JIMENEZ-PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 356.

No. 09–9818. HENAO-MELO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 3d 798.

No. 09–9823. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 829.

No. 09–9824. TORRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9825. HERNANDEZ LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 511.

No. 09–9826. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 586 F. 3d 859.

No. 09–9833. AVILA-RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 841.

No. 09–9836. ORTIZ-ALVEAR *v.* UNITED STATES ATTORNEY'S OFFICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9840. DUMONT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 345 Fed. Appx. 586.

No. 09–9843. TSOSIE *v.* ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 09–9844. UPSHAW, AKA EPPS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 118.

No. 09–9847. WATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–9848. NYAMAHARO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 899.

No. 09–9851. JENNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 355 Fed. Appx. 440.

No. 09–9857. MOJICA, AKA SALAZAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 273.

No. 09–9858. RIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 357 Fed. Appx. 404.

No. 09–9866. CABRERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9872. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9879. TRUONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 3d 1049.

No. 09–9886. SOTO-MUNOZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 303.

No. 09–9895. RIVERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–999. MALLERY ET AL. *v.* NBC UNIVERSAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 331 Fed. Appx. 821.

No. 09–1007. MOUNTAIN AMERICA, LLC, ET AL. *v.* HUFFMAN, ASSESSOR OF MONROE COUNTY, WEST VIRGINIA, ET AL. Sup. Ct. App. W. Va. Motion of West Virginia Manufacturers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 224 W. Va. 669, 687 S. E. 2d 768.

No. 09–1016. SIMONELLI *v.* UNIVERSITY OF CALIFORNIA AT BERKELEY ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 338 Fed. Appx. 673.

No. 09–1054. BERGER *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 347 Fed. Appx. 692.

No. 09–9429. MCNAMARA *v.* KAYE, CHIEF JUDGE, COURT OF APPEALS OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 360 Fed. Appx. 177.

No. 09–9712. COOPER *v.* UNITED STATES; and

No. 09–9880. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions. Reported below: 354 Fed. Appx. 439.

No. 09–9856. DEANDRADE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 600 F. 3d 115.

Rehearing Denied

No. 09–722. GREEN *v.* CLEARY WATER, SEWER AND FIRE DISTRICT, *ante*, p. 971;

No. 09–768. STRALEY *v.* UTAH BOARD OF PARDONS ET AL., *ante*, p. 991;

No. 09–7887. MCDUFFIE *v.* FLORIDA, *ante*, p. 944;

No. 09–7891. SCOTT, AKA THOMAS *v.* SOUTH CAROLINA, *ante*, p. 911;

No. 09–8139. GREER *v.* NELSON, WARDEN, *ante*, p. 975;

No. 09–8303. WOODSON *v.* RUNDLE-FERNANDEZ, STATE ATTORNEY, *ante*, p. 980;

No. 09–8304. TOMPSON *v.* TOWN OF SALEM, NEW HAMPSHIRE, *ante*, p. 980;

No. 09–8391. SAMPSON *v.* FRANCE ET AL., *ante*, p. 994;

No. 09–8463. WHITE ET UX. *v.* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., *ante*, p. 1010;

No. 09–8464. IN RE WALCK, *ante*, p. 934;

No. 09–8487. HOLLAND *v.* HOLLAND, *ante*, p. 982; and

No. 09–8969. PISKANIN *v.* UNITED STATES, *ante*, p. 1019. Petitions for rehearing denied.

APRIL 27, 2010

Certiorari Denied

No. 09–10396 (09A1009). BUSTAMANTE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

APRIL 28, 2010

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1121; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1129; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1141; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1153; and an amendment to the Federal Rules of Evidence, see *post*, p. 1159.)

MAY 3, 2010

Certiorari Granted—Vacated and Remanded

No. 07–1489. TRAINER WORTHAM & CO., INC., ET AL. *v.* BETZ. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Merck & Co.* v. *Reynolds*, *ante*, p. 633. Reported below: 519 F. 3d 863.

No. 08–1473. AMERICAN EXPRESS CO. ET AL. *v.* ITALIAN COLORS RESTAURANT ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, *ante*, p. 662. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 554 F. 3d 300.

Certiorari Dismissed

No. 09–9332. ROBENSON *v.* HASZINGER. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 26 So. 3d 1290.

No. 09–9362. ROBENSON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 28 So. 3d 45.

No. 09–9400. MATTHEWS *v.* ENDEL 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.

