(ORDER LIST: 594 U.S.)

FRIDAY, JULY 2, 2021

SUMMARY DISPOSITIONS

19-793 INSTITUTE FOR FREE SPEECH V. BONTA, ATT'Y GEN. OF CA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. ___ (2021).

19-1328 DEPT. OF JUSTICE V. HOUSE COMM. ON JUDICIARY

The motion to vacate the judgment is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit with instructions to direct the District Court to vacate the October 25, 2019 order granting the application of the Committee on the Judiciary, U. S. House of Representatives. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

20-138 BIDEN, PRESIDENT OF U.S., ET AL. V. SIERRA CLUB, ET AL.

The motion to vacate the judgment is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate its judgments. The District Court should consider what further proceedings are necessary and appropriate in light of the changed circumstances in this case.

ORDER IN PENDING CASE

143, ORIG. MISSISSIPPI V. TENNESSEE, ET AL.

The Exceptions to the Special Master Report are set for oral argument in due course.

CERTIORARI GRANTED

19-1401 HUGHES, APRIL, ET AL. V. NORTHWESTERN UNIVERSITY, ET AL.

The petition for a writ of certiorari is granted. Justice Barrett took no part in the consideration or decision of this petition.

20-219 CUMMINGS, JANE V. PREMIER REHAB KELLER, P.L.L.C.

20-1088 CARSON, DAVID, ET AL. V. MAKIN, A. PENDER

The petitions for writs of certiorari are granted.

20-1114 AMERICAN HOSPITAL ASSN., ET AL. V. BECERRA, SEC. OF H&HS, ET AL.

The petition for a writ of certiorari is granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether petitioners' suit challenging HHS's adjustments is precluded by 42 U. S. C. §1395l(t)(12).

20-1263 GALLARDO, GIANINNA V. MARSTILLER, SIMONE

20-1312 BECERRA, SEC. OF H&HS V. EMPIRE HEALTH FOUNDATION

The petitions for writs of certiorari are granted.

20-1374 CVS PHARMACY, INC., ET AL. V. DOE, JOHN, ET AL.

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

20-1459 UNITED STATES V. TAYLOR, JUSTIN E.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

20-1541 PIVOTAL SOFTWARE, INC., ET AL. V. SUPERIOR COURT OF CA, ET AL.

The petition for a writ of certiorari is granted.

CERTIORARI DENIED

19-333 ARLENE'S FLOWERS, INC., ET AL. V. WASHINGTON, ET AL.

The petition for a writ of certiorari is denied. Justice Thomas, Justice Alito, and Justice Gorsuch would grant the petition for a writ of certiorari.

20-298 EL PASO COUNTY, TX, ET AL. V. BIDEN, PRESIDENT OF U.S., ET AL.

The petition for a writ of certiorari before judgment is denied.

20-1486 EMPIRE HEALTH FOUNDATION V. BECERRA, SEC. OF H&HS

The petition for a writ of certiorari is denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* MATTHEW REEVES

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

No. 20–1084. Decided July 2, 2021

PER CURIAM.

Willie Johnson towed Matthew Reeves' broken-down car back to the city after finding Reeves stranded on an Alabama dirt road. In payment for this act of kindness, Reeves murdered Johnson, stole his money, and mocked his dying spasms. Years after being convicted of murder and sentenced to death, Reeves sought state postconviction relief, arguing that his trial counsel should have hired an expert to develop sentencing-phase mitigation evidence of intellectual disability. But despite having the burden to rebut the strong presumption that his attorneys made a legitimate strategic choice, Reeves did not call *any* of them to testify. The Alabama Court of Criminal Appeals denied relief, stressing that lack of evidence about counsel's decisions impeded Reeves' efforts to prove that they acted unreasonably. *Reeves* v. *State*, 226 So. 3d 711, 750–751 (2016).

On federal habeas review, the Eleventh Circuit held that this analysis was not only wrong, but indefensible. In an unpublished, *per curiam* opinion that drew heavily on a dissent from denial of certiorari, the Eleventh Circuit reinterpreted the Alabama court's lengthy opinion as imposing a simple *per se* prohibition on relief in all cases where a prisoner fails to question his counsel. *Reeves* v. *Commissioner, Ala. Dept. of Corrections*, 836 Fed. Appx. 733, 744–747 (2020). It was the Eleventh Circuit, however, that went astray in its "readiness to attribute error." *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*). Federal habeas

courts must defer to reasonable state-court decisions, 28 U. S. C. §2254(d), and the Alabama court's treatment of the spotty record in this case was consistent with this Court's recognition that "the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt* v. *Titlow*, 571 U. S. 12, 23 (2013) (internal quotation marks and brackets omitted).

I

In November 1996, Reeves and some friends decided to "go out looking for some robberies." *Reeves*, 226 So. 3d, at 719 (internal quotation marks omitted). The group's initial target was a drug dealer in a nearby town, but their car broke down and left them stranded on the side of the road. A few hours later, however, Johnson happened to drive by in his truck and offered to tow the disabled vehicle to Reeves' house.

After they arrived, Reeves, who was riding in the bed of the truck, stuck a shotgun through the rear window of the cab and shot Johnson in the neck. As Johnson sat slumped in the driver's seat "bleeding heavily and making gagging noises," Reeves directed the rest of the group to "go through Johnson's pockets to get his money." *Id.*, at 720 (internal quotation marks omitted). Throughout the rest of the day, Reeves repeatedly "brag[ged] about having shot Johnson," boasting that the murder "would earn him a 'teardrop,' a gang tattoo acquired for killing someone." *Ibid.* (internal quotation marks omitted). And at a party that night, Reeves invented a dance in which he "pretend[ed] to pump a shotgun" and "jerk[ed] his body around in a manner mocking the way that Willie Johnson had died." *Ibid.* (brackets and internal quotation marks omitted).

Alabama charged Reeves with murder and appointed counsel for him. His attorneys took several steps to develop mitigating evidence, including exploring the possibility that

Reeves was intellectually disabled. For example, they obtained extensive records of Reeves' educational, medical, and correctional history. Counsel also requested funding to hire a neuropsychologist, Dr. John Goff, to evaluate Reeves and prepare mitigation evidence. And when the trial court initially rejected that request, counsel successfully sought reconsideration.

After the court granted funding, Reeves' attorneys managed to acquire additional mental-health records from the State, including documents related to a pretrial competency evaluation that featured a partial administration of an IQ test.[1] The totality of the evidence reflected that Reeves had a troubled childhood, suffered from numerous behavioral difficulties, and was within the "borderline" range of intelligence. While in school—before being expelled for violence and misbehavior—he had been referred to special services for emotional conflict and behavioral issues. But Reeves' records also showed that he had previously been *denied* special educational services for intellectual disability. Counsel also learned that Reeves had attended classes and earned certificates in welding, masonry, and automotive mechanics. And the psychologist who initially evaluated Reeves later opined that he was not intellectually disabled.

At some point before trial, Reeves' attorneys apparently elected to pursue other mitigation strategies instead of hiring Dr. Goff. The record does not reveal the exact reason for this decision—likely because Reeves did not ask them to testify. The record does show, however, that counsel presented a holistic mitigation case. For example, counsel called several witnesses at sentencing—including Reeves' mother and the psychologist who performed the competency

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[1] Around the same time, one of Reeves' attorneys withdrew from the case, explaining that Reeves "ha[d] been combative, argumentative[,] and ha[d] totally refused to assist [the attorney] in any manner." Electronic Case Filing in No. 1:17–cv–00061 (SD Ala.) (ECF), Doc. 23–1, pp. 3, 78. Another attorney replaced him.

evaluation—and elicited testimony about Reeves' turbulent childhood, neglectful family, and educational difficulties. The jury, however, recommended a death sentence.

Reeves later sought postconviction relief in state court, alleging almost 20 theories of error. Relevant here, he asserted that he was categorically exempt from execution by reason of intellectual disability, see *Atkins* v. *Virginia*, 536 U. S. 304 (2002), or at the very least that counsel should have hired Dr. Goff to develop mitigation along those lines for use at sentencing, see *Porter* v. *McCollum*, 558 U. S. 30 (2009) (*per curiam*). At a 2-day hearing in state court, Reeves called two experts, including Dr. Goff. The doctor concluded that Reeves was intellectually disabled, explaining that the so-called Flynn Effect—a controversial theory involving the inflation of IQ scores over time—required adjusting Reeves' score downward into the 60s.[2] Dr. Goff also cited a number of behavioral assessments that supposedly showed Reeves' shortcomings in adaptive functioning. For its part, the State offered the expert testimony of Dr. King, who administered his own evaluation and concluded that Reeves was not intellectually disabled. In fact, Dr. King pointed out that Reeves had a leadership role in a drug-dealing group and earned as much as $2,000 a week.

Despite Reeves' focus on his attorney's performance, he did not give them the opportunity to explain their actions. Although all three of his lawyers apparently were alive and available, Reeves did not call them to testify.