No. 09–9531. ERICKSON *v.* LAU, TRUSTEE OF THE LAU FAMILY TRUST. App. Ct. Mass. 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)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 09A886. DOE *v.* DUNCAN ET AL. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–2465. IN RE DISBARMENT OF POPE. Disbarment entered. [For earlier order herein, see *ante*, p. 968.]

No. 09M89. JONES *v.* VIRGINIA DEPARTMENT OF SOCIAL SERVICES; and

No. 09M92. GRANDOIT *v.* BANE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09M90. BROWN *v.* BANK OF AMERICA ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 09M91. IN RE DOE. Motion for leave to file petition for writ of habeas corpus under seal with redacted copies for the public record denied.

No. 08–1457. NEW PROCESS STEEL, L. P. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 558 U. S. 989.] Motion of Michigan Regional Council of Carpenters for leave to file a supplemental brief after argument denied.

No. 09–920. SIMMONS ET AL. *v.* GALVIN, SECRETARY OF COMMONWEALTH OF MASSACHUSETTS. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 09–5801. FLORES-VILLAR *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1005.] Motion of petitioner for appointment of counsel granted. Steven F. Hubacheck, Esq., of San Diego, Cal., is appointed to serve as counsel for petitioner in this case.

No. 09–9464. MUSALL *v.* OWENS ET AL. Sup. Ct. Nev. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 24, 2010, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 09–9669. GAINES *v.* NEW YORK CITY TRANSIT AUTHORITY ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 24, 2010, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion.

No. 09–10090. IN RE FRAZIER; and

No. 09–10165. IN RE YOUNG. Petitions for writs of habeas corpus denied.

No. 09–9366. IN RE WARREN; and

No. 09–9369. IN RE WARREN. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Denied

No. 08–1222. Boy Scouts of America et al. *v.* Barnes-Wallace et al. C. A. 9th Cir. Certiorari denied. Reported below: 530 F. 3d 776.

No. 09–740. Hill *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 950.

No. 09–766. Palmyra Pacific Seafoods, L. L. C., et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 561 F. 3d 1361.

No. 09–771. Acceptance Insurance Cos., Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 583 F. 3d 849.

No. 09–772. Western Radio Services Co. et al. *v.* United States Forest Service et al. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 3d 1116.

No. 09–900. Carty *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 3d 244.

No. 09–910. Attea *v.* Department of Taxation and Finance of New York et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 3d 909, 883 N. Y. S. 2d 610.

No. 09–912. Ghazali *v.* Holder, Attorney General. C. A. 6th Cir. Certiorari denied. Reported below: 585 F. 3d 289.

No. 09–914. Markell, Governor of Delaware, et al. *v.* Office of the Commissioner of Baseball et al. C. A. 3d Cir. Certiorari denied. Reported below: 579 F. 3d 293.

No. 09–1008. Scott et ux. *v.* Samuel I. White, P. C., et al. Sup. Ct. Va. Certiorari denied.

No. 09–1022. Bayer Schering Pharma AG et al. *v.* Barr Laboratories, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 575 F. 3d 1341.

No. 09–1025. Moncier *v.* United States District Court for the Eastern District of Tennessee. C. A. 6th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 636.

No. 09–1029. MASSI *v.* FLYNN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 353 Fed. Appx. 658.

No. 09–1030. KOEHNKE *v.* CITY OF MCKEESPORT, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 720.

No. 09–1033. HUJAZI *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 09–1038. WAGNER ET AL. *v.* LIVE NATION MOTOR SPORTS, INC., FKA SFX MOTOR SPORTS, INC., DBA CLEAR CHANNEL ENTERTAINMENT-MOTOR SPORTS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 586 F. 3d 1237.

No. 09–1047. TEKILA FILMS, INC., ET AL. *v.* NEW FORM INC., DBA LAGUNA FILMS. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 10.

No. 09–1048. LIGGINS *v.* WILLIAM A. HAZEL, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 854.

No. 09–1050. MARINE EXPRESS, INC. *v.* KARMIN. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–1053. WALKER ET AL. *v.* CITY OF WATERBURY, CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 163.

No. 09–1070. VAN HARDY ET UX. *v.* MICHIGAN DEPARTMENT OF TREASURY. C. A. 6th Cir. Certiorari denied.

No. 09–1075. MARYANYAN ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 306.

No. 09–1160. JP MORGAN CHASE BANK, N. A. *v.* WHALEN. C. A. 2d Cir. Certiorari denied. Reported below: 587 F. 3d 529.

No. 09–7778. RAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 3d 184.

No. 09–8059. ROSENCRANTZ *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 568 F. 3d 577.

No. 09–8327. RUNGE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 234 Ill. 2d 68, 917 N. E. 2d 940.

No. 09–8833. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 586 F. 3d 1342.

No. 09–8855. MILLER *v.* GLANZ. C. A. 10th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 608.

No. 09–8972. DALLAL *v.* NEW YORK TIMES CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 508.

No. 09–9137. CALDWELL *v.* UNITED STATES TAX COURT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 360 Fed. Appx. 161.

No. 09–9317. DOBBINS *v.* CARLSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 09–9318. DREW *v.* MULLINS ET AL. Sup. Ct. Va. Certiorari denied.

No. 09–9319. DREW *v.* JABE ET AL. Sup. Ct. Va. Certiorari denied.

No. 09–9320. COX *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1129, 982 N. E. 2d 992.

No. 09–9321. DENNIE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 09–9323. BROWN *v.* HOWARD COUNTY POLICE DEPARTMENT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 358 Fed. Appx. 186.

No. 09–9324. BROWN *v.* COUNCIL, BARADEL, KOSMERL & NOLAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 360 Fed. Appx. 162.

No. 09–9325. BROWN *v.* UPPER MARLBORO TOWN POLICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 360 Fed. Appx. 163.

No. 09–9329. CURRY *v.* GABLES RESIDENTIAL SERVICES, INC. Ct. App. Ga. Certiorari denied.

No. 09–9341. DAVILA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9344. WENTZ *v.* SEVIER, SUPERINTENDENT, MIAMI CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 09–9346. TAFARI *v.* STEIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–9359. EATO *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 21 So. 3d 823.

No. 09–9361. EDMOND *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9363. WEAVER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 09–9367. LOPEZ DE LA CRUZ *v.* LARSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9370. WILLIAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 09–9373. LANKSTER *v.* CITY OF LINDEN, ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 09–9377. BANKS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 1099, 985 N. E. 2d 722.

No. 09–9378. ALFORD *v.* POWER, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9379. BRUNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 09–9380. ARBUCKLE *v.* KNIGHT, SUPERINTENDENT, PLAINFIELD CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 09–9381. BARBOUR *v.* STANFORD ET AL. C. A. 4th Cir. Certiorari denied.

No. 09–9384. MENDEZ *v.* NEVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9387. DURSCHMIDT *v.* CITY OF CHANDLER, ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 09–9392. HERNANDEZ *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 745.

No. 09–9398. GURNSEY *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9399. FRASER *v.* HIGH LINER FOODS (USA), INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 337 Fed. Appx. 883.

No. 09–9403. NICHOLS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 285 Ga. 784, 683 S. E. 2d 610.

No. 09–9407. MANTZKE *v.* PROVINCE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 293.

No. 09–9408. RENDER *v.* HALL ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 09–9414. THORNTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 1104, 985 N. E. 2d 725.

No. 09–9418. CHAPPELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. ——, 281 P. 3d 1160.

No. 09–9422. MCKINLEY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9423. PORTLEY-EL *v.* STEINBECK ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 204.

No. 09–9425. ORMOND *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 09–9426. MCGORE *v.* LUDWICK, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9427. MAYES *v.* PROVINCE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 100.

No. 09–9435. RUFFIN *v.* NORTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 841.

No. 09–9439. CALLENDER *v.* ROSS STORES, INC. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–9442. YSAIS *v.* REYNOLDS ET AL. Sup. Ct. N. M. Certiorari denied.

No. 09–9465. CANN *v.* HAYMAN, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 346 Fed. Appx. 882.

No. 09–9520. THOMPSON *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION. C. A. 3d Cir. Certiorari denied.

No. 09–9529. DE LA GARZA *v.* FABIAN, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 3d 998.

No. 09–9532. ERBY *v.* BENNETT ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–9533. SOW *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied.

No. 09–9538. MENDOZA-MENDOZA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 220.

No. 09–9557. BOWIE *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Catawba County, N. C. Certiorari denied.

No. 09–9563. ROSARIO *v.* CHAMBERLAIN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MUNCY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9604. WALDRIP *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 3d 729.

No. 09–9612. SHERWOOD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 603 Pa. 92, 982 A. 2d 483.

No. 09–9632. JACKSON *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 3d 856.

No. 09–9659. MURRELL *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 344 Fed. Appx. 616.