The trial court denied relief, and the Alabama Court of Criminal Appeals affirmed. First, it agreed that Reeves

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[2] According to some proponents of this theory, the Flynn Effect posits that IQ scores increase "by approximately 0.3 points per year," which in turn "requires that the IQ test be 'normed' periodically so that the mean score on the test stays the same" and "that 0.3 points be deducted from [a] full-scale IQ score achieved on an IQ test for each year since the test was last normed." *Reeves* v. *State*, 226 So. 3d 711, 730 (Ala. Crim. App. 2016).

had failed to prove that he was actually intellectually disabled and thus exempt from execution. *Reeves*, 226 So. 3d, at 744. The court specifically addressed Dr. Goff's reliance on the Flynn Effect, reiterating that this approach "has not been accepted as scientifically valid by all courts" and was "not settled in the psychological community." *Id.*, at 739 (internal quotation marks omitted). In fact, even Dr. Goff had "admitted that he did not use the 'Flynn Effect' for over 20 years after it was first discovered." *Ibid.*

Second, the court rejected Reeves' claim that counsel should have hired an expert to develop mitigating evidence of intellectual disability. Stressing that an attorney's decision not to hire an expert is "typically [a] strategic decisio[n]" that will "not constitute per se deficient performance," the court looked to the record to assess the "reasoning behind counsel's actions." *Id.*, at 750, 751 (internal quotation marks omitted). In this case, the court observed, "the record [was] silent as to th[ose] reasons" "because Reeves failed to call his counsel to testify." *Id.*, at 751 (internal quotation marks omitted). Hence, he could not overcome the "presumption of effectiveness" that courts must afford to trial counsel. *Ibid.* (internal quotation marks omitted).

Reeves sought certiorari, which we denied over a dissent. *Reeves* v. *Alabama*, 583 U. S. ___ (2017) (opinion of SOTOMAYOR, J.). The dissent acknowledged that the "absence of counsel's testimony may make it more difficult for a defendant to meet his burden" of proving deficient performance, but still would have reversed and remanded because it understood the Alabama court to have applied "a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim." *Id.*, at ___, ___ (slip op., at 2, 9). Although the dissent cited no decision in which this Court reprimanded a state court for taking that approach, it reasoned that such a rule was contrary to decisions in

which this Court had "found deficient performance *despite* [attorney] testimony, based on a review of the full record." *Id.*, at ___ (slip op., at 9).[3]

Reeves next sought federal habeas review. The District Court denied relief, but the Eleventh Circuit reversed in part. Like every court before it, the Eleventh Circuit first rejected Reeves' claim that he was intellectually disabled. 836 Fed. Appx., at 741. But, it held that his lawyers were constitutionally deficient for not developing more evidence of intellectual disability and that this failure might have changed the outcome of the trial.

In reaching that result, the Eleventh Circuit explained that it owed no deference to the "unreasonable" decision of the Alabama court. §2254(d). Quoting at length from the earlier dissent from denial of certiorari, the panel reasoned that "a *per se* rule that the petitioner must present counsel's testimony" was clearly contrary to federal law. *Id.*, at 744–747. And, to demonstrate that the Alabama court had applied such a rule, the Eleventh Circuit excised a single statement from a lengthy block quote: "'[T]o overcome the strong presumption of effectiveness, a [state] petitioner must, at his evidentiary hearing, question trial counsel regarding his actions and reasoning.'" *Id.*, at 744 (emphasis deleted). The Eleventh Circuit then reasoned that the state court surely must have imposed this "categorical rule" because its opinion also said that Reeves' "'failure to call his attorneys to testify was fatal to his claims.'" *Ibid.* (emphasis deleted; brackets omitted). But that quote was not quite complete; the original sentence reads, "*In this case*, Reeves's

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[3] We note that this dissent—unlike the Eleventh Circuit—considered the case before it entered the exceedingly deferential posture of federal habeas review. Moreover, the dissent did *not* conclude that Reeves was entitled to relief on the merits of his claim, but instead would have "remand[ed] so that the [Alabama court] could explain why, given the full factual record, Reeves' counsel's choices constituted reasonable performance." 583 U. S., at ___ (slip op., at 14).

failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Reeves*, 226 So. 3d, at 749 (emphasis added).

II

This case presents a simple question: Did the Alabama court violate clearly established federal law when it rejected Reeves' claim that his attorneys should have hired an expert?

In answering this question, we owe deference to both Reeves' counsel *and* the state court. As to counsel, we have often explained that strategic decisions—including whether to hire an expert—are entitled to a "strong presumption" of reasonableness. *Harrington* v. *Richter*, 562 U. S. 86, 104 (2011). Defense lawyers have "limited" time and resources, and so must choose from among "'countless'" strategic options. *Id.*, at 106–107. Such decisions are particularly difficult because certain tactics carry the risk of "harm[ing] the defense" by undermining credibility with the jury or distracting from more important issues. *Id.*, at 108.

The burden of rebutting this presumption "rests squarely on the defendant," and "[i]t should go without saying that the absence of evidence cannot overcome [it]." *Titlow*, 571 U. S., at 22–23. In fact, even if there is reason to think that counsel's conduct "was far from exemplary," a court still may not grant relief if "[t]he record does not reveal" that counsel took an approach that no competent lawyer would have chosen. *Id.*, at 23–24.

This analysis is "doubly deferential" when, as here, a state court has decided that counsel performed adequately. *Id.*, at 15 (internal quotation marks omitted); see also *Sexton* v. *Beaudreaux*, 585 U. S. ___, ___–___ (2018) (*per curiam*) (slip op., at 7–8) (deference is "near its apex" in such cases). A federal court may grant habeas relief only if a state court violated "*clearly established* Federal law, as determined by *the Supreme Court* of the United States."

§2254(d)(1) (emphasis added). This "wide latitude" means that federal courts can correct only "extreme malfunctions in the state criminal justice syste[m]." *Richter*, 562 U. S., at 102, 106 (internal quotation marks omitted). And in reviewing the work of their peers, federal judges must begin with the "presumption that state courts know and follow the law." *Woodford*, 537 U. S., at 24. Or, in more concrete terms, a federal court may grant relief only if *every* "'fair-minded juris[t]'" would agree that *every* reasonable lawyer would have made a different decision. *Richter*, 562 U. S., at 101.

A straightforward application of these principles reveals the extent of the Eleventh Circuit's error. We start, as we must, with the case as it came to the Alabama court. Reeves had filed a 100-plus-page brief alleging manifold errors, including several theories of ineffective assistance of counsel. *Reeves*, 226 So. 3d, at 749–750, and n. 16. Many of these attacked basic strategic choices, including his current argument that counsel should have hired Dr. Goff to develop additional evidence of intellectual disability. Yet, despite Reeves' determination to find fault with his lawyers, he offered no testimony or other evidence from them.

That omission was particularly significant given the "range of possible reasons [Reeves'] counsel may have had for proceeding as they did." *Cullen* v. *Pinholster*, 563 U. S. 170, 196 (2011) (internal quotation marks omitted). This is not a case in which a lawyer "failed to uncover and present *any* evidence of [Reeves'] mental health or mental impairment, [or] his family background." *Porter*, 558 U. S., at 40 (emphasis added). Counsel's initial enthusiasm to collect Reeves' records and obtain funding hardly indicates professional neglect and disinterest.

Rather, we simply do not know what information and considerations emerged as counsel reviewed the case and refined their strategy. The attorneys may very well have pored over the voluminous evidence in their possession—

including those obtained *after* their funding request—and identified several reasons that a jury was unlikely to be persuaded by a claim of intellectual disability. After all, although Reeves' records suggested that his intelligence was below average, they also indicated that he was not intellectually disabled. *E.g.*, 226 So. 3d, at 729. Counsel might also have been concerned about the evidence of Reeves' history of violence, criminal past, and behavior problems, *ibid.*, and concluded that presenting these characteristics alongside a full-throated intellectual-disability argument would have convinced the jury that Reeves "was simply beyond rehabilitation," *Pinholster*, 563 U. S., at 201. Or, counsel may have uncovered additional evidence confirming their concerns about an intellectual-disability strategy. Perhaps Reeves informed them, as he later did Dr. King, that he was savvy enough to earn thousands of dollars a week in a drug-dealing operation where he had a leadership role. 226 So. 3d, at 736.

Or, counsel may well have further investigated Dr. Goff and decided that his debatable methodologies would undermine credibility with a local jury—possibly a prescient choice given that *every single court* to consider the issue has rejected Reeves' claim of intellectual disability. In fact, around the time that counsel were formulating their trial strategy, Dr. Goff was already performing questionable evaluations. See, *e.g.*, *King* v. *Apfel*, 2000 WL 284217, *2 (SD Ala., Feb. 29, 2000) (Dr. Goff's 1996 evaluation of a Social Security claimant was "unsupported by the medical evidence," and "*everything else* in the record [was] counter to [his] extreme findings" (emphasis added)); *Small* v. *Apfel*, 2000 WL 1844727, *3, n. 5 (SD Ala., Oct. 17, 2000) ("[Dr.] Goff's [1998] conclusions regarding deficits in adaptive behavior are not only mere guesses . . . but also suffer from a lack of support in the record"). It is not unreasonable for a lawyer to be concerned about overreaching.

Simply put, if the attorneys had been given the chance to

testify, they might have pointed to information justifying the strategic decision to devote their time and efforts elsewhere. Yet, Reeves—possibly pursuing a strategy of his own—declined to put that testimonial evidence before the Alabama court. So given that the Alabama court was entitled to reject Reeves' claim if trial counsel had any "possible reaso[n] . . . for proceeding as they did," *Pinholster*, 563 U. S., at 196 (internal quotation marks omitted), it surely was not obliged to accept Reeves' blanket assertion on an incomplete evidentiary record that "[n]o reasonable strategy could support counsel's failure," ECF Doc. 23–29, at 81.