No. 09–9662. OLMEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 959.

No. 09–9689. BERRY *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 666.

No. 09–9782. GALLO-MORENO, AKA CARRION *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 3d 751.

No. 09–9802. HYMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 342 Fed. Appx. 730.

No. 09–9803. FLYNN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–9822. WILKERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 909.

No. 09–9850. PARMALEE *v.* UTTECHT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 395.

No. 09–9862. AKERS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. C. A. 10th Cir. Certiorari denied.

No. 09–9878. SCINTO *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 352 Fed. Appx. 448.

No. 09–9882. SYNDAB, AKA NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 852.

No. 09–9883. SMITH *v.* MARBERRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–9892. COOPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 93.

No. 09–9893. DENMARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9894. DISLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 121.

No. 09–9899. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9902. JOHNSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 840.

No. 09–9904. LOCKETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 598.

No. 09–9905. MATTHEWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9909. NELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 3d 924.

No. 09–9912. MERTENS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 347 Fed. Appx. 565.

No. 09–9914. GARCIA-SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 790.

No. 09–9915. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–9916. GARCIA-LIMONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9922. AJIJOLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 3d 763.

No. 09–9924. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9926. WALLACE *v.* BLEDSOE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9927. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 562.

No. 09–9928. CRAIG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 446.

No. 09–9929. CHARLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9932. DOVE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 877.

No. 09–9933. DYER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 589 F. 3d 520.

No. 09–9934. GOVAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 71.

No. 09–9935. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 801.

No. 09–9936. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 40.

No. 09–9937. HILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–9946. CHARLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 1.

No. 09–9948. HENRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 356 Fed. Appx. 423.

No. 09–9949. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 442.

No. 09–9951. AITCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 788.

No. 09–9960. ESCOBAR DE JESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–9961. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 487.

No. 09–9963. DYCHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 707.

No. 09–9964. DANIELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 3d 835.

No. 09–9971. TREJO MIRELES, AKA TREJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 599.

No. 09–9975. BRACKEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 457.

No. 09–9976. BRANCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 3d 602.

No. 09–9977. PARKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9978. VILLASENOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–9981. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9984. ELLIOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 885.

No. 09–9985. RYAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–9987. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–9989. MEDINA-CASTELLANOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 404.

No. 09–9990. HAMBLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 591 F. 3d 471.

No. 09–9992. MASSEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 581 F. 3d 172.

No. 09–9997. MARSHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 24.

No. 09–9998. JUVENILE MALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 417.

No. 09–10001. BLACKMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 3d 1115.

No. 09–10002. BOYD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–10005. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 856.

No. 09–10006. EVANS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 3d 787.

No. 09–10007. NICHOLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 410.

No. 09–10011. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 898.

No. 09–10014. PINKNEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 351 Fed. Appx. 448.

No. 09–10022. MCKNIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 860.

No. 08–1315. PHARMACIA CORP. ET AL. *v.* ALASKA ELECTRICAL PENSION FUND ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 554 F. 3d 342.

No. 09–1042. SHAH *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 341 Fed. Appx. 670.

No. 09–9336. BONILLA *v.* JARONCZYK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 354 Fed. Appx. 579.

No. 09–9376. KEARNEY *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–9626. ABASCAL *v.* JARKOS ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 357 Fed. Appx. 388.

No. 09–9954. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 370 Fed. Appx. 135.

No. 09–9968. LIGGINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consid-

eration or decision of this petition. Reported below: 359 Fed. Appx. 266.

Rehearing Denied

No. 08–10932. BATEKREZE *v.* ARIZONA, *ante,* p. 935;

No. 09–807. DENEAL *v.* SHAVER, *ante,* p. 1005;

No. 09–7699. HOFFMAN *v.* HOFFMAN, *ante,* p. 1009;

No. 09–7780. KENNEDY *v.* LOCKETT ET AL., *ante,* p. 942;

No. 09–7892. KINNARD *v.* METROPOLITAN POLICE DEPARTMENT ET AL., *ante,* p. 945;

No. 09–7894. LIGGON-REDDING *v.* WILLINGBORO TOWNSHIP, NEW JERSEY, ET AL., *ante,* p. 945;

No. 09–8023. BAEZ *v.* JAMES, JUDGE, SUPERIOR COURT OF GEORGIA, DOUGLAS COUNTY, *ante,* p. 948;

No. 09–8230. WATSON *v.* NEIGHBORS CREDIT UNION ET AL., *ante,* p. 978;

No. 09–8305. WOOTEN *v.* MICHIGAN, *ante,* p. 980;

No. 09–8307. TRUSS *v.* THOMAS, WARDEN, ET AL., *ante,* p. 980;

No. 09–8333. BOWMAN-GOONE *v.* GORDON, JUSTICE, APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ET AL., *ante,* p. 993;

No. 09–8368. MARTIN *v.* JENKINS, WARDEN, *ante,* p. 994;

No. 09–8381. BRADDEN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante,* p. 994;

No. 09–8683. BROWN *v.* UNITED STATES, *ante,* p. 984;

No. 09–8838. MCNEILL *v.* RUFFIN, *ante,* p. 1016;

No. 09–8906. MILLAN *v.* SOUTHERN CALIFORNIA EDISON CO., *ante,* p. 1017;

No. 09–8976. MCCRAY *v.* FRANCIS HOWELL SCHOOL DISTRICT ET AL., *ante,* p. 1019; and

No. 09–9131. WYATT *v.* UNITED STATES, *ante,* p. 1023. Petitions for rehearing denied.

No. 09–7853. WENDELL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, *ante,* p. 963. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 09–8331. RITTER *v.* RITTER, *ante,* p. 993. Motion of petitioner to defer consideration of petition for rehearing denied. Petition for rehearing denied.

May 6, 2010

Dismissals Under Rule 46

No. 09A953. Davis *v.* Hobbs, Interim Director, Arkansas Department of Correction, et al. C. A. 8th Cir. Application for stay of execution of sentence of death dismissed under this Court's Rule 46.

No. 09–10120. Davis *v.* Hobbs, Interim Director, Arkansas Department of Correction, et al. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 594 F. 3d 592.

May 10, 2010

Dismissal Under Rule 46

No. 09–1210. Hollingsworth et al. *v.* Perry et al. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 591 F. 3d 1147.

May 12, 2010

Miscellaneous Orders

No. 09A1088. Beuke *v.* Strickland, Governor of Ohio, et al. C. A. 6th Cir. Application for injunction, presented to Justice Stevens, and by him referred to the Court, denied.

No. 09–10701 (09A1087). In re Beuke. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. Justice Stevens and Justice Breyer would grant the application for stay of execution.

Certiorari Denied

No. 09–10719 (09A1089). Beuke *v.* Strickland, Governor of Ohio, et al. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Certiorari denied. Reported below: 604 F. 3d 939.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 28, 2010, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1120. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, and 556 U. S. 1291.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 2010

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 28, 2010

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 4, and 29, and Form 4.

[See *infra*, pp. 1123–1125.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2010, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of rules; definition; title.

(*a*) *Scope of rules.*

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(*b*) *Definition.*—In these rules, "state" includes the District of Columbia and any United States commonwealth or territory.

(*c*) *Title.*—These rules are to be known as the Federal Rules of Appellate Procedure.

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

. . . . .

(*7*) *Entry defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

. . . . .

Rule 29. Brief of an amicus curiae.

(*a*) *When permitted.*—The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

. . . . .

(*c*) *Contents and form.*—An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(7) a certificate of compliance, if required by Rule 32(a)(7).

. . . . .

FORM 4. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

. . . . .

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only]	Relationship	Age
_____	_____	____

. . . . .

13. *State the city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 28, 2010, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1128. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, and 556 U. S. 1307.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 2010

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 28, 2010

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012.

[See *infra*, pp. 1131–1138.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2010, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, schedules, statements, and other documents; time limits.

(*a*) *Corporate ownership statement, list of creditors and equity security holders, and other lists.*

. . . . .

(*2*) *Involuntary case.*—In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

. . . . .

(*c*) *Time limits.*—In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a

motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

Rule 1014. Dismissal and change of venue.

. . . . .

(*b*) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed. Except as otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on the other petitions shall be

stayed by the courts in which they have been filed until the determination is made.

Rule 1015. Consolidation or joint administration of cases pending in same court.

(*a*) *Cases involving same debtor.*—If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.

. . . . .

Rule 1018. Contested involuntary petitions; contested petitions commencing Chapter 15 cases; proceedings to vacate order for relief; applicability of rules in Part VII governing adversary proceedings.