Rather than defer to this commonsense analysis, the Eleventh Circuit took a path that we have long foreclosed: "mischaracterization of the state-court opinion." *Woodford*, 537 U. S., at 22. As explained above, the Alabama court reasonably concluded that the incomplete evidentiary record—which was notably "silent as to the reasons trial counsel . . . chose not to hire Dr. Goff or another neuropsychologist"—doomed Reeves' belated efforts to second-guess his attorneys. *Reeves*, 226 So. 3d, at 751. The Eleventh Circuit, however, recharacterized this case-specific analysis as a "categorical rule" that *any* prisoner will *always* lose if he fails to call and question "trial counsel regarding his or her actions and reasoning." 836 Fed. Appx., at 744 (emphasis deleted; internal quotation marks omitted).

We think it clear from context that the Alabama court did not apply a blanket rule, but rather determined that the facts of this case did not merit relief. As an initial matter, the Alabama court twice recognized that there *can* be instances of "*per se* deficient performance." *Reeves*, 226 So. 3d, at 750–751. It simply concluded that here, counsel's choice regarding experts involved a strategic decision entitled to a presumption of reasonableness. *Ibid.* Moreover, *other* portions of the opinion's lengthy recitation of the law (which the Eleventh Circuit omitted) belie a categorical approach. In particular, the court twice said that it would

consider "'all the circumstances'" of the case, and it qualified its supposedly categorical rule by explaining that "counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective." *Id.*, at 744, 747 (emphasis added; some internal quotation marks omitted).

Other parts of the opinion yield the same interpretation. For example, the court devoted almost nine pages to discussing ineffective assistance of counsel. That would have been a curious choice for a "busy state cour[t]" if a single sentence applying a *per se* rule could have sufficed. *Johnson* v. *Williams*, 568 U. S. 289, 298 (2013) (state courts need not even "discuss separately every single claim"). Within that lengthy discussion, the court individually mentioned many of Reeves' specific theories, including his current intellectual-disability argument. Moreover, that the court in a footnote summarily rejected *different* ineffective-assistance-of-counsel claims for procedural reasons further weighs against imputing a *per se* rule for the theories that the court discussed in the body of its opinion. *Reeves*, 226 So. 3d, at 749–750, n. 16.

Even more important, the actual analysis of the claim at issue here reflects a case-specific approach. The court did not merely say, as the Eleventh Circuit wrongly suggested, that Reeves' "'failure to call his attorneys to testify was fatal to his claims.'" 836 Fed. Appx., at 744 (brackets omitted). Rather, the opinion prefaced this quote with an important qualifier—"*In this case*." *Reeves*, 226 So. 3d, at 749 (emphasis added). And sure enough, the court proceeded to explain why Reeves could not prevail "in this case"—because "the record [was] silent as to the reasoning behind counsel's actions." *Id.*, at 751 (internal quotation marks omitted). To be sure, the record in this particular case happened to be deficient "because Reeves failed to call his counsel to testify." *Ibid.* But, this unremarkable observation of cause and effect in light of the facts before the court was

hardly an absolute bar in *every* case where *other* record evidence might fill in the details. And, it certainly was not contrary to clearly established law given that this Court and the Eleventh Circuit have made the same observation that a silent record cannot discharge a prisoner's burden. *E.g.*, *Titlow*, 571 U. S., at 15, 22–24; *Grayson* v. *Thompson*, 257 F. 3d 1194, 1218 (CA11 2001) (noting that "the record [was] silent as to why trial counsel did not pursue a motion to suppress the evidence," and that "habeas counsel did not inquire as to trial counsel's reasons for not raising such a claim").[4]

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For the foregoing reasons, we grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER dissents.

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[4]Today's dissent suggests that a more recent decision—*State* v. *M.D.D.*, ___ So. 3d ___, 2020 WL 6110694 (Ala. Crim. App., Oct. 16, 2020)—illustrates that Alabama courts understand *Reeves* to announce a *per se* rule. *Post*, at 6–9, and n. 4 (opinion of SOTOMAYOR, J.). But that case does the exact opposite. In *M.D.D.*, the petitioner alleged that his attorney should have called a medical expert at trial, yet he did not have the attorney testify at the postconviction hearing. 2020 WL 6110694, *5–*6. The Alabama court denied relief after examining the evidence and identifying a "sound, strategic reason for not calling [the expert] to testify." *Id.*, at *8 (discussing a possible downside to having the expert testify); see also *id.*, at *9 (explaining, in the alternative, why the petitioner suffered no prejudice). Notably, the court did so after citing *Reeves* and quoting the *same language* that the dissent claims represents a *per se* rule. Compare *id.*, at *7–*8 ("[A] Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. . . . In this case, the failure to have trial counsel testify is fatal to [the petitioner's] claims of ineffective assistance of counsel" (emphasis deleted; internal quotation marks omitted)), with *post*, at 1, 5. Again, it would have been strange for a busy Alabama court to devote pages to rejecting a claim if a categorical bar would have sufficed.

SUPREME COURT OF THE UNITED STATES

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* MATTHEW REEVES

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

No. 20–1084. Decided July 2, 2021

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

Under *Strickland* v. *Washington*, 466 U. S. 668 (1984), courts must assess a defendant's claim that his attorney failed to provide constitutionally effective assistance "in light of all the circumstances." *Id.*, at 690. No single type of evidence is a prerequisite to relief. Therefore, as the majority implicitly acknowledges, a *per se* rule that a habeas petitioner's claim fails if his attorney did not testify at an evidentiary hearing is flatly incompatible with *Strickland*.

The Court of Criminal Appeals of Alabama applied precisely such a rule in this case. When respondent Matthew Reeves raised several ineffective-assistance-of-counsel (IAC) claims in state postconviction proceedings, the court stated, in no uncertain terms (and underlined for emphasis), that "to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." *Reeves* v. *State*, 226 So. 3d 711, 748 (2016) (internal quotation marks omitted). Applying that rule "[i]n this case," the court held that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.*, at 749. Reeves then sought habeas relief in federal court. Based on the state court's clear holding, the Court of Appeals for the Eleventh Circuit properly determined that the state court's use of the *per se* rule was an

unreasonable application of *Strickland*. *Reeves* v. *Commissioner*, *Ala. Dept. of Corrections*, 836 Fed. Appx. 733, 744 (2020) (*per curiam*).

Through linguistic contortion, the Court today rescues the state court's decision by construing it not to apply a *per se* rule at all. Based on that implausible reading, the Court summarily reverses the Eleventh Circuit's grant of relief. The lengths to which this Court goes to ensure that Reeves remains on death row are extraordinary. I respectfully dissent.

I

A

In 1998, Reeves was convicted of capital murder for a brutal crime he committed when he was 18 years old. By a vote of 10 to 2, a divided jury recommended that Reeves be sentenced to death, and the trial court accepted that recommendation.

During his trial, Reeves was initially represented by two attorneys, Blanchard McLeod and Marvin Wiggins. Reeves' counsel moved for the appointment of a neuropsychologist, Dr. John Goff, to conduct an intellectual disability evaluation. When the motion was denied, Reeves' counsel sought rehearing. They explained that they had collected "hundreds of pages of psychological, psychometric and behavioral analysis material relating to [Reeves]." Electronic Case Filing in No. 1:17–cv–00061 (SD Ala.) (ECF), Doc. 23–1, p. 74. That material, McLeod had represented in court, was "exceptionally pertinent" to Reeves' penalty phase defense. ECF Doc. 23–3, at 96. Counsel stated that retaining "a clinical neuropsychologist" like Dr. Goff was "the only avenue open to the defense to compile this information . . . and present [it] in an orderly and informative fashion to the jury." ECF Doc. 23–1, at 74–75. The state court granted the request and provided funding to hire Dr. Goff. *Id.*, at

81. Around the same time, McLeod was replaced by another attorney, Thomas Goggans. 836 Fed. Appx., at 736.

Reeves' new team, Goggans and Wiggins, failed to follow through on hiring a neuropsychologist. As Dr. Goff later testified, in the more than three months between his appointment and the penalty phase trial, Reeves' attorneys "just never called." ECF Doc. 23–24, at 68. They also never hired any other neuropsychologist to review the evidence and evaluate Reeves for intellectual disability. 836 Fed. Appx., at 748. Instead, on the day of the penalty phase trial, counsel contacted Dr. Kathleen Ronan, a clinical psychologist who had previously evaluated Reeves for competence to stand trial and his mental state at the time of the offense. ECF Doc. 23–26, at 82–84. She had never evaluated Reeves for intellectual disability, and she had not spoken with Goggans or Wiggins until "the day that [she] testified." *Id.*, at 84.

Dr. Ronan informed Reeves' counsel that her prior evaluation would not serve their purposes. *Ibid.* As she later explained, assessing Reeves for intellectual disability "was not within the scope of [her] evaluation." *Ibid.* Had she been hired to conduct such an assessment, she would have administered a full IQ test and conducted other evaluations designed to diagnose intellectual disability. *Id.*, at 85–87. Instead, Dr. Ronan had only administered part of an IQ test and found that Reeves' verbal IQ "was not in a level that they would call him [intellectually disabled]." ECF Doc. 23–8, at 155; see also ECF Doc. 23–26, at 85. An expert for the State later administered a full IQ test, however, showing that Reeves' IQ was well within the range for intellectual disability. *Reeves*, 226 So. 3d, at 737; ECF Doc. 23–25, at 24; ECF Doc. 23–24, at 26.

Nevertheless, Reeves' counsel called Dr. Ronan to testify. The only other witnesses counsel called were Reeves' mother and a police detective. The entire penalty phase trial lasted just one and a half hours. ECF Doc. 23–14, at

154. Reviewing the record, the trial judge found that "[t]he only evidence that [he could] consider in mitigation of this offense . . . is the evidence of [Reeves'] age and [his] youthfulness." ECF Doc. 23–8, at 212. Concluding that such limited evidence would not outweigh the aggravating circumstances, the court sentenced Reeves to death. *Ibid.*

B

In 2002, Reeves filed a motion for state postconviction relief under Alabama Rule of Criminal Procedure 32 (known as a Rule 32 petition). Reeves alleged that his trial counsel had been constitutionally ineffective in several ways, including by failing to hire a neuropsychologist to evaluate him for intellectual disability.

The state court held a 2-day evidentiary hearing on Reeves' claims. Reeves called Dr. Goff to testify. At the request of Reeves' postconviction counsel, Dr. Goff had reviewed Reeves' mental health and school records and administered "a battery of tests designed to assess Mr. Reeves' IQ, cognitive abilities, and adaptive functioning." 836 Fed. Appx., at 737. Dr. Goff found that Reeves' IQ scores were 71 and 73,[1] showing that Reeves "has significantly subaverage intellectual functioning," and that he "has significant deficits in multiple areas of adaptive functioning." *Ibid.* These deficits manifested before Reeves turned 18 years old. ECF Doc. 23–24, at 25–26, 65–67. Based on his findings, Dr. Goff concluded that Reeves is intellectually disabled. 836 Fed. Appx., at 737. Dr. Goff testified that "had Mr. Reeves' trial counsel asked him to evaluate Mr. Reeves years earlier for the purpose of testifying at trial, he would have performed similar evaluations and reached the same conclusions." *Ibid.*

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[1] Reeves' IQ scores were even lower after accounting for the Flynn Effect. ECF Doc. 23–24, at 43–46. Dr. Goff concluded that Reeves' IQ fell within the intellectual disability range even without such an adjustment. *Id.*, at 44, 99.

Reeves' trial counsel did not testify at the Rule 32 hearing. At the beginning of the hearing, the State had declared that it intended to call Goggans and Wiggins to "explain why they did certain things and maybe why they didn't do certain things." ECF Doc. 23–24, at 14. But at the conclusion of the hearing, the State "decided not to call trial counsel." ECF Doc. 23–25, at 86.

The state court denied Reeves' motion for postconviction relief. On appeal, Reeves argued that the lower court had "erred in ignoring substantial evidence in support of [his IAC claim] on the basis that he did not call counsel to testify." ECF Doc. 23–29, at 45. In response, the State argued that because "Reeves failed to call either of his trial attorneys to testify concerning their decision to call Dr. Ronan rather than Dr. Goff," the lower court "properly presumed that they acted reasonably." *Id.*, at 199–200.

The Court of Criminal Appeals of Alabama agreed with the State, rejecting Reeves' contention that "testimony from counsel is not necessary to prove any claim of ineffective assistance of counsel." *Reeves*, 226 So. 3d, at 747. That argument, the court reasoned, "fail[ed] to take into account the requirement that courts indulge a strong presumption that counsel acted reasonably, a presumption that must be overcome by evidence to the contrary." *Ibid.* (emphasis in original). The court then specified what that evidence must be: "'[T]o overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.'" *Id.*, at 748 (emphasis in original; quoting *Stallworth* v. *State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2013)). The court cited over half a dozen cases supporting that *per se* rule. See 226 So. 3d, at 748. It then applied the rule to Reeves, explaining that "[i]n this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.*, at 749.

Reeves filed a petition for a writ of certiorari seeking review of the state court's decision, which this Court denied. I dissented, joined by Justice Ginsburg and JUSTICE KAGAN. We pointed out that the state court had applied a *per se* rule "that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim." *Reeves* v. *Alabama*, 583 U. S. ___, ___ (2017) (slip op., at 2). Even the State did not defend the constitutionality of such a rule. See *ibid.*

C

Reeves then filed a federal habeas petition pursuant to 28 U. S. C. §2254. The District Court denied Reeves' petition and his motion for reconsideration. See 2019 WL 1938805, *11 (SD Ala., May 1, 2019). The Eleventh Circuit reversed in relevant part. It read the state appellate court's decision to "trea[t] Mr. Reeves' failure to call his counsel to testify as a *per se* bar to relief—despite ample evidence in the record to overcome the presumption of adequate representation." 836 Fed. Appx., at 744. In so doing, the state court "unreasonably applied *Strickland*." *Ibid.* The Eleventh Circuit accordingly reviewed Reeves' claim *de novo* and found that Reeves had proved ineffective assistance of counsel. *Id.*, at 747–753.

The Eleventh Circuit was not alone in interpreting the state court's decision to apply a "categorical rule." *Id.*, at 744. Less than a month earlier, the Court of Criminal Appeals of Alabama (the same court that had issued the decision in question) denied another defendant's IAC claim. Once again, the court stated its *per se* rule: "[T]o overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." *State* v. *M.D.D.*, ___ So. 3d ___, ___, 2020 WL 6110694, *7 (Oct. 16, 2020) (internal quotation marks omitted; emphasis deleted). In support, the court cited its prior decision in

Reeves, which it summarized as "holding that [a] Rule 32 petitioner had failed to prove his claims of ineffective assistance of trial and appellate counsel because he did not call his trial or appellate counsel to testify at the Rule 32 evidentiary hearing." *Id.*, at *8. As in Reeves' case, the court in *M.D.D.* held that "the failure to have trial counsel testify is fatal to M.D.D.'s claims of ineffective assistance of counsel." *Ibid.*[2]

The State petitioned this Court to review the Eleventh Circuit's decision in *Reeves*. Despite the Alabama court's plain embrace of a *per se* rule, the State accused the Eleventh Circuit of too "readily attributing error to the state court" by interpreting its decision to "purportedly creat[e] and us[e] this per se rule." Pet. for Cert. i. On that basis, the State asked this Court to reverse summarily the Eleventh Circuit. *Id.*, at 30.

II

The sole question presented in this case is whether the Court of Criminal Appeals of Alabama applied a categorical rule that Reeves' failure to call his attorneys to testify was fatal to his IAC claim as a matter of law. No one disputes that such a rule would be an "unreasonable application" of *Strickland* and its progeny. 28 U. S. C. §2254(d)(1); see also *ante*, at 1, 10; Pet. for Cert. 1. Under those decisions, no single type of evidence, such as counsel's testimony, is a prerequisite to relief.[3] See *Roe* v. *Flores-Ortega*, 528 U. S.

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[2] The state court separately held that relief was not warranted because the court could conceive of a sound strategic reason for counsel's actions and because M.D.D. failed to show prejudice. See *State* v. *M.D.D.*, ___ So. 3d ___, ___–___, 2020 WL 6110694, *8–*9 (Ala. Crim. App., Oct. 16, 2020).

[3] As the Eleventh Circuit recognized, this Court has found deficient performance without any testimony from trial counsel. See *Reeves* v. *Commissioner, Ala. Dept. of Corrections*, 836 Fed. Appx. 733, 751 (2020) (*per curiam*) (discussing *Buck* v. *Davis*, 580 U. S. ___ (2017)). This Court

470, 478 (2000) (describing *Strickland*'s "circumstance-specific reasonableness inquiry"); *Williams* v. *Taylor*, 529 U. S. 362, 391 (2000) (explaining that "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence'").

The Court of Criminal Appeals improperly applied such a *per se* rule here. It began by invoking Reeves' burden "to present evidence" sufficient to overcome the "strong presumption that counsel acted reasonably." *Reeves*, 226 So. 3d, at 751 (emphasis deleted). It then ignored all of the evidence that Reeves' counsel had acted unreasonably, including Dr. Goff's description of the evaluation he would have conducted, Dr. Ronan's warning that her testimony was no substitute for an actual intellectual disability assessment, and trial counsel's repeated representations about the necessity of hiring Dr. Goff to conduct such an evaluation.

The court held that none of this evidence mattered because trial counsel did not testify: "[B]ecause Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel . . . chose not to hire Dr. Goff or another neuropsychologist." *Ibid.* The court treated that fact as "fatal" to Reeves' claim. *Id.*, at 749. Because Reeves could not establish the subjective "reasoning behind counsel's actions, the presumption of effectiveness [was] sufficient to deny relief." *Id.*, at 751 (internal quotation marks omitted); see also *M.D.D.*, ___ So. 3d, at ___, 2020 WL 6110694, *8 (explaining that the court denied Reeves relief "because he did not call his trial . . . counsel to testify").[4]

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has also found deficient performance when counsel testified and "attempt[ed] to justify their [actions] as reflecting a tactical judgment." *Wiggins* v. *Smith*, 539 U. S. 510, 521 (2003).

[4] The Court has no answer to the explicit description in *M.D.D.* of the state court's reasoning in *Reeves.* Instead, the Court collapses the state court's alternative holdings in *M.D.D.*, conflating the state court's application of the *per se* rule requiring counsel's testimony with the state court's separate reasons for denying relief. *Ante,* at 12, n. 4. It is true, as the Court notes, that the state court "examin[ed] the evidence and

III

In reviewing habeas petitions, "federal judges must begin with the 'presumption that state courts know and follow the law.'" *Ante*, at 8 (quoting *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*)). But when state courts contravene this Court's precedents, federal courts cannot turn a blind eye. Here, it is hard to see how the state court could have been any clearer in applying a *per se* rule that undisputedly violates *Strickland*.

A

The Court declares that it is "clear from context that the Alabama court did not apply a blanket rule, but rather determined that the facts of this case did not merit relief." *Ante*, at 10. The problem is that the "facts of this case" make no appearance in the state court's discussion. See *Reeves*, 226 So. 3d, at 749–751. This Court thus searches for some sign (any sign) that the state court implicitly assessed the facts of the case.