Unless the court otherwise directs and except as otherwise prescribed in Part I of these rules, the following rules in Part VII apply to all proceedings contesting an involuntary petition or a chapter 15 petition for recognition, and to all proceedings to vacate an order for relief: Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056, and 7062. The court may direct that other rules in Part VII shall also apply. For the purposes of this rule a reference in the Part VII rules to adversary proceedings shall be read as a reference to proceedings contesting an involuntary petition or a chapter 15 petition for recognition, or proceedings to vacate an order for relief. Reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

Rule 1019. Conversion of a Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to a Chapter 7 liquidation case.

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

. . . . .

(*2*) *New filing periods.*

(A) A new time period for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under Rules 1017, 3002, 4004, or 4007, but a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:

(i) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or

(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

. . . . .

Rule 4001. Relief from automatic stay; prohibiting or conditioning the use, sale, or lease of property; use of cash collateral; obtaining credit; agreements.

. . . . .

(*d*) *Agreement relating to relief from the automatic stay, prohibiting or conditioning the use, sale, or lease of property, providing adequate protection, use of cash collateral, and obtaining credit.*

. . . . .

(*2*) *Objection.*—Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

Unless the court fixes a different time, objections may be filed within 14 days of the mailing of the notice.

(*3*) *Disposition; hearing.*—If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

. . . . .

Rule 4004. Grant or denial of discharge.

(*a*) *Time for objecting to discharge; notice of time fixed.*—In a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor's discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 case, the complaint shall be filed no later than the first date set for the hearing on confirmation. In a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

. . . . .

(*c*) *Grant of discharge.*

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

. . . . .

(4) In a chapter 11 case in which the debtor is an individual, or a chapter 13 case, the court shall not grant a discharge if the debtor has not filed any statement required by Rule 1007(b)(7).

(*d*) *Applicability of rules in Part VII and Rule 9014.*—An objection to discharge is governed by Part VII of these rules, except that an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f) is commenced by motion and governed by Rule 9014.

. . . . .

Rule 5009. Closing Chapter 7 liquidation, Chapter 12 family farmer's debt adjustment, Chapter 13 individual's debt adjustment, and Chapter 15 ancillary and cross-border cases.

(*a*) *Cases under Chapters 7, 12, and 13.*—If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

(*b*) *Notice of failure to file Rule 1007(b)(7) statement.*—If an individual debtor in a chapter 7 or 13 case has not filed the statement required by Rule 1007(b)(7) within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the statement is filed within the applicable time limit under Rule 1007(c).

(*c*) *Cases under Chapter 15.*—A foreign representative in a proceeding recognized under § 1517 of the Code shall file a final report when the purpose of the representative's appearance in the court is completed. The report shall describe the nature and results of the representative's activities in the court. The foreign representative shall transmit the report to the United States trustee, and give notice of its filing to the debtor, all persons or bodies authorized to administer

foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct. The foreign representative shall file a certificate with the court that notice has been given. If no objection has been filed by the United States trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered.

Rule 5012. Agreements concerning coordination of proceedings in Chapter 15 cases.

Approval of an agreement under § 1527(4) of the Code shall be sought by motion. The movant shall attach to the motion a copy of the proposed agreement or protocol and, unless the court directs otherwise, give at least 30 days' notice of any hearing on the motion by transmitting the motion to the United States trustee, and serving it on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519, all parties to litigation pending in the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct.

Rule 7001. Scope of rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

. . . . .

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f);

. . . . .

Rule 9001. General definitions.

The definitions of words and phrases in §§ 101, 902, 1101, and 1502 of the Code, and the rules of construction in § 102, govern their use in these rules. In addition, the following

words and phrases used in these rules have the meanings indicated:

. . . . .

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 28, 2010, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1140. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, 550 U. S. 1003, 553 U. S. 1149, and 556 U. S. 1341.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 2010

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 28, 2010

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 8, 26, and 56, and Illustrative Civil Form 52.

[See *infra*, pp. 1143–1150.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General rules of pleading.

. . . . .

(*c*) *Affirmative defenses.*

(*1*) *In general.*—In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

. . . . .

Rule 26. Duty to disclose; general provisions governing discovery.

(*a*) *Required disclosures.*

. . . . .

(*2*) *Disclosure of expert testimony.*

(*A*) *In general.*—In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(*B*) *Witnesses who must provide a written report.*—Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(*C*) *Witnesses who do not provide a written report.*—Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(*D*) *Time to disclose expert testimony.*—A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(*E*) *Supplementing the disclosure.*—The parties must supplement these disclosures when required under Rule 26(e).

. . . . .

(*b*) *Discovery scope and limits.*

. . . . .

(*3*) *Trial preparation: materials.*

(*A*) *Documents and tangible things.*—Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(*B*) *Protection against disclosure.*—If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(*C*) *Previous statement.*—Any party or other person may, on request and without the required showing, ob-

tain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(*4*) *Trial preparation: experts.*

(*A*) *Deposition of an expert who may testify.*—A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(*B*) *Trial-preparation protection for draft reports or disclosures.*—Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(*C*) *Trial-preparation protection for communications between a party's attorney and expert witnesses.*—Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(*D*) *Expert employed only for trial preparation.*—Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(*E*) *Payment.*—Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

. . . . .

Rule 56. Summary judgment.

(*a*) *Motion for summary judgment or partial summary judgment.*—A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(*b*) *Time to file a motion.*—Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(*c*) *Procedures.*

(*1*) *Supporting factual positions.*—A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(*2*) *Objection that a fact is not supported by admissible evidence.*—A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(*3*) *Materials not cited.*—The court need consider only the cited materials, but it may consider other materials in the record.

(*4*) *Affidavits or declarations.*—An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(*d*) *When facts are unavailable to the nonmovant.*—If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(*e*) *Failing to properly support or address a fact.*—If a party fails to properly support an assertion of fact or fails to

properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(*f*) *Judgment independent of the motion.*—After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(*g*) *Failing to grant all the requested relief.*—If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(*h*) *Affidavit or declaration submitted in bad faith.*—If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

FORM 52. REPORT OF THE PARTIES' PLANNING MEETING

(Caption—See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(Use separate paragraphs or subparagraphs if the parties disagree.)

(a) Discovery will be needed on these subjects: *(describe)*.

(b) Disclosure or discovery of electronically stored information should be handled as follows: *(briefly describe the parties' proposals, including the form or forms for production)*.

(c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: *(briefly describe the provisions of the proposed order)*.

(d) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)

(e) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)

(f) (Maximum number of requests for admission, along with the dates responses are due.)

(g) (Maximum number of depositions for each party.)

(h) (Limits on the length of depositions, in hours.)

(i) (Dates for exchanging reports of expert witnesses.)

(j) (Dates for supplementations under Rule 26(e).)

4. Other Items:

. . . . .

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 28, 2010, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1152. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, 550 U. S. 1165, 553 U. S. 1155, and 556 U. S. 1363.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 2010

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Supreme Court recommitted proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure to the Advisory Committee for further consideration.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 28, 2010

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.3, 21, and 32.1.

[See *infra*, pp. 1155–1156.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.3. Notice of a public-authority defense.

(*a*) *Notice of the defense and disclosure of witnesses.*

. . . . .

(*4*) *Disclosing witnesses.*

. . . . .

(*C*) *Government's reply.*—Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name of each witness—and the address and telephone number of each witness other than a victim—that the government intends to rely on to oppose the defendant's public-authority defense.

(*D*) *Victim's address and telephone number.*—If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

. . . . .

(*b*) *Continuing duty to disclose.*

(*1*) *In general.*—Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness—and the

address, and telephone number of any additional witness other than a victim—if:

(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(*2*) *Address and telephone number of an additional victim-witness.*—The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

. . . . .

Rule 21. Transfer for trial.

. . . . .

(*b*) *For convenience.*—Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

. . . . .

Rule 32.1. Revoking or modifying probation or supervised release.

(*a*) *Initial appearance.*

. . . . .

(*6*) *Release or detention.*—The magistrate judge may release or detain the person under 18 U. S. C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

. . . . .

AMENDMENT TO FEDERAL RULES OF EVIDENCE

The following amendment to the Federal Rules of Evidence was prescribed by the Supreme Court of the United States on April 28, 2010, pursuant to 28 U. S. C. § 2072, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1158. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, 538 U. S. 1097, and 547 U. S. 1281.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 2010

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 28, 2010

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein an amendment to Evidence Rule 804.

[See *infra*, p. 1161.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay exceptions; declarant unavailable.

. . . . .

(*b*) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . . .

(*3*) *Statement against interest.*—A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

. . . . .

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1161 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

JACKSON ET AL. *v.* DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS ET AL.