The Court first points to two statements at the beginning

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identif[ied] a sound, strategic reason" for counsel's actions "after citing *Reeves* and quoting the *same language* that the dissent claims represents a *per se* rule." *Ibid.* (internal quotation marks omitted). What the Court fails to mention is that the state court first concluded that the *per se* rule applied in *Reeves* was sufficient, on its own, to deny relief. *M.D.D.*, ___ So. 3d, at ___, 2020 WL 6110694, *8 ("In this case, the failure to have trial counsel testify is fatal to M.D.D.'s claims of ineffective assistance of counsel," because "where the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief" (internal quotation marks omitted)). Only after announcing this holding did the state court separately offer two additional, independent reasons for denying relief, explaining that "[f]urther," there was a "sound, strategic reason" for counsel's actions, and "[m]ore[o]ver," an examination of the record showed that M.D.D. had failed to demonstrate prejudice. *Id.,* at *8–*9. Contrary to the Court's suggestion, these alternative holdings formed no part of the state court's discussion of *Reeves* or application of the *per se* rule. The Court rewrites yet another state-court decision in service of its efforts to rewrite this one.

of the state court's analysis in which it "said that it would consider 'all the circumstances' of the case." *Ante*, at 10–11. But after perfunctorily citing the *Strickland* standard, the state court never actually followed through on its obligation to consider the evidence. Its analysis began and ended with counsel's failure to testify. See *Reeves*, 226 So. 3d, at 750–751. State courts cannot insulate their decisions from scrutiny by quoting the proper standard and then ignoring it.

In a similar vein, this Court seizes upon the state court's quotation from an earlier case stating that trial "'counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective.'" *Ante*, at 11. This, the Court claims, "belie[s] a categorical approach." *Ante*, at 10. The state court, however, expressly overrode that formulation of the rule, stating that the court "[s]ubsequently" held that IAC petitioners "'must'" question trial counsel. *Reeves*, 226 So. 3d, at 747–748 (emphasis in original). It relied on that rule to reject Reeves' claim. *Id.*, at 748–749.

The Court also cites the length of the state court's opinion as purported proof that the court conducted a fact-specific inquiry. *Ante*, at 11. But what matters is the state court's reasoning, not the length of its opinion. The state court did not spend "almost nine pages" conducting a detailed "case-specific" analysis. *Ibid.* The vast majority of the state court's discussion instead consists of a list of Reeves' IAC allegations and lengthy block quotes of general legal standards. See *Reeves*, 226 So. 3d, at 744–750. When the court finally turned to the facts of this case, it explicitly barred relief only "because Reeves failed to call his counsel to testify." *Id.*, at 751.

Finally, the Court latches on to three words, "[i]n this case," insisting that they prove that the state court merely concluded that trial counsel's testimony was critical to Reeves' IAC claim "[i]n this case." *Ante*, at 11 (quoting 226 So. 3d, at 749; emphasis deleted). But in using the phrase

"[i]n this case," the state court was not addressing the evidentiary record. It was analogizing Reeves' case to the many cases it had just cited for the proposition that "'a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning.'" *Id.*, at 748–749 (emphasis in original). It then concluded that "Reeves's failure to call his attorneys to testify" in this case was similarly "fatal to his claims." *Id.*, at 749. If the state court had meant to weigh the evidence in the record, it would have. It did not. This Court is putting words in the state court's mouth that the state court never uttered, and which are flatly inconsistent with what the state court did say.

B

Finding no relevant factual analysis in the state court's decision, this Court attempts its own, speculating as to what Reeves' counsel might have said had they been called to testify. See *ante*, at 8–10. For instance, the Court imagines that "counsel may have uncovered additional evidence confirming their concerns about an intellectual-disability strategy." *Ante*, at 9.[5] The Court also insinuates that

[5]The Court hypothesizes that "[t]he attorneys may very well have pored over the voluminous evidence in their possession—including those obtained *after* their funding request—and identified several reasons that a jury was unlikely to be persuaded [by] a claim of intellectual disability." *Ante*, at 8–9 (noting evidence indicating that Reeves' "intelligence was below average," but he was not intellectually disabled, and Reeves' "history of violence, criminal past, and behavior problems"). But counsel already knew of these concerns when they moved for Dr. Goff's appointment. For instance, several months before counsel filed their initial motion, they received a report from Dr. Ronan's guilt-phase evaluation detailing these issues. See ECF Doc. 23–13, at 61–63, 65. It is hard to see how counsel's later request for the records underlying that evaluation could have significantly changed their calculus. See *ante*, at 3; ECF Doc. 23–1, at 88. Moreover, even if counsel had discovered additional evidence related to Reeves' intellectual disability, there would still be a need for an expert to evaluate the evidence in its totality. Indeed, Reeves'

Reeves may have strategically declined to call his trial counsel to avoid harmful testimony. *Ante*, at 10. But if counsel's testimony would have been damaging to Reeves' claim, one would have expected the State to call counsel to testify. Yet the State expressly declined to do so, despite having counsel available to testify. See ECF Doc. 23–25, at 85–86.

The Court's eagerness to invent scenarios harmful to Reeves' claim stems from its apparent belief that "the Alabama court was entitled to reject Reeves' claim if trial counsel had any 'possible reaso[n] . . . for proceeding as they did.'" *Ante*, at 10 (quoting *Cullen* v. *Pinholster*, 563 U. S. 170, 196 (2011)). That view has no basis in this Court's precedent. *Cullen* did not hold that an IAC claim fails if a court can imagine any possible reason for counsel's actions. No claim could ever survive such a standard. One can always imagine some unsubstantiated reason for what trial counsel did. *Cullen* instead stated that, to assess whether counsel's conduct was reasonable, courts must "entertain the range of possible reasons" for counsel's actions in light of the events and evidence actually established in the record. *Id.*, at 196 (internal quotation marks omitted). The Court's speculations about what may have occurred after Dr. Goff's appointment are pure conjecture.

In any case, the Court's guesswork is beside the point because it was not the basis for the state court's decision. When a state court gives a reasoned explanation for its decision, federal habeas courts must review that decision on its own terms. See *Wilson* v. *Sellers*, 584 U. S. ___, ___ (2018) (slip op., at 2) ("In that case, a federal habeas court

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counsel argued to the state court that, given the volume of evidence, they needed the assistance of a qualified expert to properly "compile" and "correlate" the information and evaluate Reeves. *Id.*, at 74–75; see ECF Doc. 23–3, at 91 (counsel arguing that they required Dr. Goff's assistance because "the amount of material that we have received through discovery . . . is beyond our ability to deal with").

simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable"). Here, the state court relied solely on the mere fact that Reeves' counsel did not testify. That is the only reason subject to our review, and it plainly contravenes *Strickland*.

Even as the Court attempts to save the state court's decision, it erroneously embraces the state court's flawed assumption that IAC claims require direct evidence of the subjective "'reasoning behind counsel's actions.'" See *ante*, at 11. "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington* v. *Richter*, 562 U. S. 86, 110 (2011). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. 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." *Strickland*, 466 U. S., at 690. This inquiry must be conducted "[e]ven assuming" that counsel acted "for strategic reasons," *Wiggins* v. *Smith*, 539 U. S. 510, 527 (2003), and even if counsel does not testify. Cf. *Buck*, 580 U. S., at ___ (slip op., at 17) ("No competent defense attorney would introduce such evidence about his own client"). "'In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Hinton* v. *Alabama*, 571 U. S. 263, 273 (2014) (*per curiam*). This Court simply cannot escape the fact that the state court failed to conduct the necessary inquiry.

* * *

Today's decision continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution. See, *e.g.*, *United States* v. *Higgs*, 592

U. S. ___ (2021) (emergency vacatur of stay and reversal); *Shinn* v. *Kayer*, 592 U. S. ___ (2020) (*per curiam*) (summary vacatur); *Dunn* v. *Ray*, 586 U. S. ___ (2019) (emergency vacatur of stay). This Court has shown no such interest in cases in which defendants seek relief based on compelling showings that their constitutional rights were violated. See, *e.g.*, *Johnson* v. *Precythe*, 593 U. S. ___ (2021) (denying certiorari); *Whatley* v. *Warden*, 593 U. S. ___ (2021) (same); *Bernard* v. *United States*, 592 U. S. ___ (2020) (same). In Reeves' case, this Court stops the lower court from granting Reeves' petition by adopting an utterly implausible reading of the state court's decision. In essence, the Court turns "deference," *ante*, at 7, into a rule that federal habeas relief is never available to those facing execution. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

ASHLYN HOGGARD *v.* RON RHODES, ET AL.

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

No. 20–1066. Decided July 2, 2021

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

As I have noted before, our qualified immunity jurisprudence stands on shaky ground. *Ziglar* v. *Abbasi*, 582 U. S. ___, ___ (2017) (opinion concurring in part and concurring in judgment); *Baxter* v. *Bracey*, 590 U. S. ___ (2020) (opinion dissenting from denial of certiorari). Under this Court's precedent, executive officers who violate federal law are immune from money damages suits brought under Rev. Stat. §1979, 42 U. S. C. §1983, unless their conduct violates a "clearly established statutory or constitutional righ[t] of which a reasonable person would have known." *Mullenix* v. *Luna*, 577 U. S. 7, 11 (2015) (*per curiam*) (internal quotation marks omitted). But this test cannot be located in §1983's text and may have little basis in history. *Baxter*, 590 U. S., at ___, ___ (slip op., at 2, 4) (opinion of THOMAS, J.).

Aside from these problems, the one-size-fits-all doctrine is also an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions. *Ziglar*, 582 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 4–5).* This petition illustrates that oddity: Petitioner alleges that university officials violated

*Certain Government officials receive heightened immunity, including absolute immunity, based on the common law or their constitutional status. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982) (discussing judges, prosecutors, and the President, among others).

her First Amendment rights by prohibiting her from placing a small table on campus near the student union building to promote a student organization. According to the university, petitioner could engage with students only in a designated "Free Expression Area"—the use of which required prior permission from the school. The Eighth Circuit concluded that this policy of restricting speech around the student union was unconstitutional as applied to petitioner. *Turning Point USA at Ark. State Univ.* v. *Rhodes*, 973 F. 3d 868, 879 (2020). Yet it granted immunity to the officials after determining that their actions, though unlawful, had not transgressed "'clearly established'" precedent. *Id.,* at 881.

But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question. See *Ziglar*, 582 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 4–5).

This approach is even more concerning because "our analysis is [not] grounded in the common-law backdrop against which Congress enacted [§1983]." *Id.,* at ___ (slip op., at 5). It may be that the police officer would receive more protection than a university official at common law. See Oldham, Official Immunity at the Founding (manuscript, at 22–23, available at https://ssrn.com/abstract=3824983) (suggesting that the "concept of unreasonableness [in the Fourth Amendment] could bring with it [common-law] official immunities"). Or maybe the opposite is true. Lee, The Curious Life of *In Loco Parentis* at American Universities, 8 Higher Ed. in Rev. 65, 67 (2011) (discussing how "[f]rom the mid-1800s to the 1960s" "constitutional rights stopped at the college gates—at both private and public institutions"). Whatever the history establishes, we at least ought to consider it. Instead, we have "substitute[d] our own policy

preferences for the mandates of Congress" by conjuring up blanket immunity and then failed to justify our enacted policy. *Ziglar*, 582 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 6).

The parties did not raise or brief these specific issues below. But in an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally.

SUPREME COURT OF THE UNITED STATES

AMOS MAST, ET AL. *v.* FILLMORE COUNTY, MINNESOTA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

No. 20–7028. Decided July 2, 2021

The motion of petitioners for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Minnesota for further consideration in light of *Fulton* v. *Philadelphia*, 593 U. S. ___ (2021).

JUSTICE ALITO, concurring in the judgment.

I agree that we should vacate the judgment below and remand for further consideration. The lower court plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act.

SUPREME COURT OF THE UNITED STATES

AMOS MAST, ET AL. *v.* FILLMORE COUNTY, MINNESOTA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

No. 20–7028. Decided July 2, 2021

JUSTICE GORSUCH, concurring in the decision to grant, vacate, and remand.

The Swartzentruber Amish are religiously committed to living separately from the modern world. Maintaining that commitment is not easy. They grow their own food, tend their farms using pre-industrial equipment, and make their own clothes. In short, they lead lives of faith and self-reliance that have "not altered in fundamentals for centuries." *Wisconsin* v. *Yoder*, 406 U. S. 205, 216–217 (1972).

In this long-running litigation, officials in Fillmore County, Minnesota have insisted that the Amish must adopt certain modern technologies or risk jail, fines, and even losing their farms. Today, the Court grants the Amish's petition for review, vacates the lower court's decisions, and remands this case for further proceedings in light of our recent decision in *Fulton* v. *Philadelphia*, 593 U. S. ___ (2021). I support this decision and write to highlight a few issues the lower courts and administrative authorities may wish to consider on remand.

*

Each Amish community has its own body of religious rules, called an *Ordnung*. When a community must decide whether its faith permits a certain action—say, using the phone at a neighbor's farm should a fire break out—it makes that decision collectively. Sometimes there are disagreements and communities fracture. Over time, this phenomenon has led to approximately 40 different affiliations

within the broader Amish community across the United States. The Swartzentruber Amish are among the most traditional.

Today's dispute is about plumbing, specifically the disposal of gray water—water used in dishwashing, laundry, and the like. The Swartzentruber Amish do not have running water in their homes, at least as most would understand it. Water arrives through a single line and is either pumped by hand or delivered by gravity from an external cistern.

In 2013, Fillmore County adopted an ordinance requiring most homes to have a modern septic system for the disposal of gray water. See App. to Pet. for Cert. 3; Minn. Stat. §115.55(2)(a) (2020); Minn. Admin. Rules 7080.1050–7080.2550 (2019); Fillmore County, Sub-Surface Sewage Treatment System Ordinance §§501–502 (2013). Responding to this development, the Swartzentruber Amish submitted a letter explaining that their religion forbids the use of such technology and "'asking in the name of our Lord to be exempt'" from the new rule. App. to Brief in Opposition for Respondent Minnesota Pollution Control Agency 78 (MPCA App.). Instead of accommodating this request or devising a solution that respected the Amish's faith, the Minnesota Pollution Control Agency filed an administrative enforcement action against 23 Amish families in Fillmore County demanding the installation of modern septic systems under pain of criminal penalties and civil fines. *Id.*, at 79.

Faced with this action, the Amish filed their own declaratory judgment suit in state court against Fillmore County and the Minnesota Pollution Control Agency (collectively, the County), alleging that the County's septic-system mandate violated the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). But the Amish also offered an alternative. They offered to install systems that clean gray water in large earthen basins filled with wood chips that filter water as it drains. These wood chip basins

may be more primitive than modern septic systems, but other jurisdictions permit their use for the disposal of gray water. See App. to Pet. for Cert. 4; *id.*, at 73–74.

Evidently, none of this pleased the authorities. The County replied by filing a counterclaim seeking an order displacing the Amish from their homes, removing all their possessions, and declaring their homes uninhabitable if the Amish did not install septic systems within six months. MPCA App. 80. The County even unsuccessfully sought a court order authorizing its agents to inspect the inside of Amish homes as part of an investigation into what "types of modern technologies and materials" they might be using. *Id.*, at 81. Apparently, this was part of an effort to amass "evidence" to "attack the sincerity of [the Amish's] religious beliefs." *Ibid.*, n. 5.

Eventually, the case proceeded to trial. There, the state trial court rejected the County's most aggressive arguments, including (1) its claim that the Amish's "limited use of telephones" proved that their objection to modern septic systems was contrived, App. to Pet. for Cert. 43; (2) its argument that the Bible commands the Amish to submit to "secular authority," *id.*, at 44, n. 16; and (3) its assertion that installing septic systems represented only a *de minimis* burden on the Amish's religious beliefs because they sometimes "use various items of 'modern' technology," such as "some rubber tires" or "power tools," *id.*, at 50. At the same time, however, the trial court sided with the County on the merits, requiring the Amish to install modern septic systems. The Minnesota Court of Appeals affirmed and the Minnesota Supreme Court denied review. *Id.*, at 2, 76.

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Fulton makes clear that the County and courts below misapprehended RLUIPA's demands. That statute requires the application of "strict scrutiny." Under that form of review, the government bears the burden of proving both

that its regulations serve a "compelling" governmental interest—and that its regulations are "narrowly tailored." *Fulton*, 593 U. S., at ___ (slip op., at 13); 42 U. S. C. §2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest").

Perhaps most notably, the County and courts below erred by treating the County's *general* interest in sanitation regulations as "compelling" without reference to the *specific* application of those rules to *this* community. As *Fulton* explains, strict scrutiny demands "a more precise analysis." 593 U. S., at ___ (slip op., at 14). Courts cannot "rely on 'broadly formulated'" governmental interests, but must "'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" *Ibid.* (quoting *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 431 (2006)). Accordingly, the question in this case "is not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally*, but whether it has such an interest in denying an exception" from that requirement to the Swartzentruber Amish *specifically*. *Fulton*, 593 U. S., at ___ (slip op., at 14) (emphasis added); see also *Holt* v. *Hobbs*, 574 U. S. 352, 362–363 (2015) (RLUIPA requires courts to "scrutiniz[e] the asserted harm of granting specific exemptions to *particular* religious claimants" (internal quotation marks omitted; emphasis added)).*

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*Before this Court, the County argues chiefly that the Amish forfeited this aspect of the law's protections by failing to press it sufficiently below. That is incorrect. The Amish asked the Minnesota Supreme Court to review whether the County had proved the absence of any "alternative

Separately, the County and lower courts erred by failing to give due weight to exemptions other groups enjoy. For example, in Minnesota those who "hand-carr[y]" their gray water are allowed to discharge it onto the land directly. Minn. Admin. Rule 7080.1500, §2. So thousands of campers, hunters, fishermen, and owners and renters of rustic cabins are exempt from the septic system mandate. Under strict scrutiny doctrine, the County must offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish. As *Fulton* put it, the government must offer a "compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making [exceptions] available to others." 593 U. S., at ___ (slip op., at 15). Or as this Court has said elsewhere, it is "established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993) (internal quotation marks and alteration omitted); see also *Holt*, 574 U. S., at 367 ("[T]he Department has not adequately demonstrated why its grooming policy is substantially underinclusive"); *O Centro Espírita*, 546 U. S., at 436 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions").

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means for adequately disposing of household gray water that is less restrictive on *Petitioners'* freedom to exercise their religious beliefs." MPCA App. 41 (boldface omitted; emphasis added). And they argued in the Minnesota Court of Appeals that "RLUIPA requires the court to scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants." *Id.*, at 112 (internal quotation marks omitted). In any event, this Court has now vacated and remanded the decisions below, affording the County and courts below alike another opportunity to consider this issue.