ON APPLICATION FOR STAY

No. 09A807. Decided March 2, 2010

Applicants' request for a stay to prevent the District of Columbia's Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (Act) from going into effect is denied. Applicants seek to subject the Act to a public referendum pursuant to the procedures set forth by the D. C. Charter. The D. C. Board of Elections, D. C. Superior Court, and D. C. Court of Appeals denied applicants' request on the grounds the referendum would violate the D. C. Human Rights Act. Without addressing the merits of applicants' claims, a stay is not warranted because the Court is not likely to grant certiorari for the following reasons. First, as "a matter of judicial policy"—if not "judicial power"—"it has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern." *Whalen* v. *United States,* 445 U. S. 684, 687. Second, the Act was placed before Congress for the 30-day period of review required by the D. C. Charter, and Congress has chosen not to prevent the Act from going into effect. Finally, while applicants' challenge to the Act by referendum will apparently become moot when the Act goes into effect, applicants have also pursued a ballot initiative that would give D. C. voters a similar opportunity to repeal the Act if they so choose. That challenge is now awaiting consideration by the D. C. Court of Appeals, and applicants will have the right to challenge any adverse decision through a petition for certiorari at the appropriate time.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Applicants in this case are Washington D. C. voters who would like to subject the District of Columbia's Religious Freedom and Civil Marriage Equality Amendment Act of 2009 to a public referendum before it goes into effect, pursu-

ant to procedures set forth in the D. C. Charter. See D. C. Code §§ 1–204.101 to 1–204.107 (2001–2006). The Act expands the definition of marriage in the District to include same-sex couples. See D. C. Act 18–248; 57 D. C. Reg. 27 (Jan. 1, 2010).

The D. C. Charter specifies that legislation enacted by the D. C. Council may be blocked if a sufficient number of voters request a referendum on the issue. D. C. Code § 1–204.102. The Council, however, purported in 1979 to exempt from this provision any referendum that would violate the D. C. Human Rights Act, § 2–1401.01 *et seq.* (2001–2007 and Supp. 2009). See §§ 1–1001.16(b)(1)(C) (2001–2006), 2–1402.73 (2001–2007). The D. C. Board of Elections, D. C. Superior Court, and D. C. Court of Appeals denied applicants' request for a referendum on the grounds that the referendum would violate the Human Rights Act.

Applicants argue that this action was improper, because D. C. Council legislation providing that a referendum is not required cannot trump a provision of the D. C. Charter specifying that a referendum *is* required. See *Price* v. *District of Columbia Bd. of Elections*, 645 A. 2d 594, 599–600 (D. C. 1994). They point out that if the Act does become law, they will permanently lose any right to pursue a referendum under the Charter. See § 1–204.102(b)(2) (2001–2006). Applicants ask the Court for a stay that would prevent the Act from going into effect, as expected, on March 3, 2010.

This argument has some force. Without addressing the merits of applicants' underlying claim, however, I conclude that a stay is not warranted. First, as "a matter of judicial policy"—if not "judicial power"—"it has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern." *Whalen* v. *United States*, 445 U. S. 684, 687 (1980); see also *Fisher* v. *United States*, 328 U. S. 463, 476 (1946).

Second, the Act at issue was adopted by the Council and placed before Congress for the 30-day period of review re-

quired by the D. C. Charter, see § 1–206.02(c)(1) (2001–2006). A joint resolution of disapproval by Congress would prevent the Act from going into effect, but Congress has chosen not to act. The challenged provision purporting to exempt certain D. C. Council actions from the referendum process, § 1–1001.16(b)(1)(C), was itself subject to review by Congress before it went into effect. While these considerations are of course not determinative of the legal issues, they do weigh against granting applicants' request for a stay, given that the concern is that action by the Council violates an Act of Congress.

Finally, while applicants' challenge to the Act by way of a referendum apparently will become moot when the Act goes into effect, applicants have also pursued a ballot initiative, under related procedures in the D. C. Charter, that would give D. C. voters a similar opportunity to repeal the Act if they so choose. See §§ 1–204.101 to 1–204.107; *Jackson* v. *District of Columbia Bd. of Elections and Ethics*, Civ. Action No. 2009 CA 008613 B (D. C. Super., Jan. 14, 2010). Their separate petition for a ballot initiative is now awaiting consideration by the D. C. Court of Appeals, which will need to address many of the same legal questions that applicants have raised here. Unlike their petition for a referendum, however, the request for an initiative will not become moot when the Act becomes law. On the contrary, the D. C. Court of Appeals will have the chance to consider the relevant legal questions on their merits, and applicants will have the right to challenge any adverse decision through a petition for certiorari in this Court at the appropriate time.

The foregoing considerations, taken together, lead me to conclude that the Court is unlikely to grant certiorari in this case. Accordingly, the request for a stay is denied.

It is so ordered.

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