Relatedly, the County and lower courts failed to give sufficient weight to rules in other jurisdictions. Governments in Montana, Wyoming, and other States allow for the disposal of gray water using mulch basins of the sort the Amish have offered to employ. App. to Pet. for Cert. 73–74. Given that, the County in this case bore the burden of presenting a "compelling reason why" it cannot offer the Amish this same alternative. *Fulton*, 593 U. S., at ___ (slip op., at 15). To be sure, the County stresses the fact that the "record contains no evidence of a single, properly working mulch basin system in Minnesota." App. to Pet. for Cert. 74. But that is not enough. It is the government's burden to show this alternative won't work; not the Amish's to show it will. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U. S., at ___ (slip op., at 13).

Finally, despite acknowledging that mulch basins could "theoretically" work, the County and lower courts rejected this alternative based on certain assumptions. They assumed that suitable sites for mulch basins could not be found on the Amish's farms—and that maintaining the basins would prove too much work. See, *e.g.,* App. to Pet. for Cert. 67 ("It is questionable whether one could even find sites on the Plaintiffs' farms in Fillmore County that would" satisfy the technical requirements for an effective mulch system); *ibid.* ("[S]ites that would satisfy that requirement may simply not be available to the Plaintiffs"); *id.,* at 68 ("[T]he maintenance required to keep such a system properly operating would be so burdensome as to render it unfeasible"); *ibid.* ("[I]n Dr. Heger's opinion, this maintenance requirement makes the mulch basin concept unworkably labor intensive"); *id.*, at 69 ("'I don't think it's practical'"). But strict scrutiny demands more than supposition. The County must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate. Here,

that means proving that mulch basins will not work on these particular farms with these particular claimants. Again, if "the government can achieve its interests in a manner that does not burden religion, *it must do so*." *Fulton*, 593 U. S., at ___ (slip op., at 13) (emphasis added); see also *Tandon* v. *Newsom*, 593 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 3) ("The State cannot 'assume the worst when people go to worship but assume the best when people go to work'" (quoting *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*))).

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RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort. Despite that clear command, this dispute has staggered on in various forms for over six years. County officials have subjected the Amish to threats of reprisals and inspections of their homes and farms. They have attacked the sincerity of the Amish's faith. And they have displayed precisely the sort of bureaucratic inflexibility RLUIPA was designed to prevent. Now that this Court has vacated the decision below, I hope the lower courts and local authorities will take advantage of this "opportunity for further consideration," *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) (*per curiam*), and bring this matter to a swift conclusion. In this country, neither the Amish nor anyone else should have to choose between their farms and their faith.

SUPREME COURT OF THE UNITED STATES

SHKELZEN BERISHA *v.* GUY LAWSON, ET AL.

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

No. 20–1063. Decided July 2, 2021

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

In 2015, Guy Lawson published a book detailing the "true story" of how three Miami youngsters became international arms dealers. 973 F. 3d 1304, 1306 (CA11 2020). A central plot point involves the protagonists' travels to Albania and subsequent run-ins with the "Albanian mafia," a key figure of which, the book claims, is petitioner Shkelzen Berisha. The book performed well, and Lawson eventually sold the movie rights to Warner Bros., which made the feature film War Dogs.

Unhappy with his portrayal, Berisha sued Lawson for defamation under Florida law. According to Berisha, he is not associated with the Albanian mafia—or any dangerous group—and Lawson recklessly relied on flimsy sources to contend that he was.

The District Court granted summary judgment in favor of Lawson. Setting aside questions of truth or falsity, the court simply asked whether Berisha is a "public figure." Why? Because under this Court's First Amendment jurisprudence, public figures cannot establish libel without proving by clear and convincing evidence that the defendant acted with "'actual malice'"—that is with knowledge that the published material "was false or with reckless disregard of whether it was false." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964); accord, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 334–335, 342 (1974); *Curtis Pub-*

lishing Co. v. *Butts*, 388 U. S. 130, 155 (1967). After concluding that Berisha is a public figure (or at least is one for purposes of Albanian weapons-trafficking stories), the court found that he had not satisfied this high standard. The Eleventh Circuit affirmed.

Berisha now asks this Court to reconsider the "actual malice" requirement as it applies to public figures. As I explained recently, we should. See *McKee* v. *Cosby*, 586 U. S. ___, ___ (2019) (opinion concurring in denial of certiorari) (slip op., at 2).

This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears "no relation to the text, history, or structure of the Constitution." *Tah* v. *Global Witness Publishing, Inc.*, 991 F. 3d 231, 251 (CADC 2021) (Silberman, J., dissenting) (emphasis deleted). In fact, the opposite rule historically prevailed: "[T]he common law deemed libels against public figures to be . . . *more* serious and injurious than ordinary libels." *McKee*, 586 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 7).

The Court provided scant explanation for the decision to erect a new hurdle for public-figure plaintiffs so long after the First Amendment's ratification. In *Gertz*, for example, the Court reasoned that public figures are fair targets because "they invite attention and comment." 418 U. S., at 345. That is, "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Ibid.* But it is unclear why exposing oneself to an increased risk of becoming a victim necessarily means forfeiting the remedies legislatures put in place for such victims. And, even assuming that it is sometimes fair to blame the victim, it is less clear why the rule still applies when the public figure "has not voluntarily sought attention." 378 F. Supp. 3d 1145, 1158 (SD Fla. 2018); see also *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F. 2d 859, 861 (CA5 1978) ("It is no answer to the assertion

that one is a public figure to say, truthfully, that one doesn't choose to be").

The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be "the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton," Kennedy, 'Pizzagate' Gunman Sentenced to 4 Years in Prison, NPR (June 22, 2017), www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison. Or consider how online posts falsely labeling someone as "a thief, a fraudster, and a pedophile" can spark the need to set up a home-security system. Hill, A Vast Web of Vengeance, N. Y. Times (Jan. 30, 2021), www.nytimes.com/2021/01/30/technology/change-my-google-results.html. Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. See, *e.g.,* Wemple, Bloomberg Law Tried To Suppress Its Erroneous Labor Dept. Story, Washington Post (Sept. 6, 2019), www.washingtonpost.com/opinions/2019/09/06/bloomberg-law-tried-suppress-its-erroneous-labor-dept-story. Or read about Kathrine McKee—surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. See *McKee*, 586 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 1–2).

The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. I would grant certiorari.

SUPREME COURT OF THE UNITED STATES

SHKELZEN BERISHA *v.* GUY LAWSON, ET AL.

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

No. 20–1063. Decided July 2, 2021

JUSTICE GORSUCH, dissenting from the denial of certiorari.

The Bill of Rights protects the freedom of the press not as a favor to a particular industry, but because democracy cannot function without the free exchange of ideas. To govern themselves wisely, the framers knew, people must be able to speak and write, question old assumptions, and offer new insights. "If a nation expects to be ignorant and free . . . it expects what never was and never will be. . . . There is no safe deposit for [liberty] but with the people . . . [w]here the press is free, and every man able to read." Letter from T. Jefferson to C. Yancey (Jan. 6, 1816), in 10 The Writings of Thomas Jefferson 4 (P. Ford ed. 1899).

Like most rights, this one comes with corresponding duties. The right to due process in court entails the duty to abide the results that process produces. The right to speak freely includes the duty to allow others to have their say. From the outset, the right to publish was no different. At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.

This principle extended far back in the common law and far forward into our Nation's history. As Blackstone put it,

"[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but if he publishes falsehoods "he must take the consequence of his own temerity." 4 W. Blackstone, Commentaries on the Laws of England 151–152 (1769). Or as Justice Story later explained, "the liberty of the press do[es] not authorize malicious and injurious defamation." *Dexter* v. *Spear*, 7 F. Cas. 624 (No. 3,867) (CC RI 1825).

This was "[t]he accepted view" in this Nation for more than two centuries. *Herbert* v. *Lando*, 441 U. S. 153, 158–159, and n. 4 (1979). Accordingly, "from the very founding" the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 369–370 (1974) (White, J., dissenting). As a rule, that meant all persons could recover damages for injuries caused by false publications about them. See Kurland, The Original Understanding of the Freedom of the Press Provision of the First Amendment, 55 Miss. L. J. 225, 234–237 (1985); J. Baker, An Introduction to English Legal History 474–475 (5th ed. 2019); Epstein, Was *New York Times* v. *Sullivan* Wrong? 53 U. Chi. L. Rev. 782, 801–802 (1986); *Peck* v. *Tribune Co.*, 214 U. S. 185, 189 (1909).

This changed only in 1964. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), this Court declared that public officials could no longer recover for defamation as everyone had for centuries. Now, public officials could prevail only by showing that an injurious falsehood was published with "'actual malice.'" *Id.,* at 279–280. Three years later, the Court extended its actual malice standard from "public officials" in government to "public figures" outside government. See generally *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). Later still, the Court cast the net even wider, applying its new standard to those who have achieved "pervasive fame or notoriety" and those "limited" public figures who "voluntarily injec[t]" themselves or are "drawn into a particular public controversy." *Gertz*, 418

U. S., at 351. The Court viewed these innovations "overturning 200 years of libel law" as "necessary to implement the First Amendment interest in 'uninhibited, robust, and wide-open' debate on public issues." *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 766 (1985) (White, J., concurring in judgment).

Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. Back then, building printing presses and amassing newspaper distribution networks demanded significant investment and expertise. See Logan, Rescuing Our Democracy by Rethinking *New York Times Co.* v. *Sullivan*, 81 Ohio St. L. J. 759, 794 (2020) (Logan). Broadcasting required licenses for limited airwaves and access to highly specialized equipment. See *ibid.* Comparatively large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers. See *id.,* at 794–795. But "[t]he liberty of the press" has never been "confined to newspapers and periodicals"; it has always "comprehend[ed] every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 (1938); see also Sentelle, Freedom of the Press: A Liberty for All or a Privilege for a Few? 2013 Cato S. Ct. Rev. 15, 30–34. And thanks to revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world. Logan 803 (noting there are 4 billion active social media users worldwide).

The effect of these technological changes on our Nation's media may be hard to overstate. Large numbers of newspapers and periodicals have failed. See Greico, Pew Research Center, Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy (Feb. 14, 2020), http://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/. Network news has lost most of its viewers. Pew Research Center, Network Evening News

Ratings (Mar. 13, 2006), https://www.journalism.org/numbers/network-evening-news-ratings/. With their fall has come the rise of 24-hour cable news and online media platforms that "monetize anything that garners clicks." Logan 800. No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. *Id.*, at 804. A study of one social network reportedly found that "falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements." *Id.,* at 804, n. 302; see Vosoughi, Roy, & Aral, The Spread of True and False News Online, Science Magazine, Mar. 9, 2018, pp. 1146–1151. All of which means that "the distribution of disinformation"—which "costs almost nothing to generate"—has become a "profitable" business while "the economic model that supported reporters, fact-checking, and editorial oversight" has "deeply erod[ed]." Logan 800.

It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." Brief in Opposition 22. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. Logan 794–795. In that era, many major media outlets employed fact-checkers and editors, *id.,* at 795, and one could argue that most strived to report true stories because, as "the public gain[ed] greater confidence that what they read [wa]s true," they would be willing to "pay more for the information so

provided," Epstein, 53 U. Chi. L. Rev., at 812. Less clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing.

These questions lead to other even more fundamental ones. When the Court originally adopted the actual malice standard, it took the view that tolerating the publication of *some* false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. See *Sullivan*, 376 U. S., at 270–272. But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability. Statistics show that the number of defamation trials involving publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2018 there were 3. Logan 808–810 (surveying data from the Media Law Resource Center). For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial motions practice. *Id.,* at 809. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 10 jury awards now survives appeal. *Id.,* at 809–810.

The bottom line? It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy. See *id.,* at 778–779. Under the actual malice regime as it has evolved, "ignorance is bliss." *Id.*, at 778. Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can dissemi-

nate the most sensational information as efficiently as possible without any particular concern for truth. See *ibid.* What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. *Id.*, at 804. As *Sullivan*'s actual malice standard has come to apply in our new world, it's hard not to ask whether it now even "cut[s] against the very values underlying the decision." Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing A. Lewis, Make No Law: The *Sullivan* Case and the First Amendment (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?

Other developments raise still more questions. In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs. Here again, the Court may have thought that allowing some falsehoods about these persons and topics was an acceptable price to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. Perhaps the Court weighed the costs and benefits similarly when it extended the actual malice standard to the "pervasively famous" and "limited purpose public figures."

But today's world casts a new light on these judgments as well. Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most. See, *e.g., Hibdon* v. *Grabowski*, 195 S. W.

3d 48, 59, 62 (Tenn. App. 2005) (holding that an individual was a limited-purpose public figure in part because he "entered into the jet ski business and voluntarily advertised on the news group *rec.sport.jetski*, an Internet site that is accessible worldwide"). Lower courts have even said that an individual can become a limited purpose public figure simply by *defending* himself from a defamatory statement. See *Berisha* v. *Lawson*, 973 F. 3d 1304, 1311 (CA11 2020). Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as limited purpose public figures too. See *McKee* v. *Cosby*, 586 U. S. ___, ___ (2019) (THOMAS, J., concurring in denial of certiorari) (slip op., at 1). In many ways, it seems we have arrived in a world that dissenters proposed but majorities rejected in the *Sullivan* line of cases—one in which, "voluntarily or not, we are all public [figures] to some degree." *Gertz*, 418 U. S., at 364 (Brennan, J., dissenting) (brackets and internal quotation marks omitted).

Again, it's unclear how well these modern developments serve *Sullivan*'s original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. And the very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure"—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of

goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.

"In a country like ours, where the people . . . govern themselves through their elected representatives, adequate information about their government is of transcendent importance." *Dun & Bradstreet*, 472 U. S., at 767 (White, J., concurring in judgment). Without doubt, *Sullivan* sought to promote that goal as the Court saw the world in 1964. Departures from the Constitution's original public meaning are usually the product of good intentions. But less clear is how well *Sullivan* and all its various extensions serve its intended goals in today's changed world. Many Members of this Court have raised questions about various aspects of *Sullivan*. See, *e.g., McKee*, 586 U. S., at ___ (opinion of THOMAS, J.); *Coughlin* v. *Westinghouse Broadcasting & Cable, Inc.*, 476 U. S. 1187 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); *Gertz*, 418 U. S., at 370 (White, J., dissenting); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 62 (1971) (Harlan, J., dissenting); *id.*, at 78 (Marshall, J., dissenting); *Rosenblatt* v. *Baer*, 383 U. S. 75, 92–93 (1966) (Stewart, J., concurring); see also Kagan, 18 L. & Soc. Inquiry, at 205, 209; Lewis & Ottley, *New York Times* v. *Sullivan* at 50, 64 De Paul L. Rev. 1, 35–36 (2014) (collecting statements from Justice Scalia). JUSTICE THOMAS does so again today. In adding my voice to theirs, I do not profess any sure answers. I am not even certain of all the questions we should be asking. But given the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the "safe deposit" of our liberties.

SUPREME COURT OF THE UNITED STATES

FRED J. EYCHANER *v.* CITY OF CHICAGO, ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 20–1214. Decided July 2, 2021

The petition for a writ of certiorari is denied. JUSTICE KAVANAUGH would grant the petition for a writ of certiorari.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting from denial of certiorari.

Fred Eychaner owned a tract of land in Chicago's River West neighborhood. Two blocks south stood a factory, owned and operated by the Blommer Chocolate Company. The company wanted Eychaner's land to create a buffer with nearby residential areas, so it offered to purchase the property for $824,980. Eychaner declined.

Eychaner's refusal to sell, however, did not end the matter. Two months later, the city of Chicago notified Eychaner that it was considering whether to take his property. As formalized later, the city planned to invoke its eminent domain power to transfer Eychaner's property to the company.

At face value, this plan conflicted with the settled constitutional rule that a "sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo* v. *New London*, 545 U. S. 469, 477 (2005); see also *Calder* v. *Bull*, 3 Dall. 386, 388 (1798). Governments can take property only "for public use." U. S. Const., Amdts. 5, 14; see also *Kelo*, 545 U. S., at 507 (THOMAS, J., dissenting).

So Chicago identified an ostensible "public use": The city needed to transfer the land to the factory because otherwise

it "may become a blighted area." Ill. Comp. Stat., ch. 65, §5/11–74.4–3(b) (West 2018). Although Eychaner argued that stemming speculative future problems is not a public use, the Appellate Court of Illinois disagreed, holding that the city "may use the power of eminent domain to prevent future blight." 2015 IL App (1st) 131883, ¶69, 26 N. E. 3d 501, 521.

We should grant certiorari for two reasons.

First, this petition provides us the opportunity to correct the mistake the Court made in *Kelo*. There, the Court found the Fifth Amendment's "public use" requirement satisfied when a city transferred land from one private owner to another in the name of economic development. See 545 U. S., at 484. That decision was wrong the day it was decided. And it remains wrong today. "Public use" means something more than any conceivable "public purpose." See *id.*, at 508–511 (THOMAS, J., dissenting). The Constitution's text, the common-law background, and the early practice of eminent domain all indicate "that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking." *Id.*, at 507–514; see also *id.*, at 479 (majority opinion) (acknowledging that "many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use"). Taking land from one private party to give to another rarely will be for "public use." But see *id.*, at 513–514 (THOMAS, J., dissenting). The majority in *Kelo* strayed from the Constitution to diminish the right to be free from private takings. See generally *id.*, at 505–523 (same).

Second, even accepting *Kelo* as good law, this petition allows us to clarify the Public Use Clause and its remaining limits. *Kelo* weakened the public-use requirement but did not abolish it. In fact, the *Kelo* majority favorably cited an opinion that had concluded that a taking to prevent "future blight" violated the Public Use Clause. *Id.*, at 487, and n. 17

(citing *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (CD Cal. 2001)). This Court should not stand by as lower courts further dismantle constitutional safeguards.

Failure to step in today not only disserves the Constitution and our precedent, but also leaves in place a legal regime that benefits "those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Kelo*, 545 U. S., at 505 (O'Connor, J., dissenting). This case is a prime example. Blommer is purportedly the largest cocoa processor and ingredient chocolate supplier in North America and worth $750 million dollars.* And Chicago has decided to use the coercive power of the government to give the company a valuable parcel of not-yet-blighted-land. According to the court below, this forcible transaction is permissible, in part, because "[r]ecognizing the difference between a valid public use and a sham can be challenging." 26 N. E. 3d, at 521. I think that, if our doctrine makes it difficult to discern public use from private favors, we should grant certiorari to provide some much needed clarity.

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*See Elejalde-Ruiz, Blommer Chocolate To Be Sold to Japanese Company, The Chicago Tribune, Nov. 19, 2018, www.chicagotribune.com/business/ct-biz-blommer-chocolate-sale-20181119-story.html.